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 XLIV.

CONTAINING THE REMAINING CASES DECIDED AT THE APRIL TERM, 1867, AND A PART OF THOSE DECIDED AT THE JUNE TERM, 1867.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. PINKNEY H. WALKER, CHIEF JUSTICE.
HON. SIDNEY BREESE, CHIEF JUSTICE,*
HON. SIDNEY BREESE,
HON. CHARLES B. LAWRENCE, } JUSTICES.
HON. PINKNEY H. WALKER,

ATTORNEY GENERAL,

ROBERT G. INGERSOLL, ESQ.

* The term for which Mr. CHIEF JUSTICE WALKER had been elected expired on the 3d day of June, 1867, and on the same day he was re-elected. Mr. JUSTICE BREESE, as the senior Justice, thereupon became CHIEF JUSTICE, and presided in that capacity at the June Term, 1867.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.

PAGE

Alexander *v.* Crosthwaite 359
Allen *v.* Peoria & Bureau Valley Railroad Co..... 85
——— *ads.* Strang et al..... 428
Alwood et al. *ads.* Ruckman et al..... 183
American Express Co. *v.* Parsons 312
Anderson *ads.* Pease..... 218
Armstrong, Admr., *v.* Bartram... 422
Arter *v.* Byington 468
Aurora, City of, *ads.* Gates 121

B.

Bailey *ads.* Gold, Admr., et al.... 491
Baker et ux. *v.* Young 42
Banker *ads.* Chicago, Burlington & Quincy Railroad Co..... 26
Barker *ads.* Clark 349
Barr, etc., *ads.* People ex rel..... 198
Bartram *ads.* Armstrong, Admr.,. 422
Bedard *v.* Hall et al..... 91
Belton, Admx., *v.* Fisher 32
Blake, Exr., etc., *ads.* Dwen, Exr., etc., et al..... 135
——— *v.* Fish..... 302
Blow et al. *v.* Gage et al 208
Bonner et al. *v.* Peterson..... 253
Boone County, Supervisors of, *ads.* Chicago & N. W. R. R. Co..... 240
Bowman *ads.* Governor of Illinois, use of Thomas 499
Bradley et al. *v.* King et al..... 339
——— *ads.* ——— 342
Brainard *ads.* Small 355
Brewster et al. *ads.* Kiley et al.. 186
Brooks *ads.* Niemeyer..... 77
Brown *ads.* Pitney et al..... 363
Bull, Admx., *ads.* Maher 97

PAGE

Bureau Co., Supervisors of, *v.* Chicago, Burlington & Quincy R. R. Co..... 229
Burris *v.* Jackson et ux... 345
Byington *ads.* Arter 468
——— *v.* Gaff, Cochran & Co..... 510

C.

Cable et al. *ads.* Pitts et al 103
Camp et ux. *v.* Small..... 37
Chadwick *v.* Parker 326
Chandler et al. *ads.* Mix et al.... 174
Chase *v.* Dana..... 262
Chicago, City of, *ads.* Clayton ... 280
——— *v.* Gallagher, Admx. 295
——— *ads.* Scammon et al 269
Chicago & Northwestern R. R. Co. *v.* Dement 74
——— *v.* Lee Co., Supervisors of, 248
——— *v.* Supervisors of Boone Co. 240
——— *v.* Williams 176
Chicago, Burlington & Quincy R. R. Co. *v.* Banker..... 26
——— *ads.* Supervisors of Bureau County..... 229
City of Aurora *ads.* Gates..... 121
Clark *v.* Barker 349
Clayton *v.* City of Chicago 280
Clement *ads.* Humphrey 299
Cole *v.* Van Riper 58
Cook *v.* Marsh..... 178
Conlee et al. *ads.* McFarland et al. 455
Conroy *v.* Sullivan et al..... 451
Croskey *v.* Skinner 321
Crosthwaite *ads.* Alexander 359
Cumins et al. *v.* Wood 416
Cummings *ads.* Henderson et al.. 325
Cummings *v.* Tilton 172

D.

PAGE

Dana *ads.* Chase 262
Davis *ads.* Hall et al..... 494
——— *v.* Hoeppner..... 306
Davis et al. *ads.* Mahoney..... 288
Dean *v.* Gecman..... 286
Demars *ads.* Illinois Central Railroad Co..... 292
Dement *ads.* Chicago and Northwestern R. R. Co. 74
Diversy *v.* Kellogg 114
Dodds *v.* Snyder et al..... 53
Dutcher et al. *v.* Leake et al. 398
Dwen, Exr., et al. *v.* Blake, Exr., 135

E.

Esslinger *ads.* Koester 476

F.

Fergus et al. *v.* Woodworth et al. 374
Fish *ads.* Blake 302
Fisher *ads.* Belton, Admx., ... 32
Fullerton *ads.* Stoetzell et al..... 108

G.

Gaff, Cochran & Co. *ads.* Byington 510
Gage et al. *v.* Blow et al..... 208
Gallagher, Admx., etc. *ads.* City of Chicago..... 295
Gates *v.* City of Aurora 121
Gecman *ads.* Dana..... 286
Gibson *v.* Webster..... 483
Gilcreest *v.* Savage, use, etc. 56
Gold, Admr., et al. *v.* Bailey..... 491
Governor of Illinois, use of Thomas *v.* Bowman 499
Graham et al. *v.* Holloway 385
Graves *ads.* Mills..... 50
Grosvenor *ads.* Winchester..... 425

H.

Hall et al. *ads.* Bedard..... 91
——— *v.* Davis 494
Hall *ads.* McPherson et al..... 264
Halty *v.* Markel..... 225
Hambleton *v.* People ex rel 458
Hammer *v.* Johnson et al..... 192
Harding et al. *ads.* Sheldon 68
Harper *ads.* Marion Co..... 482
Hart *v.* Wing..... 141
Heckethorn *ads.* Maxey et al 437

PAGE

Henderson et al. *v.* Cummings... 325
Hesing *ads.* Liness 113
Hoeppner *ads.* Davis..... 306
Holbrook *v.* Prettyman et al..... 311
Holloway *ads.* Graham et al..... 385
Holmes *v.* Holmes..... 168
Holmes *ads.* Poppen..... 360
Holt et al. *v.* Rees 30
Hoy *v.* Hoy 469
Hoyt *ads.* Stolp et al..... 219
Humphrey *v.* Clement 299

I.

Illinois Central R. R. Co. *v.* Demars 292

J.

Jackson et ux. *ads.* Burris..... 345
James *v.* Morey 352
Jenkins *ads.* Miller..... 443
Jennings *ads.* People, use of, etc. 488
Johnson et al. *ads.* Hammer..... 192
Johnson *v.* Jones et al 142
Jones et al. *ads.* Johnson..... 142
Jones *v.* Miller 181
Jones et al. *ads.* Sheean..... 167

K.

Kellogg *ads.* Diversy..... 114
Kennedy *v.* People 283
Kiley et al. *v.* Brewster et al..... 186
King et al. *ads.* Bradley et al.... 339
——— *v.* ——— 342
Koester *v.* Esslinger..... 476

L.

Lake View, Town of, *v.* Letz et al. 81
Lawrence *ads.* Parmelee et al.... 405
Leake et al. *ads.* Dutcher et al... 398
Lee Co., Supervisors of, *ads.* Chicago & Northwestern R. R. Co. 248
Lessley et al. *v.* Lessley..... 527
Lester et al. *v.* White's Heirs.... 464
Letz et al. *ads.* Town of Lake View 81
Lewis *v.* People 452
Liness *v.* Hesing 113

M.

Maher *v.* Bull, Admx..... 97
Mahoney *v.* Davis et al..... 288
Manny *v.* Rixford 129
Marion County *v.* Harper 482

PAGE

Markel *ads.* Halty..... 225
Marsh *ads.* Cook 178
Maxey et al. *v.* Heckethorn..... 437
McCabe *ads.* Mills et al..... 194
McCloskey *v.* McCormick et al... 336
McCormick et al *ads.* McCloskey 336
McFarland et al. *v.* Conlee et al.. 455
McPherson *v.* Hall 264
——— *v.* Nelson et al..... 124
Mercer *ads.* Nichols..... 250
Merchants' Dispatch Co. et al. *v.* Smith & Nixon..... 319
Merrick *v.* Wagner..... 266
Miller *v.* Jenkins..... 443
——— *ads.* Jones..... 181
Millay *ads.* Pierce..... 189
Mills *v.* Graves..... 50
Mills et al. *v.* McCabe..... 194
Mix et al. *v.* Chandler et al..... 174
Moore *v.* Titman 367
Morey *ads.* James 352
Murray *v.* Schlosser 14
Myatt *v.* Myatt..... 473
Myatt et al. *v.* Walker et al..... 485

N.

Nelson et al. *ads.* McPherson.... 124
Nichols *v.* Mercer..... 250
Nickle *v.* Williamson..... 48
Niemeyer *v.* Brooks..... 77

O.

Ohio & Mississippi R. R. Co. *v.* Schiebe 460
Onley *ads.* Storing 123
Ostrander *ads.* Warner 356

P.

Parker *ads.* Chadwick..... 326
Parmelee et al. *v.* Lawrence..... 405
Parsons *ads.* American Express Co. 312
Pease *v.* Anderson..... 218
People *ads.* Kennedy 283
——— *ads.* Lewis 452
——— *ads.* Russell et al. 508
——— *ads.* Williams et al..... 478
People ex rel.. etc., *v.* Barr 198
——— *ads.* Hambleton 458
——— *ads.* Smith 16

PAGE

People for use, etc., *v.* Jennings.. 488
People of the State of New York *ads.* Wells..... 40
Peoria & Bureau Valley R. R. Co. *ads.* Allen, Treasurer, etc..... 85
Peterson *ads.* Bonner et al..... 253
Pidgeon *v.* Trustees of Schools, etc. 501
Pierce *v.* Millay..... 189
Pitney et al. *v.* Brown 363
Pitts et al. *v.* Cable et al..... 103
Poppen *v.* Holmes..... 360
Prettyman et al. *ads.* Holbrook.. 311

Q.

Quigley *v.* Roberts 503

R.

Radcliffe *ads.* Townsend et al. ... 446
Rees *ads.* Holt et al..... 30
Renick et al. *ads.* Rosenthal, Admr. etc. 202
Roberts *ads.* Quigley 503
Ropiequet *ads.* Werner..... 522
Rosenthal, Admr., etc., *v.* Renick et al..... 202
Rotan et al. *ads.* Smith et al..... 506
Rixford *ads.* Manny..... 129
Ruckman et al. *v.* Alwood et al.. 183
Russell et al. *v.* People, etc..... 508

S.

Savage *ads.* Gilcreest 56
Scammon et al. *v.* City of Chicago 269
Schiebe *ads.* Ohio and Mississippi Railroad Co. 460
Schlosser *ads.* Murray 14
Sheean *v.* Jones et al..... 167
Sheldon *v.* Harding et al. 68
Shipp *ads.* Stuhl 133
Skinner *ads.* Croskey 321
Small *v.* Brainard 355
——— *ads.* Camp et ux..... 37
Smith *v.* People ex rel., etc..... 16
Smith et al. *v.* Rotan et al..... 506
Smith & Nixon *ads.* Merchants' Dispatch Co. et al..... 319
Snyder et al. *ads.* Dodds..... 53
Spalding *ads.* Tilley..... 80
Stoetzell et al. *v.* Fullerton..... 108

PAGE

Stolp et al. *v.* Hoyt..... 219
Storing *v.* Onley..... ... 123
Strang et al. *v.* Allen..... 428
Stuhl *v.* Shipp 133
Sullivan et al. *ads.* Conroy..... 451
Supervisors of Boone Co. *ads.* Chicago & Northwestern R. R. Co.. 240
Supervisors of Bureau Co. *v.* Chicago, Bur. & Quincy R. R. Co... 229
Supervisors of Lee Co. *ads.* Chicago & Northwestern R. R. Co..... 248

T.

Thomas *v.* Brown 499
Thompson et al. *ads.* Vieley..... 9
Tilley *v.* Spalding..... 80
Tilton *ads.* Cummings..... 172
Titman *ads.* Moore 367
Toledo, Peoria & Warsaw R. R. Co. *v.* Wickery 76
Town of Lake View *v.* Letz et al. 81
Townsend et al. *v.* Radcliffe 446
Trustees of Schools, etc. *ads.* Pidgeon..... 501

V.

Van Riper *ads.* Cole..... 58
Van Wormer *ads.* Wittram 525
Vieley *v.* Thompson et al..... 9

W.

Wagner *ads.* Merrick..... 266
Walker et al. *ads.* Myatt et al... 485
Warner *v.* Ostrander 356
Webster *ads.* Gibson 483
Wells *v.* People of the State of New York..... 40
Werner *v.* Ropiequet 522
Wheeler *ads.* Whitaker..... 440
Whitaker *v.* Wheeler..... 440
White's Heirs *ads.* Lester et al... 464
Wickery *ads.* Toledo, Peoria & Warsaw R. R. Co..... 76
Williams *ads.* Chicago & Northwestern R. R. Co. 176
Williams et al. *v.* People..... 478
Williamson *ads.* Nickle..... 48
Winchester *v.* Grosvenor..... 425
Wing *ads.* Hart 141
Wittram *v.* Van Wormer 525
Wood *ads.* Cumins et al..... 416
Woodworth et al. *ads.* Fergus et al 374

Y.

Young *ads.* Baker et ux..... 42

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1867.

MINARD T. VIELEY

v.

HUGH THOMPSON *et al.*

1. CHANCERY — *motion to dismiss before answer.* Although irregular and unknown to correct chancery practice, a motion to dismiss a bill, interposed before answer, and acted upon by the court, must be held to have the same effect as a demurrer.

2. TAX — *levy of special.* To make the levy of a special tax valid, every requirement of the law authorizing it must be strictly complied with.

3. INJUNCTION — *to restrain collection of tax.* A court of chancery will take jurisdiction and restrain by injunction the collection of a tax, if not authorized by law, or imposed on property exempt from taxation, or where the assessment was vitiated by fraud, or the tax-payer likely to suffer irreparable injury, or if the persons levying the same are not officers *de jure* or *de facto.*

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

The facts of the case sufficiently appear in the opinion of court.

Mr. CHARLES J. BEATTIE, for the appellant.

Messrs. COLLINS, PERRY & PAYSON, and Messrs. HARDING & FOSDICK, for the appellees.

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

This was a bill filed in the Livingston Circuit Court by Minard T. Vieley against Hugh Thompson, Wm. R. Vealch and James H. Carter, to enjoin the collection of a bounty tax levied in the town of Pleasant Ridge. The bill alleges, that the town on the 3d day of February, 1865, contained ninety-five legal voters; that on that day forty-one of those voters came together and held an election, and voted for and against levying a bounty tax upon all the taxable property in the town; that there were thirty-nine votes for, and two against, levying the tax; that the supervisor, assessor and collector of the town determined, that a tax of three per cent should be levied on the assessment of 1865, and certified the levy of the same to the county clerk, and that he had extended the same in the collector's warrant; that the treasurer was about to enforce the collection of the same; that complainant was the owner of two hundred and eighty acres of land, upon which this tax had been levied.

The bill alleges, that there were no volunteers, drafted men or substitutes furnished by the town after the first day of February, 1865; that the supervisor, assessor and collector of the town issued bonds to each of the persons who voted in favor of the tax, payable in 1866, and to thirty-three of the same persons, payable in 1867, all bearing ten per cent; that they issued bonds to themselves in like manner; that the bonds were not issued for the purpose of paying any indebtedness of the town, nor to pay bounties to volunteers, substitutes or drafted men, who enlisted after the 2d day of February, 1865, nor for the purpose of paying bounties to volunteers, substitutes

or drafted men, who had entered the service prior to that date, or for any legal or corporate purpose; but that the bonds were issued unlawfully and fraudulently for the purpose of paying certain sums of money formerly subscribed by the parties, to whom the bonds were issued to raise a fund, to procure substi tutes to save themselves, and each of them, from being drafted into the army of the United States; that they severally gave such sums for their individual benefit, and not as a loan to the town; that it never received any consideration for the bonds, from any person receiving the same.

A temporary injunction was granted. A summons was issued and served on the defendants; they entered a motion to dissolve the injunction and dismiss the bill. On a hearing, the court below allowed the motion, and rendered a decree dissolving the injunction and dismissing the bill. Suggestions of damages were filed, and the court assessed the same, and rendered a decree for $100 in favor of defendants, and awarded execution for its collection. To reverse that decree the case i brought to this court, and various errors are assigned.

Although irregular and unknown to correct chancery prac tice, a motion to dismiss a bill, interposed before answer, and acted upon by the court, must be held to have the same effect as a demurrer. If, then, it must be treated as a demurrer, the allegations of the bill must be considered as true. Was the complainant entitled to relief, on the facts stated in his bill, admitting them to be true?

The only law to which we have been referred, under which authority to issue these bonds can be claimed, is the act of 1865. Private Laws, vol. 1, p. 102. By the first section of that act, the various towns of the several counties named, are authorized to levy a tax of not more than three per cent on the taxable property, to pay bounties to volunteers, substitutes, and drafted men, who might thereafter enlist, or be drafted into the army. The second section declares that, when any ten legal voters of any town, shall make a request in writing, it shall be the duty of the supervisor to call a special election within five days after the request, to determine whether such tax shall be

levied, by posting notices in three of the most public places in the town, at least ten days next previous to the election. The notices are required to state the object of the election.

By taxation the citizen is deprived of his property to the extent of the sum levied. It operates to transfer that amount from him, to the purpose for which it is levied. And it is a constitutional right, enjoyed by every person, that he shall be protected in the enjoyment of his property, and that he shall not be deprived of it, except by the judgment of his peers or the law of the land. Under this provision it is not a mere unmeaning ceremony which the law has imposed, when it has required certain acts to be performed, in taking steps to levy a tax which deprives the citizen of his property; such requirements are generally essential to the validity of the tax. No one in the case under consideration would contend, that the town officers, without a vote having been first had, could legally impose a tax for the purposes contemplated by the act, nor could they levy a tax for any purpose unauthorized by law.

This being so, before they could act, in returning the certificate to the county clerk, the law has declared, that they shall be authorized by a majority of the voters of the town. It is from the consent of the voters, alone, that their authority is derived; until that is had they are powerless to act, and their consent must be obtained in the mode prescribed by law; and it has required, that it shall be by a vote for and against the imposition of the tax, and for the purpose of having a fair expression of the will of the tax payers, an opportunity was intended by the law makers, to be given to the voters to express their wishes. Hence the requirement, that a notice should be given by the persons, and in the manner prescribed. This notice was intended to be, and is, essential to the validity of the election. It was indispensable to the legal exercise of the power of levying the tax. It was important to prevent fraud and oppression, and was therefore made indispensable. Without the notice, an election could not be legally held, and without a legal election resulting in favor of the tax, no power was conferred on the town officers to levy the tax.

It then appearing, that the vote was taken on the next day after the passage of the law, it is apparent that the ten days notice could not possibly have been given, and such a notice being indispensable to the exercise of the power to levy the tax, it follows that it was unauthorized.

It only remains to be determined whether a court of chancery will take jurisdiction to restrain the collection of this tax It has been held by this court, that equity will not interpose its power to prevent the collection of a tax, simply for mere irregularities. If, however, the tax is not authorized by law, or, if authorized, it is imposed upon property exempt from the burden, it is otherwise. *Chicago, Burlington & Quincy R. R.* v. *Frary*, 22 Ill. 34; *Munson* v. *Miner*, 22 id. 595; *Metz* v. *Anderson*, 23 id. 463. It has been held, that where a tax is attempted to be levied for the benefit of the officers making the levy, corruptly, equity will relieve. *Scholfield* v. *Watkins*, 22 Ill. 66; *Merritt* v. *Farris*, id. 308; *Ryan* v. *Anderson*, 25 id. 372. In the case of *McBride* v. *The City of Chicago*, 22 id. 574, it was said if the assessment was vitiated by fraud, or the tax payer was likely to suffer irreparable injury, or if the persons levying the same were not officers *de jure* or *de facto*, then equity might afford relief, but would not for mere irregularity.

In this case, if the allegations of the bill are true, and they must, for the purpose of the motion, be so held, it is manifest that the whole proceeding was a fraud upon the other tax-payers. The meeting is charged to have been held without the notice required by the law. Those attending (with the exception of two) had paid money to free themselves from the draft; and voted a tax on others to refund to themselves money, without any legal or moral obligation resting upon the town or inhabitants thereof, for repayment of the money thus appropriated. This we regard as such a fraud as requires a court of equity to stay its collection.

Again, the tax was wholly unauthorized, as there were no volunteers, substitutes, or drafted men who went into the service after the passage of the law, and it only authorizes the imposition of the tax for the purpose of raising a fund

for the payment of such recruits to the army; unless there was at least a reasonable probability that there would be such, there was no power to levy a tax for the accumulation of such a fund. In this case, the bill contains the allegation that the quota of the town had been filled, and the necessity for troops having ceased to exist, it could not have been necessary to collect the tax. The decree of the court below is reversed and the cause remanded.

Decree reversed.

BRONSON MURRAY
v.
SAMUEL SCHLOSSER.

CONTRACT — *rescission — where time is made essence.* In an action of forcible entry and detainer by vendor against vendee, under a contract making time of the essence of the agreement and giving vendor the right to rescind and hold vendee as tenant at will in case of failure to make payments as stipulated, it appeared that default was made and notice of rescission served on vendee's wife during his absence in the military service of the government, as a volunteer soldier; the court instructed the jury that the contract could not be rescinded except by personal notice, and that notice upon vendee's wife while he was thus absent was not sufficient. *Held,* that the instructions were erroneous. That the contract required no personal notice of rescission to be served on vendee. And that the right of rescission being reserved by the vendor to be exercised at his option, in case of default, could be asserted by the vendor in any manner manifesting an intention to rescind and that the absence of vendee, however meritorious, did not change the terms of the contract or furnish immunity from the consequence of its violation.

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

The case sufficiently appears in the opinion of the court.

Mr. J. M. BARRET, for the appellant.

Mr. CHARLES J. BEATTIE, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 1st of March, 1860, Murray sold Schlosser a tract of land on credit, and the latter went into possession. By the terms of the contract the purchase money was payable in installments, and it was stipulated that, in the event of failure to make the payments as they should become due, time being made of the essence of the agreement, the vendor should have the right to rescind the contract, and hold the vendee or any person in possession under him, as a tenant at will on a rent equal to ten per cent interest on the purchase money, payable quarterly, and should enjoy the same rights as if the relation of landlord and tenant had been created by an original lease. Schlosser failed to pay, and, on the 1st of March, 1865, Bronson caused a notice addressed to Schlosser to be served upon his wife who was in possession, Schlosser being absent in the army. This notice declared a forfeiture of the contract of sale, and that Murray would hold Schlosser to the payment of rent. It does not appear that Schlosser ever paid rent. On the 30th of June, 1866, Murray served upon Schlosser a written demand of possession, and subsequently commenced the present action of forcible entry and detainer. On the trial the court instructed the jury that Murray could not rescind the contract of sale except by personal notice upon Schlosser of his intention so to do, and that the notice of such rescission served upon his wife, while he was in the military service of the government as a volunteer soldier, would not be sufficient.

These instructions were erroneous. Under such a rule the vendee of land, by placing himself beyond the reach of personal service, could rob these stipulations in a contract of all their efficacy for the protection of the vendor. This was not the design of the contracting parties, and it is by the terms they have embodied in their contract that their respective rights and privileges must be ascertained. The contract requires no personal notice of rescission to be served on the vendee. The right of rescission was reserved by the vendor, to be exercised at his own option in case the vendee should

fail to perform his covenants; and this right, as has been hitherto decided by this court, could be asserted by the vendor in any manner which would manifest upon his part an intention to rescind. *Chisman* v. *Miller*, 21 Ill. 226. The absence of the vendee as a volunteer in the military service of the government, however meritorious, did not change the terms of his contract, or furnish him immunity from the consequences of its violation. For the error in these instructions we must reverse the judgment.

Judgment reversed.

ARTHUR A. SMITH
v.
THE PEOPLE OF THE STATE OF ILLINOIS, on the relation of DAVID H. FRISBIE.

ELIGIBILITY TO OFFICE — *loss of residence.* On information in the nature of *quo warranto* to test the eligibility of a party to hold the office of judge; *held*, that a conditional removal from this to another State, does not render the party upon return ineligible to the office of judge, under the 11th section of article 5, of our Constitution.

APPEAL from the Circuit Court of Bureau county; the Hon. E. S. LELAND, Judge, presiding.

This was an information in the nature of a *quo warranto*, by James A. McKenzie, State's attorney for the tenth judicial circuit, on the relation of David H. Frisbie, of Knox county, against Arthur A. Smith, judge of said tenth judicial circuit.

The first count of the information charges that on the 19th day of February, 1867, Arthur A. Smith, at the county of Knox, unlawfully usurped the office of judge of the tenth judicial circuit, and did then and there enter upon and exercise the duties and powers of the office of judge, and enjoy the privileges and immunities of said office, to the great injury of the relator

and other citizens of Knox county, and said tenth judicial circuit. The second count charges substantially the same as the first, with the addition that on the 19th day of February, 1867, Arthur A. Smith unlawfully usurped the office of judge "well knowing that he had not been a resident of the State of Illinois for the term of five years next preceding said 19th day of February, 1867, and next preceding the date of the filing of this information." It was stipulated on the part of the State's attorney and appellant, that the information might be presented at the March Term, A. D. 1867, of the Bureau Circuit Court; that no special pleas need be filed; that any and all legal defenses might be made without pleas; that the only point at issue should be whether or not appellant had been for the last five years a resident of this State.

That no question should be raised as to the fact that the governor, under the power vested in him by law, did commission appellant as judge of the tenth judicial circuit aforesaid, on the 19th day of February, 1867, and that he took the oath of office required by law, the only question in the case being that of residence. It was further stipulated that either party might use the affidavits of persons who would be competent to be sworn as witnesses in the cause, and that such affidavits should be entitled to the same weight as though the persons making them had sworn to the same matter in open court.

To maintain the issues on his part, appellant proved by John Becker, that he was a citizen of Knox county, Illinois; that he had known appellant in Knox county for the last twenty years; that he had frequent conversations with appellant after his return from the army in July, 1865, and before his return to Tennessee in August of that year; that he and appellant had discussed the question whether it would be possible for a northern man to live south; that witness had visited Tennessee where appellant was stationed during the war; that he was pleased with the country and climate, but had doubts about the temper of the people. Witness had some notion of removing to Tennessee himself, and freqently discussed the propriety of the step with appellant after his return from the army; that

appellant always stated to him that his return to Tennessee would be an experiment; that he thought there would be a good opening to make money there for a year or two after the close of the war, and while the military occupied the country; and that, if society should become settled so that the life and property of a northern man would be safe there, he might purchase property and make it his home; that it was arranged between witness and appellant that appellant should go south and try the experiment of living there, and if he should become satisfied, after remaining there a reasonable time, that a northern man could live there unmolested and in peace, he was instructed to purchase property for witness, in or near Clarksville, Tennessee, with a view to witness' removal to that place; that appellant had not been gone more than a month before he informed witness by letter that he was satisfied that he could not live in safety in Tennessee, and that he intended to return to Illinois as soon as he could close up his business; that appellant did return to Galesburg, Illinois, where he had resided before the war and has resided ever since; that appellant returned about the middle of March, A. D. 1866. Appellant then proved by Elias Benner, a citizen of Knox county, Illinois, that he had known appellant in said county for the last twelve years; that appellant entered the military service of the United States in the month of August, 1862, and was absent from Illinois, in said service, nearly three years, returning to his home in said county in July, 1865; that appellant was stationed a part of the time, during the military service aforesaid, at Clarksville, Tennessee, and while there stationed had his family with him, and that his family returned to Illinois with him, when he was mustered out of service in July, 1865.

That soon after appellant's return he told witness, that his business relations had been broken up by his absence in the army, and that, as there was a prospect that business would be very dull in the north for some time after the close of the war, he had decided to go back to Tennessee, where he had been in command, and engage in the claim and law business for a time, and if he found it safe for him to live there, he

might buy property and make it his home; but if he found it otherwise, he should return to Illinois.

That in the month of August, 1865, appellant did go with his family to Clarksville, Tennessee; that previous to his departure, appellant sold a part of his household goods and left the remainder in witness' possession for safe keeping; that appellant rented his dwelling-house, and authorized witness to collect the rent; that witness acted as agent of appellant, both while he was in the army and during his second absence in Tennessee, appellant being the son-in-law of witness.

That appellant had not been absent, as aforesaid, more than a month, when he wrote witness, that he had tried the experiment of living south, and found, that he could not safely make it his home on account of the unsettled state of society and the hostility of the citizens against him, and that he had determined to return to Illinois as soon as he could close up his business and as soon as the river was navigable, it being then so low that boats could not run; that appellant did return to Galesburg, Knox county, Illinois, with his family, in the month of March, A. D. 1866, where he has since resided and now resides.

Appellant next proved, by Wm. A. Peffer, of Clarksville, Tennessee, that he was the partner and particular friend of appellant in the latter part of A. D. 1865, and the first part of A. D. 1866, at Clarksville, Tennessee.

That he frequently conversed with appellant, prior to the partnership, about his coming to Tennessee. Appellant was not then satisfied of the propriety of the move, and expressed doubt of his ability to make a permanent residence profitable.

When he did come, in 1865, appellant told witness, that his removal was merely "an experiment;" that he could not decide to remain permanently until he was satisfied it would be best; that he had left Illinois with that view, and his stay in Tennessee would depend entirely on his getting along well with the people.

A short time after appellant's arrival in Tennessee, developments were made which caused witness to remark to him, that

he would not remain long. His reply was, in substance, "I will try a little longer."

Early in October, 1865, appellant, in a confidential conversation, told witness that he had made up his mind to go back to Illinois, and he regretted that he had sold his property there, instead of renting it. Henceforward it was understood, that appellant was to return, and he proposed to sell witness his interest in their business. Witness would not purchase, and appellant decided to wait a month or two and see if they would realize something from their business with the government. Appellant often said, that whenever he was sure the river was open, or would remain open long enough, he would leave instanter.

Witness believes, that appellant had not been in Clarksville more than two months before he was satisfied with his experiment of living in Tennessee, and had fully determined to return to Illinois.

Appellant had frequent application to purchase property, but refused, for the reason that he did not intend to remain. He did not tell the people his reasons, but did tell witness.

An election was held while appellant was in Tennessee. Witness asked him to vote for his favorite candidate. Appellant told witness that he did not want to do any act that would in any way deprive him of his citizenship in Illinois for he had never relinquished it. Appellant would have left Tennessee as early as November, 1865, if witness would have purchased his interest in their business. In October, 1865, appellant told witness, that as he did not intend to remain, he would withdraw from the partnership if witness desired it. Witness is confident that appellant never had a fixed determination to make Tennessee his home; that his removal was an experiment, and that it required only about two months to test it.

Appellant then offered to read in evidence his own affidavit, to which the State's attorney objected, on the ground that this was a criminal proceeding, but the court permitted the affidavit of appellant to be read, but did not consider the same in making up his judgment, to which appellant excepted.

Brief for the Appellant.

The people proved: First, by M. M. Clark, that appellant was a resident of Galesburg, Knox county, Illinois, about the last of August, A. D. 1865, and had been a resident of that place for more than ten years prior to that date. That about the date mentioned he removed with his family to the State of Tennessee, and returned with his family to Galesburg about the middle of March, A. D. 1866, where he has since resided. That while appellant was preparing to remove to Tennessee, he told witness that he would not sell his Illinois Reports, giving as a reason that he might return in a short time.

Appellant told witness that he was going to Clarksville, Tennessee, to open an office; that he did not know whether he would remain there or not. It depended on circumstances. It was an experiment and might fail. Second, by James A. McKenzie, that he had known appellant as a resident of Knox county, Illinois, for nine years previous to August, A. D. 1865. That, about the date named, appellant removed from the city of Galesburg, where he had before that time resided. Appellant informed witness that it was his intention to go to Clarksville, Tennessee.

Witness afterward received letters from appellant dated at that place. Appellant told witness that he was going to Clarksville, to open a law office; that he thought he could do better there than in Galesburg.

The court gave judgment *pro forma* against the defendant, who appealed therefrom.

Messrs. T. G. FROST and E. P. WILLIAMS, for the appellant.

Did appellant lose his residence by going to Tennessee the last of August, 1865, and returning to Illinois in the middle of March, 1866?

This is a question of intention, from all the facts and circumstances in each case. *Kitchell* v. *Burgwin et ux.*, 21 Ill. 44; *Ives* v. *Mills*, 37 id. 75; *Walters* v. *The People*, 21 id. 178 *Walters* v. *The People*, 31 id. 174. A person may have his domicile in one place and his residence in another. *Butler* v. *City of New York*, 5 Sandf. 44.

A domicile once acquired is presumed to continue until a new one is obtained *facto et animo*. *Glover* v. *Glover*, 18 Ala. 365.

Unless one's change of domicile is complete and final, it does not constitute an abandonment of one's country. *Hardy* v. *De Leon*, 5 Texas, 211; *Brown* v. *Smith*, 11 Eng. Law and Eq. 6; *Leach* v. *Pillsbury*, 15 N. H. 137.

When a domicile has been once obtained, it will not be lost by a temporary absence, with the intention to return. *The State* v. *Judge*, 13 Ala. 805.

Every person has a domicile of origin, which he retains until he acquires another, and the one thus acquired is in like manner retained. *Thorndike* v. *The City of Boston*, 1 Metc. 242; *Kilburn* v. *Bennett*, 3 id. 199.

If a person goes out of the State, county or town, for a particular purpose, and does not take up a permanent residence elsewhere, he cannot be considered as having removed from the State, county or town, so as to affect his domicile and inhabitancy. *Sears* v. *City of Boston*, 1 Metc. 250; *Sacket's case*, 1 Mass. 58; *Abington* v. *Boston*, 4 id. 312, 556; 7 id. 1; 11 id. 350, 424; 5 Pick. 370.

A man's domicile is not changed by an absence for a temporary purpose, with or without his family. *Cadwalader* v. *Howell*, 3 Harr. 138.

There must be intention and act united to effect a change of domicile. *Sumerville* v. *Sumerville*, 5 Vesey, 750.

A person's home or domicile is his habitation, fixed in any place, without any present intention of removing therefrom. *Putnam* v. *Johnson*, 10 Mass. 488.

A domicile, once fixed, will continue, notwithstanding the absence of the party, until a new domicile is acquired. *Jennison* v. *Hapgood*, 10 Pick. 77.

The domicile is not affected by the formation of an intention to remove, unless such intention is carried into effect. *Hallowell* v. *Saco*, 5 Greenl. 143.

A domicile may be defined "a residence at a particular place, accompanied with positive or presumptive proof of continuing

it an unlimited time;" and is a conclusion of law on an extended view of facts and circumstances. *Grier* v. *O'Daniel*, 1 Binn. 352.

A resident is a person coming into a place with an intention to establish his domicile or permanent residence, and actually executing that intention by taking a home or lodging, opening a store, or the like. *United States* v. *The Penelope*, 2 Peters Adm. Dec. 450.

Residence is a question of intention. By a removal out of the State, without an intention permanently to reside elsewhere, a person will not lose his residence, nor will he acquire it by a mere intention to remove permanently, not followed by actual removal. *Casey's case*, 1 Ash. 126.

The existing domicile always continues until another is acquired, so that by the acquisition of another the former is relinquished.

To effect a change of domicile there must be intention and act united. 2 Kent Com. 43; 15 La. An. 281; *Crawford* v. *Wilson*, 4 Barb. 504.

To effect a change of residence, it is not enough that one intends to change it, and believes he has done in law what amounts to a change.

The intent and fact must concur, and his opinion cannot produce the result. *Chaine* v. *Wilson*, 8 Abbott's Pr. 78.

Mr. J. A. MCKENZIE, for the appellee.

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

This was an information in the nature of a *quo warranto* exhibited against appellant, charging that he had usurped the office of judge of the tenth judicial circuit. The only question presented, and which we are called upon to determine, is, whether, under the eleventh section of article five of our Constitution, he was eligible to the place. That section requires, as a qualification for that office, that the person shall have been a

resident of the State for at least five years next preceding his election or appointment.

It appears from the evidence, that appellant went to Tennessee with his family in the month of August, 1865, and returned to Illinois in March, 1866, where he had resided for many years previously. Before he left this State, and for a short period after his arrival in Tennessee, he frequently declared, that it was only an experiment. That if he found that the feelings of the people there were such that he could remain with satisfaction he would not return, but if he found that he could not, then he would return to Illinois. But he was there but a short time until he became satisfied that he could not remain with satisfaction to himself, and informed his partner that he would return to Illinois as soon as the river became navigable, and this seems to have been his fixed determination until it was carried out by his return. So far as the evidence discloses, he at no time expressed an unqualified intention to remain in Tennessee. It was at all times expressed conditionally. And when he was requested by his partner in Tennessee, to vote at an election, he declined, upon the ground that he desired to do no act by which he would lose his citizenship in this State.

Before leaving he refused to sell his Illinois Reports, saying, that he would probably return, and would then need them in his practice. He only rented his residence when he left. And against this is the fact, that he was in Tennessee in the practice, some six months, having his family with him, perhaps as much as two months immediately after his arrival there undetermined whether he would remain, and the remainder of the time fully determined to return to this State. This is, we think, the extent of the proof.

This is a proceeding in the nature of a criminal information, and before it can be maintained, the proof must be clear and satisfactory that the party is disqualified. In this case we find appellant has been appointed judge of the tenth judicial circuit, by the executive branch of the government, and holding a commission regular and apparently legal. This must necessarily raise a presumption of right to the office, and that pre-

sumption must be overcome by satisfactory evidence before the incumbent can be ousted. In this case, we think the evidence, at most, leaves the question, whether he had lost his residence in this State, one of doubt. It does not appear that he ever intended to abandon his residence here; but, on the contrary, during all but a short period of time he expressed a determination to return, and for that short period he only seemed to have been in a state of doubt. We think, that, when the residence is lost, it is by a union of intention and acts; but the intention in many cases will be inferred from the surrounding circumstances. In this case, however, we do not think all of the circumstances appearing in evidence establish a presumption of loss of residence sufficient to overcome the presumption arising from the fact, that the governor gave him the commission under which he is now acting.

The judgment of the court below, which was entered *pro forma*, is reversed and the cause remanded.

Judgment reversed.

BREESE, J. (dissenting). The proof is positive that appellant resided with his family in Clarksville, Tennessee, from August, 1865, to March, 1866, when he returned to this State. At Clarksville he opened an office, and remained there so long as his professional prospects encouraged him. With all my desire to do so, I cannot say he was not a resident of Tennessee during all that time. That State was his then fixed residence. Being a resident of Tennessee, it is impossible he could be a resident of this State at the same time. I therefore cannot concur in the opinion of the majority of the court.

Chicago, Burlington & Quincy Railroad Company
v.
Edward W. Banker.

Evidence—*plat or map.* In an action on the case against a railway company for killing a colt, the defendant, for the purpose of showing that the place where the accident occurred was inside of the limits of the village of Hinsdale, offered to give in evidence to the jury a map or plat thereof, recorded subsequent to the date of the accident. The court excluded the map on the ground that it had not been recorded at the time of the accident. *Held,* that the map was proper to show the intent of the owners of the land to dedicate, and the extent of the dedication, and therefore ought not to have been excluded from the jury.

Appeal from the Superior Court of Chicago; the Hon. Joseph E. Gary, Judge, presiding.

This was an action on the case commenced to the August Term, A. D. 1866, of the Superior Court of Chicago, by the appellee against the appellant to recover the value of a colt killed upon the road of the appellant at a place called Hinsdale, in Dupage county.

The case was tried at the November Term, and a verdict and judgment obtained against the appellant for the sum of $400.

The action was brought under the act of February 14, 1855, requiring railroad companies to fence their road in certain localities.

The declaration contained two counts, and sets forth, in substance, that the killing was caused by the careless and negligent conduct of defendant in not fencing the road as required by law, and the careless, negligent and improper manner it ran its locomotive and train.

To which the defendant filed its plea "not guilty."

Messrs. Walker & Dexter, for the appellant.

It appears from the evidence that the colt was killed on the depot grounds of appellant, at a place called Hinsdale, in Du Page county.

The depot grounds of the appellant at that place are about fifteen hundred feet in length from east to west, and about three hundred feet in width from north to south. The colt was killed near the west end of those grounds, but was found west of the west end of the grounds, having been carried over the cattle guard by the locomotive. At the time this accident occurred the village of Hinsdale was quite small, consisting of some half dozen dwelling-houses, the depot building, situate on the depot grounds, about midway between the eastern and western limits of same. Other houses, a store and other buildings, however, were being erected, and those already completed were all occupied. The town at that time had been regularly platted and laid out into lots, streets and alleys, and according to the plat, extended some distance beyond the limits of the depot grounds on all sides, the depot grounds being fully within the town as platted. This plat was made and acknowledged September 22, 1865, and the lands appropriated and dedicated to the uses and purposes of the village; but was not recorded until August 14, 1866, after the accident occurred. This plat was offered in evidence on the trial, but was ruled out for the reason that it was not recorded until after the accident occurred, and exception taken.

Before the appellee was entitled to recover in this action it was, among other things, incumbent on him to prove that the colt got upon the road of the appellant at some point not excepted by the statute; that is, at some point on the road required by the statute to be fenced; and from the want of a proper fence or cattle-guard, or by reason of the fence or cattle-guard being out of repair, unless it appears that the damage was negligently or willfully done.

The term "village" in the statute, is evidently to be taken in its ordinary and common acceptation as distinguished from a city or town, as all these terms are made use of in the statute, for the purpose of determining where the company were not bound to fence, and when it says that no fence shall be required in villages, it means villages in the ordinary sense as distinguished from a city or town; any small collection of houses.

Webster says, "a village is a small assemblage of houses, less than a town or city, and inhabited chiefly by farmers and other laboring people. In England it is said that a village is distinguished from a town by the want of a market. In the United States no such distinction exists, and any small assemblage of houses in the country is called a village."

In the case of *The Illinois Central Railroad Company* v. *Williams*, 27 Ill. 49, CATON, Ch. J., says, in a similar case to this:

"Any small assemblage of houses for dwellings, or business, or both, in the country, constitutes a village, whether they are situated on regularly laid out streets or not." *Godfrey* v. *City of Alton*, 12 Ill. 30; *Marcy* v. *Taylor*, 19 id. 634; *Waugh* v *Leech*, 28 id. 488.

If the owners of land agree upon a place and make a survey and lay off grounds for the public use, and make sales in reference thereto, it amounts to a dedication of such ground to the public, although no map was made of the survey.

In the case of *The People* v. *Beaubien*, 2 Doug. 256, 276., GOODWIN, J., says, that, "To constitute a valid dedication, there must exist the intention to dedicate clearly evinced by the acts of the owner of the land; that there must be, as was said in the late case of *Poole* v. *Huskisson*, 11 Exch. 380, an *animus dedicandi*, or as Chief Justice DENMAN said in *Barraclough* v. *Johnson* (8 Ad. & E., 35 E. C. L. 337), "a dedication must be made with the intention to dedicate;" that while there may be a dedication by acts *in pais*, without deed, all such acts connected with, or relating to the premises, tending to show the design and object of the dedication which is alleged, may be gone into for the purpose of determining whether there has been a dedication or not." See also *Livingston* v. *City of New York*, 8 Wend. 85; *Wyman* v. *Mayor*, 11 id. 490; *Hunter* v. *Trustees of Sandy Hill*, 6 Hill, 407; *Warren* v. *President, etc., of the Town of Jacksonville*, 15 Ill. 236.

It is also well settled that no particular time is necessary to show a dedication; if the act is unequivocal, it may take place immediately. BEARDSLEY, J., in the case of *Hunter* v. *Trus-*

tees of Sandy Hill, above cited, says: "No certain period of time is required to prove a dedication of property to public use. It does not depend upon the lapse of time, but upon the intention and the acts of the parties. Twenty years adverse holding may bar a right of entry, and upon it, a grant may be presumed. But time, although cogent evidence of a dedication, is not a necessary ingredient in it. It may be established by acts unequivocal in their character on the part of the owner and the public, although occurring on a single day."

In *Woodyer* v. *Haddan*, 5 Taunt. 125, CHAMBRE, J., says: "No particular time is necessary as evidence of dedication; it is not, like a grant, presumed from lapse of time. If the act of dedication is unequivocal, it may take place immediately, as for instance, if a man builds a row of houses on each side of a strip of ground, making it a street, leading into another street, and sells, or lets these houses, it is instantly a highway."

Mr. GEORGE G. BELLOWS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

We deem it unnecessary to consider more than one point raised on this record, and that is, excluding from the jury the plat of the village of Hinsdale, acknowledged January 1st, 1866, and recorded August 14, of the same year.

We are of opinion the plat should have gone to the jury for two purposes, first, to show the intent by the owners of the land to dedicate certain portions of it for the village streets, and second, to show the extent of the dedication.

So far as we understand the proof, Hinsdale was a village, coming up to the definition of a village, as given by this court, in the case of the *Ill. Central R. R. Co.* v. *Williams*, 27 Ill. 49.

We are not entirely satisfied with the second instruction given for the plaintiff. We do not find in the record any evidence the colts got on the road at a crossing of a public road. To instruct the jury to believe from the evidence a fact which is not in evidence, tends to mislead a jury, and should be avoided.

For the reason given the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

DEVILLO R. HOLT *et al.*

v.

JAMES H. REES.

1. MORTGAGE—*rights of mortgagor and lessees of mortgagee—after payment of mortgage.* The payment of a mortgage debt by mortgagor terminates the right of possession by lessee under the mortgagee.

2. EJECTMENT—*declaration.* A mortgagor cannot maintain ejectment where the title, entry and ouster in the declaration are laid before the date of extinguishment of the mortgage debt. In such case the right of possession only accrues after extinguishment of debt.

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

The case is sufficiently stated in the opinion of the court.

Messrs. BARKER & TULEY, for the appellant.

Mr. JAMES L. STARK, Jr., for the appellee.

Mr JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of ejectment brought by Rees against Holt and Calkins. The following state of facts appeared upon the trial: Rees being the owner of the premises in controversy, on the 1st of September, 1857, executed to Swift, a mortgage to secure the payment of certain bonds described therein, and payable to the order of Swift. The unpaid bonds were subsequently assigned to Joy & Clapp, and the interest being unpaid, it was agreed between them and Rees in the spring of 1862, that they should rent the premises and collect the rents, to be applied on the interest. Under this arrangement they leased the premises to the defendants for one year, the lease terminating on the 1st of May, 1863. At the expiration of this

lease they again leased the premises to the defendants for the term of three years. This lease was made without the knowledge of Rees, and when apprised of it he complained to Joy & Clapp of its length. Mr. Joy testifies Rees never assented to the second lease, but always objected to it. On the 22d of August, 1865, Rees paid in full the debt secured by the mortgage, and the mortgage was released. He then brought this suit to recover from the lessee the possession of the premises, and the court below rendered judgment in his favor, from which the defendants prosecuted an appeal.

This case is not difficult of decision. The condition of the mortgage having been broken, the legal title had vested in Swift, the mortgagee. He could have turned the mortgagor out of possession, and if let into possession could have retained it until payment of the debt. The assignment of the bonds to Joy & Clapp transferred his equitable interest in the mortgage. So far as concerned Rees they held the rights of Swift and stood in his shoes. Rees could evict a stranger it is true, but when he seeks to evict them they fully protect themselves by showing the mortgage from Rees to Swift, and that they are in under that mortgage, by the implied authority from Swift arising from the assignment of the bonds. They thus connect themselves directly with the legal title in the hands of Swift, and have the same right to set it up as against Rees which Swift himself would have. This would be true if they entered for condition broken in the name of Swift, and it is certainly not less true when the mortgagor has voluntarily given them the possession as the equitable assignees of Swift and owners of the mortgage.

But while Joy & Clapp were entitled to the possession until payment of the mortgage, it is equally clear that with such payment, and in the absence of any agreement to the contrary, their right terminated. The payment extinguished all their rights, and the legal title, which had vested in Swift as mortgagee was, on the 22d of August, 1865, released by him to Rees. Joy & Clapp having thus lost all claim to the possession, their tenants, the present defendants, would occupy no

better position. They acquired under their lease no greater right or interest in the land than their lessors possessed. They accepted the lease with full knowledge that it was the right of Rees at any time to pay the mortgage and thus terminate their estate. It is not pretended that Joy & Clapp had any power over the premises, beyond that which devolved upon them from the mere fact of having been let into possession. It is not claimed that Rees ever consented to the lease for three years, or authorized a lease for any specific time. The only authority to lease that could be implied from the arrangement between the parties, would be an authority to make a lease terminable upon the payment of the mortgage. If Joy & Clapp could make a valid lease for three years without the consent of the parties, they could have made one for twenty-five years, and thus have deprived the mortgagor of all substantial right to his estate.

We must, however, reverse this judgment on a technical ground. The title, entry and ouster are laid in the declaration as committed on the 3d day of May, 1865, while the mortgage was not extinguished until the 22d of August, 1865. On the day laid, the right of possession was not in the plaintiff. On the authority of *Wood* v. *Morton*, 11 Ill. 548, this was a fatal objection to the recovery. We must, therefore, reverse the judgment, and remand the case with leave to the plaintiff to amend his declaration.

Judgment reversed.

ELIZABETH BELTON, Administratrix of Estate of Samuel J. Belton, deceased, and JAMES YATES, Surviving Partner of Samuel J. Belton,

v.

CALEB B. FISHER.

1 JUDGMENTS — *conclusiveness of.* A judgment of a sister State which, by the laws thereof, is conclusive on the parties, is equally so, when sued on in this State.

2. VARIANCE—*idem sonans.* Courts at the present day are not confined to the rigid rules of *idem sonans,* but inquire whether the variance is material. *Stevens* v. *Stebbins,* 3 Scam. 25.

3. PARTIES—*surviving partners.* The administrator of a deceased partner should not join with the surviving partner in a suit to recover a debt due to the firm. At the common law, the surviving partner, alone, could sue.

4. PRACTICE—*time to object to misjoinder of parties.* But, should the administrator improperly join in such a suit, the misjoinder should be objected to in the court in which the suit was brought,—it is too late to take the objection in a suit brought upon the judgment rendered in the action in which the misjoinder occurred.

APPEAL from the Court of Common Pleas of the city of Aurora, Kane county.

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

Mr. C. J. METZNER, for the appellee.

The case is sufficiently stated in the opinion of the court.

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

Elizabeth Belton, administratrix of Samuel J. Belton, and James Yates, surviving partner of Belton, sued Caleb B. Fisher before a police justice of the peace in Wisconsin, and recovered a judgment. The suit was brought in the court below on a transcript of that judgment. The laws of Wisconsin relating to the jurisdiction of justices of the peace and police justices are set out in the declaration. Defendant below filed a plea of *nul tiel* record; also a plea denying that Elizabeth Belton was administratrix, upon which pleas issues were formed. On the trial below, the plaintiffs offered in evidence a transcript of the record of the police justice and the letters of administration, which were rejected by the court, and a judgment was rendered in favor of the defendant, to reverse which plaintiffs bring the case by appeal to this court, and assign for error the rejection of this evidence.

We are at a loss to see that the letters of administration were admissible for any purpose. At the common law the sur-

viving partner alone has the right to sue for and recover debts due and owing the firm, and unless a different rule prevails in the courts of Wisconsin, the administratrix improperly joined in bringing the suit. But that was an objection which should have been taken in the court in which the original suit was brought. Failing to take advantage of it before the police justice, the judgment rendered on that trial became binding and conclusive on that question until reversed or overruled. So with the question as to whether Elizabeth Belton was administratrix. That was an issue tried and determined by the police justice, and that determination is as binding as the finding that the defendant was indebted to the plaintiffs. As long as that judgment remained in force, the mere production of the record or a transcript proved the fact, as between the parties to the judgment, that she was administratrix of Samuel J. Belton. This being the case, the plea that she was not administratrix interposed in the court below presented an immaterial issue, and it did not matter whether the letters were admitted or rejected. The averment in the declaration would have been fully proved by the transcript of the record had it been admitted.

The transcript from the docket of the police justice was rejected because of a variance from the declaration in the name of Elizabeth Belton. She sued in this case as Elizabeth Belton, and she is named in the transcript as Elizabeth "Beton," without any averment in the declaration that the judgment was in favor of plaintiffs below, but recovered in the name, as to her, of "Beton." These names are different in orthography, but only slightly so in sound. In the case of *Stevens* v. *Stebbins*, 3 Scam. 25, the court held that there was no variance between the names Steven and Stevens. And the court quote approvingly two cases from the Supreme Court of Indiana, in one of which the court held there was not variance between the names Beckwith and Beckworth, and in the other that there was no material variance between the names of Susan and Susanna. In that case this court say that it appears that courts at the present day are not confined to the rigid rules of *idem sonans*, but inquire whether the variance is material. Tested by this

rule we are not prepared to hold that the variance is material in this case. If this was not so, still we see that Elizabeth Belton sued in the police justice's court as administratrix, and she sues with the same addition in this case. From this fact we may safely infer that the letter was omitted by mistake in copying the judgment into the transcript. The addition to the name would seem to imply that such was the fact.

It is also insisted, that the transcript of the police justice was not properly authenticated by the certificate and seal of the clerk of the Circuit Court of Rock county. This, of course, depends upon the statutes of Wisconsin, which were offered in evidence on the trial. It appears from those statutes, and it is not contested, that the police justice of the peace had jurisdiction of the persons and of the subject-matter of the suit. The third section of the charter of the city of Janesville declares, that a police justice shall be elected, and hold his office for two years. It also declares, chapter three section thirteen, that the police justice shall have and possess all the authority, powers, rights and jurisdiction of a justice of the peace in civil proceedings. The fourth section of the one hundred and twentieth chapter of the Revised Statutes of Wisconsin declares, that every justice of the peace elected in any town in that State, is authorized to hold court for the trial of actions of which justices of the peace have jurisdiction by law, and in the absence of special provisions, such court is vested with all the necessary powers of courts of record in that State, and all general laws applicable to justices of the peace shall apply to such courts.

From these provisions, we have no doubt, that this police justice was in every sense, except the name, a justice of the peace. He was vested with the same powers, rights, and jurisdiction in civil cases as other justices of the peace. In the discharge of his official duties in civil cases, he was in all respects governed and bound by the laws applicable to justices of the peace. This constituted him a justice of the peace under the laws of Wisconsin. Courts look to the substance rather than forms; to things rather than to names. And we

must hold, that this officer, under the laws of Wisconsin, was a justice of the peace.

The question then arises, whether this transcript was properly authenticated. The police justice being virtually a justice of the peace, it would follow, that his transcripts should be authenticated in the same manner as that required for transcripts of other justices of the peace. We see by the ninety-sixth section of chapter one hundred and thirty-seven, of the Revised Statutes of Wisconsin, that it is provided, that to entitle a transcript from the docket of a justice of the peace to be read in evidence in a different county than that in which the judgment was rendered or the proceedings originated, there shall be attached thereto or indorsed thereon, a certificate of the clerk of the Circuit Court of the same county in which the justice resides, under the seal of the court, specifying, that the person subscribing the transcript was, at the date of the judgment therein mentioned, a justice of the peace of such county. The certificate of the circuit clerk of Rock county attached to this transcript is in compliance with the requirements of this statute. We are therefore of the opinion, that the court below erred in excluding this transcript from being read in evidence.

It is a matter of sincere regret, that it happens, though of rare occurrence, that attorneys so far forget their professional duty as to indulge in unkind remarks or allusions to the judge who tried the cause in the court below. Professional education, the common civilties and courtesies of life, to say nothing of the official position, all render it highly improper and censurable. In this case the counsel for appellant has indulged in remarks and allusions in his brief, that we, with extreme reluctance, feel compelled to notice. It is hoped, that in future, briefs will be decorous to the court below, trying the cause, and to opposite counsel.

The judgment of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

JOHN J. CAMP *et ux.*

v.

DARIUS SMALL, use of ISAAC SMALL.

1. PRACTICE—*preserving evidence in record.* It was assigned as error on foreclosure by *scire facias*, that the judgment greatly exceeded the principal and interest of the note. The note bore ten per cent interest, and was payable with exchange on New York. The record contained no evidence as to what the exchange amounted to. *Held*, that in the absence of such evidence the court would presume proof was made of the amount due for exchange.

2. PARTIES—*foreclosure by scire facias.* In foreclosing by *scire facias* the wife, if she signed the mortgage, is a proper and necessary party in order to bar her equity of redemption and right of dower.

3. SCIRE FACIAS—*who may foreclose by.* Assignment of a note and mortgage does not prevent a foreclosure by *scire facias* in the name of the assignor for use of the assignee. The proceeding is on the mortgage, the legal right to which is in the mortgagee, and he alone can institute the proceeding.

4. PLEADING—*demurrer, failure to abide by.* If a party does not abide by his demurrer he cannot avail on error of any defect in the pleading.

5. SAME—*what may be pleaded to scire facias.* In a proceeding to foreclose by *scire facias*, no defense can be interposed except the defense of payment, discharge, release, satisfaction, or that the mortgage never was a valid lien on the land. Pleas of usury and *non est factum* are not proper.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. JESSE O. NORTON, Judge, presiding.

The case is sufficiently stated in the opinion of the court.

Messrs. MCALLISTER, JEWETT & JACKSON, for plaintiffs in error.

Mr. G. D. A. PARKS, for defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a proceeding in the Circuit Court of Will county by Darius Small, for the use of Isaac Small, against John T. Camp, and Elizabeth, his wife, to foreclose a mortgage by *scire facias*. The writ was duly executed, and issues made up on the pleas of *non est factum* and usury, and tried by a jury, and a verdict for plaintiff.

To reverse this judgment, the defendants bring the case here by writ of error, and assign several errors: First, that the writ is defective, and did not authorize a judgment upon it; second, that the record shows, that before the institution of the suit, Darius Small had transferred and assigned the note and mortgage to Isaac Small, thereby parting with all his interest therein, and therefore was not entitled under the statute to the writ of *scire facias* to foreclose the mortgage; third, that it was error to render judgment against Elizabeth Camp; and fourth, that the amount of the judgment greatly exceeds the principal and interest of the note.

On this last point it is sufficient to say, there is no evidence preserved in the record except the note and mortgage, on which the verdict was found. The note bore interest at ten per cent, and was payable with exchange on New York. To what that may have amounted, we have no means of knowing, as the evidence is not preserved. In its absence, we must presume proof was made of the amount due for exchange.

On the point that judgment was entered against Elizabeth Camp, this court said, in *Gilbert and Wife* v. *Maggord*, 1 Scam. 471, on a similar objection being made, that we perceive no good reason why she, having signed the mortgage, should not have been made a defendant in the proceeding. On the contrary, there appears to be irresistible reasons why she should be joined and made a co-defendant, as she was one of the mortgagors, and it was necessary, to foreclose her equity of redemption and right of dower, that a judgment should pass against her. The judgment is not *in personam*, but *in rem*, and is only for the sale of the mortgaged premises to satisfy the debt, damages and costs of suit. To the same effect is the case of *Wright* v. *Langley*, 36 Ill. 381. In that case, which was in equity, a decree was taken, ordering and adjudging that the defendants, of whom the wife of mortgagor was one, pay to, and for the use of complainant, the sum found to be due on the mortgage to the master in chancery. It was held, it was not a personal decree upon which the mortgagor would be liable, nor could an action and recovery at law be had against her on the

decree. This judgment in this record is nothing more than a judicial ascertaining of the amount due, to pay which the mortgaged premises can alone be sold. The wife can never be molested by reason of it.

On the second point, the assignment of the note and mortgage did not prevent a foreclosure by *scire facias*, in the name of the mortgagee for the use of the assignee of the note. The assignment of a note secured by mortgage, only carries the equitable interest in the mortgage, and if this proceeding had been upon the note, the plea that plaintiff had assigned his interest in it before suit brought might have availed. But the proceeding is on the mortgage, the legal right to which is in the mortgagee, and he alone can institute the proceeding. In equity the assignee of the note could file his bill to foreclose.

As to the first point made that the *scire facias* is defective in substance, we are unable to see wherein. A demurrer was interposed to it, and overruled, and the defendants pleaded over. It is the doctrine of this court, that, if a party does not abide by his demurrer, he cannot avail, on error, of any defect in the pleading. We take this occasion to say, that neither of the pleas on which issues were made up was pleadable in this case. It was a proceeding by *scire facias*, to subject mortgaged premises to sale. It has been held time and again by this court that no defense can be interposed except the defense of payment, discharge, release or satisfaction, or that the mortgage was never a valid lien on the land. *White* v. *Watkins*, 23 Ill. 480; *Carpenter* v. *Mooders*, 26 id. 162. In this last case it was held that a plea of usury could not be allowed against it. In *Johnson* v. *The People*, 31 id. 469, it was held the plea of *non est factum* was not a proper plea to a *scire facias* upon a recognizance which had become a matter of record, and for the reason that it is a record.

As to the form of the judgment it is substantially like the one in *Russell* v. *Brown*, 41 Ill. 183, which was held to be proper.

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

Judgment affirmed.

GEORGE WELLS, impleaded with JOHN RYAN and ISAAC W. SWAN,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ATTACHMENT — *what facts manifest a residence.* Whether a person who moves from New York to Illinois gains a residence in this State, within the meaning of our attachment law, is a question of intention deducible from facts and circumstances.

In 1859 a party, formerly a resident of Medina, New York, came to DeKalb county, Illinois, and purchased a farm which he cultivated and lived on from the spring of 1861 to August 1864, but never moved his wife thereto from Medina.

While thus living on his farm he voted in this State and spoke of Illinois as his residence, and declared his intention to make the farm his permanent home, and said his wife would join him on the decease of her mother, who was then too old to be removed. In May, 1864, his property was attached on the ground that he was not a resident of Illinois.

Held, that these facts and circumstances manifest a residence, and, therefore, that the attachment would not lie.

WRIT OF ERROR to the Circuit Court of DeKalb county; the Hon. THEODORE D. MURPHY, Judge, presiding.

The case is sufficiently stated in the opinion of the court.

Mr. R. L. DIVINE, for the plaintiff in error.

Mr. GEORGE C. CAMPBELL, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only issue tried in this cause in the court below was whether the appellant, Wells, was a non-resident of the State of Illinois, on the 2d of May, 1864. A jury was waived, and the court found that he was a non-resident. A good deal of evidence was taken by the parties, which we have carefully examined, and it shows, substantially, the following state of facts: Wells was formerly a resident of the town of Medina, in the State of New York. In the year 1859, he came to De

Kalb county, in this State, and purchased a farm. From that time until 1861 he was on the farm on different occasions, but did not occupy it. In the spring of 1861, he began to live upon and cultivate it, having a house, and keeping it as his own, with the aid of a female relation to take charge of the domestic affairs. He was a housekeeper, and not a boarder This state of things continued up to the 2d of May, 1864, when the attachment in this suit was sued out, at which time he was living on the farm, and continued to reside there until August 1864, when he sold his farm and went away. He had no children, but did have a wife, who continued to live and keep house in Medina after his own removal from New York. She was living there in the same manner when the plaintiff's depositions were taken in August, 1865, though it does not appear that Wells has settled there since he sold his farm in De Kalb county, in August, 1864. He has been engaged in no business in Medina since the winter of 1860–'61. He voted there in 1861, but subsequently voted in this State. From the time he began to live upon his farm, in the spring of 1861, to the sale in August, 1864, he steadily occupied and cultivated it, making one visit, and perhaps more, to his wife in Medina, in the winter. During all that period, however, he was not in Medina more than from six weeks to two months. While living on his farm, he spoke of Illinois as his residence, and declared his intention to make the farm his permanent home. He made improvements on the house with that view, and said his wife would join him on the decease of her mother, who was too old to be removed.

Under this state of facts we think it clear that Wells was, on the 2d of May, 1864, a resident of Illinois and not amenable to the process of attachment. The only circumstance in the record pointing to a contrary conclusion is the fact that his wife still continued to live and keep house, as formerly, in the State of New York. But he was living and keeping house here, engaged in steady and permanent business, and manifesting, in all those modes by which such an intent is ordinarily manifested, the design of making this his permanent home.

He was living here in fact, and living here, so far as the record discloses, *animo manendi.* He left no children behind him, and why the fact that his wife kept house in New York should have any greater weight in determining the question of his residence than the fact that he kept house here, we are unable to perceive. The reason of her remaining in New York was given by him to his friends in Illinois, with the further statement that she intended to join him on her mother's death. Whether that was the true reason of their separation or not is immaterial. The fact that he gave this reason shows that he no longer regarded Medina as his residence, and that he considered his home to be where he was then actually living and doing business. See *Board of Supervisors* v. *Davenport*, 40 Ill. 197.

On the facts appearing in this record we have no hesitation in saying the issue should have been found by the court for the defendant.

Judgment reversed.

LUDWIG BAKER and CAROLINE BAKER

v.

AUGUSTA YOUNG.

1. PRACTICE — SLANDER — *allegations and proof.* In actions for slander, the plaintiff, to recover, must prove the language laid in the declaration, or as much at least as fully proves the charge; equivalent words in meaning will not suffice. All of the words need not be proved, if those which are proved fully establish the slander, but words proved which limit or qualify the meaning of those counted on, will defeat a recovery. If all of the words laid are necessary to constitute the slander, then all must be proved as laid.

2. SAME. Where the words charged were that plaintiff "was in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off," — *held*, that proof that defendants said that plaintiff "was in the family way by Tom Beal" sustained the averment. The declaration proceeds for a slander in charging the plaintiff with fornication, and the language proved proves enough of the words to make out the slander. *Held*, that the additional words laid in the declaration, or those proved, did not alter or modify the charge of fornication. Also held that there was no variance.

Statement of the case.

3. INSTRUCTIONS. *Held*, that an instruction which informed the jury, that if a sufficient number of the words laid in the declaration had been proved, which in their common acceptation, would amount to a charge of fornication, they should find for plaintiff, was not calculated to mislead the jury, and the court did not err in giving it. *Held*, that it does not mean that it did not matter how the words were connected, but that they must be considered in their connection with each other in the sentence.

4 SAME. An instruction in a case of slander which informs the jury that the law implies damages from the speaking of slanderous words, and that a defendant intends the injury the slander is calculated to produce, and that the jury, in case they find a verdict of guilty, are to determine what damages ought to be given under all of the circumstances, is not erroneous. Such an instruction does not inform the jury that the defendant is guilty.

5. SLANDER — *words spoken by the wife.* Where the wife alone speaks slanderous words concerning another person, the husband and wife must be joined as defendants, but they cannot be jointly sued for slander by both. If the wife spoke the words, the jury were bound to find a verdict against both, when they are jointly sued. Nor is a verdict defective which finds defendants guilty, but omits to say in manner and form as charged in the declaration.

6. EVIDENCE — *credibility of witnesses.* The weight to be given to evidence and the credibility of witnesses, are questions for the jury to determine. The amount of damage sustained by a plaintiff for slander by a defendant, is also a question within their province, and the verdict will not be disturbed unless they are palpably excessive, or there was manifest prejudice or other misconduct of the jury.

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

Augusta Young brought an action on the case for slander, in the Circuit Court, against Ludwig Baker, and Caroline Baker, his wife. The declaration averred, that the plaintiff was an unmarried woman, and that Caroline Baker falsely and maliciously spoke these words: "'Gusta Young is in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off." Also, that "'Gusta Young was with child, and that Rink and his wife took her to a Chicago doctor to have the child worked off." There were other words charged, but, not being proved, they are omitted. Defendants filed the general issue denying that she spoke the words, upon which issue

was joined. The venue was afterward changed to Stephenson county.

A trial was had by a jury at the September Term, 1866. On the trial Mrs. Snyder testified, that she heard Caroline Baker, one of the defendants, say, "Augusta Young was in the family way by Tom Beal." William Snyder testified that Mrs. Baker said, "Augusta Young was in the family way. 'Gusta Young is in the family way by Tom Beal. Rink and his wife had taken her to Chicago to have the child worked off." That Mrs. Snyder said she pitied them, but Mrs. Baker said that she did not; "that she rejoiced in it; that they were a high minded set any way, and it would bring them down a peg or two." Mrs. Snyder states substantially the same in reference to Mrs. Baker saying, that she rejoiced at the occurrence of which she had spoken. There was other evidence as to what was said, and as to the feelings of witnesses, etc.

Defendants moved the court to exclude the evidence because it varied from the language charged in the declaration. The court overruled the motion and defendants excepted.

Among others, the court below gave these instructions:

"The jury are further instructed, that all the words laid in the declaration need not be proven to maintain the action, unless it takes them all to constitute the slander, and if they believe from the evidence that a sufficient number of the words laid in the declaration to amount in their common acceptation to a charge of fornication against the plaintiff, have been proved to have been spoken by the defendant Caroline Baker, then they must find for the plaintiff."

"The jury are further instructed that in actions for slander the law implies damages from the speaking of actionable words, and also that the defendant intended the injury the slander is calculated to effect, and the jury, in case they find a verdict of guilty, are to determine from all the facts and circumstances in the case, what damages ought to be given, and are not confined to mere pecuniary loss or injury."

To the giving of which said instructions and each of them,

of the said plaintiff and appellee respectively the said defendants and appellants then and there excepted.

Defendants asked instructions involving propositions the reverse of those contained in these instructions, which the court refused to give, and they excepted.

The jury returned this verdict: "We, the jury, find the defendants guilty, and assess the damages at $800."

Defendants thereupon entered a motion for a new trial, and also in arrest of judgment, which were overruled by the court, and a judgment was rendered on the verdict. Defendants bring the case to this court on appeal, and ask a reversal, because the court below refused to exclude appellee's evidence; that the court erred in giving appellee's instructions; in refusing to give appellants' instructions, and in overruling the motions for a new trial, and in arrest, and in rendering judgment on the verdict.

Messrs. GOODWIN & WILLIAMS, for the appellants.

Messrs. BARGE & HEATON, for the appellee.

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

In actions for slander, the plaintiff must prove the language laid in the declaration, or so much, at least, as fully proves the charge. Equivalent words in meaning will not be sufficient. It is true, that all of the words in the sentence need not be proven, if those which are proved fully establish the slander. If, however, other words not laid are proved, which limit or change the meaning of those counted on, the action will not be sustained. If all the words laid are necessary to constitute the slander, then they must be proved as laid. *Sandford* v. *Geddis*, 15 Ill. 228; *Patterson* v. *Edwards*, 2 Gilm. 720; *Williams* v. *Odell*, 29 Ill. 156.

The words relied upon as having been proved, are contained in the second count, and are these: "'Gusta Young was in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off." "'Gusta Young is in

the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off." Mrs. Snyder testifies that Mrs. Baker stated that, "Augusta Young was in the family way by Tom Beal." Wm. Snyder testified that she stated, "'Gusta Young is in a family way;" "'Gusta Young is in a family way with Tom Beal;" Rink and his wife had taken her to Chicago to have it worked off, or, "to have the child worked off;" can't tell which. He again states the latter words both ways. It is urged that there is a variance between the words laid and the words proved, because more are proved than laid.

The declaration proceeds for an injury in charging appellee with fornication, and under the authorities above referred to, if enough of the words were proved to establish the slander, then appellee was entitled to recover. Snyder swears to one set of the words as laid. He also swears to another, with additional words, but which in no sense alter or change the slander. They only point out more specifically the manner of the offense charged. They only specify the person with whom it was charged that appellee had committed fornication, and that an effort had been made to produce an abortion. This is equally true of Mrs. Snyder's testimony. These additional words did not alter the charge, that appellee, who was an unmarried woman, was pregnant, and which implied that she had been guilty of fornication, as charged in the declaration. We are therefore of the opinion that the jury were warranted in finding that there was no variance, and that the slander was proved.

It is urged, however, that the fifth of appellee's instructions was erroneous, being calculated to mislead the jury. It informed them, that if they believed from the evidence that a sufficient number of words laid in the declaration, to amount, in their common acceptation, to a charge of fornication against appellee, had been proved to have been spoken by Caroline Baker, they should find for appellee. We have seen that such is the law. But it is insisted that it informed the jury it did not matter how the words were connected, whether uttered in the same sentence, connection, conversation, or otherwise.

This is not the natural import of the language of this instruction, nor do we suppose the jury so understood it, when we can see that connected clauses of sentences proved would, in their natural construction, clearly imply the charge. Had it been otherwise, then the instruction might have been liable to the criticism placed upon it by appellants. Nor do we see that the instruction assumes, that a sufficient number of words had been proved to establish the slander. The jury are told, that if they believe that such words had been proved, they would find for appellee.

It is insisted that the seventh of appellee's instructions was erroneous. It informs the jury, that in actions for slander, the law implies damages from the speaking of actionable words, and also that the defendant intended the injury the slander is calculated to effect; and the jury, in case they find a verdict of guilty, are to determine from all the circumstances in the case, what damages ought to be given, and are not confined to mere pecuniary loss or injury. We do not think that this instruction can be reasonably understood to assume the guilt of appellee, or the circumstances in the case, as insisted by appellants. It simply lays down a rule of law applicable to cases of slander, and leaves the jury to apply it to the case under consideration. The natural import of the language is, not that the defendant named in the instruction is the defendant in this case, or that the circumstances were those in this case, but that the instruction refers to any defendant, or the circumstances in any case of slander. We are, therefore, of the opinion that it announces a correct principle of law, applicable to this case, and did not mislead the jury.

It is objected, that the verdict is insufficient to sustain the judgment. It is urged that the plaintiff, Ludwig Baker, did not become *particeps criminis*, and should not be found guilty without having been accused, and having an opportunity of defending himself. The words in this case were spoken by the wife alone, and the question sought to be raised is, whether a judgment can be recovered against him for slander uttered by the wife. The rule is laid down by Chitty, that for torts com-

mitted by the wife, during marriage, as for slander, assault, etc., or for any forfeiture under a penal statute, they must be jointly sued; but that they cannot be jointly sued for slander by both. 1 Chitty Pl. 92. From this rule, and it seems to be fully supported by authority, if the jury found in this case that the wife spoke the words, they were compelled under the issue and the law to find a verdict against both defendants, they being husband and wife. Nor do we see that the verdict is defective, because it fails to state that they found appellants guilty in manner and form as alleged in the declaration. This would, no doubt, have been strictly formal, but such was the obvious meaning of their finding. It was, we think, clearly responsive to the issue.

As to the question of the credibility of witnesses, that was for the determination of the jury. In the conflict of evidence, whether real or only apparent, it was for them to give weight to such portions as they found to be worthy of belief. In this case we see no reason for disturbing the verdict, because it is not sustained by the evidence. Nor can we say that the damages found were excessive. That was a question for the finding of the jury, and will not be disturbed, unless the damages are palpably excessive, or there was manifest prejudice, or other misconduct of the jury. We are, after a careful examination of this entire record, unable to perceive any error for which the judgment of the court below should be reversed, and it must therefore be affirmed.

Judgment affirmed.

THOMAS J. NICKLE
v.
ASA S. WILLIAMSON.

VERDICT — *insufficiency of evidence.* To support a verdict in an action for unsoundness of a horse, there must be proof of a warranty, express or implied, or proof of the existence of some disease known to the seller, and unknown to the purchaser, at the time of sale.

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

The opinion states the case.

Messrs. BLADES & KAY, for the appellant.

To support an action for unsoundness of a horse there must be proof of a warranty, express or implied. *Ender* v. *Scott*, 11 Ill. 35; *Adams* v. *Johnson*, 15 id. 345; *Hawkins* v. *Berry*, 5 Gilm. 36; *Misner et al.* v. *Granger*, 4 id. 69; 1 Smith's L. Cas. 5 Am. ed., top page 242, *et seq.*; 1 Parsons on Cont., 5th ed. 576, 577; Hilliard on Sales, 257, § 5; Story on Sales, § 352.

Messrs. FLETCHER & KINNEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

We do not deem the evidence sufficient to sustain this verdict. There is no proof of a warranty express or implied, and no proof of any disease known to the seller, which he did not communicate to the purchaser. It is quite clear, that the animal was sold as an unsound animal, for she was sold on credit at a price far below her value had she been sound.

The weight of evidence greatly preponderates in favor of the appellant, and he should have had the verdict.

When told by Wallace when he was called on by appellee, to sign a note with him for the price of the mare, that he was "bit," he replied, "if he was he would have to stand it." How natural it would have been for him, on that occasion, to have replied, he had a warranty, if the fact was so.

The evidence is by no means clear, that the mare is seriously diseased, though sold as one not perfectly sound. It would seem the mucous membrane of one or both nostrils was disordered in some way, but no one witness testified it was incurable. But we place the case on the ground, that the evidence fails to establish a warranty, and that it goes far to establish

the fact, from the smallness of the price, that she was sold and purchased as an animal not perfectly sound.

The judgment must be reversed and the cause remanded.

Judgment reversed.

ROYAL A. B. MILLS
v.
HENRY GRAVES.

EJECTMENT — *conveyance by plaintiff pending suit.* Under our statute, a conveyance of plaintiff's title to a third person, pending suit, does not defeat his right of recovery. In such case the recovery in ejectment inures to the benefit of the grantee of the plaintiff.

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

On the 9th of April, 1855, Royal A. B. Mills commenced an action in the Circuit Court of Cook county, against Henry Graves, for the recovery of a tract of land in the city of Chicago.

On the trial of the case before the court — a jury having been waived — Graves offered to prove that on the 2d of April, 1861, after the commencement of the suit, the plaintiff, Mills, conveyed all his title in the premises to one Henry L. Rucker. To this the plaintiff's counsel objected, but the court overruled the objection, admitted the proof, and gave judgment for defendant; to reverse which the plaintiff prosecutes an appeal to this court.

Mr. J. S. PAGE, for the appellant.

Mr. J. L. STARK, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only question presented by the argument in this case is, whether, in an action of ejectment, a conveyance to a third

person, by the plaintiff, pending the suit, will defeat the action. The authorities cited are contradictory. In *Cresap's Lessee* v. *Hutton*, 9 Gill. 269; *Cheeny* v. *Cheeny*, 26 Verm. 606, and *Alden* v. *Grove*, 18 Penn. 377, it is held that the action is defeated. A contrary rule is laid down in *Jackson* v. *Leggett*, 7 Wend. 377; *Jackson* v. *Jeffries*, 1 A. K. Marsh. 90, and *Woods* v. *McGuin*, 21 Ga. 582. Our own statute furnishes, however, the means of determining this question.

Section 19 of the ejectment statute, provides that "it shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any of the profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises *at the time of the commencement of the suit*, as heir, devisee, purchaser, or otherwise." This is equivalent to saying that if the plaintiff had a title at the commencement of the suit, he shall recover, as the legislature had already provided in the third section, that if he had none at the commencement he should not recover. The state of the title at the commencement of the suit is made the criterion for either success or defeat. For this there was good reason. It has been the constant policy of this State to promote the easy sale and conveyance of land. To this end it was enacted at an early day, that land might be conveyed though adversely held. The action of ejectment is with us the only common law action for the determination of titles. Hence the statute gives each party a right to one new trial as a matter of right, and another in the discretion of the court. It thus often happens that a case remains for years in the courts before reaching a final determination. It can not have been the intention of the legislature to prevent the conveyance of lands during the long period through which the plaintiff in ejectment may often be kept in the courts, although the owner of a clear paramount title; and this may be asserted with the more confidence in view of our short statutes of limitation, under whose operation the grantee of a plaintiff in ejectment, or a purchaser under judgment and execution against the plaintiff, might be often barred from prosecuting a new suit. Neither can we dis-

cover any practical objection to allowing a plaintiff in ejectment to recover, notwithstanding a conveyance pending the suit. The recovery would be under the title upon which the suit was brought, and would practically inure to the benefit of his grantee. To allow the recovery would also be in strict conformity to the issue made by the pleadings.

Counsel for the defendant in error urge that the 25th section of the statute of ejectment applies to this case. That section is as follows:

"If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that, as to the premises claimed, the defendant go thereof without a day."

We understand this section as intended to apply to cases where the plaintiff claims an estate for years or for the life of another. Such an estate may "expire" pending the suit, by the simple lapse of time, and in such cases there should, of course, be no judgment for recovery of the possession because there is no person entitled to the possession under the title upon which the suit was commenced. But, where the estate of the plaintiff has merely been transferred to another, it cannot, in strictness, be said to have expired, and, unlike the other case, there is a person in existence to whose benefit a recovery would inure as the owner of the title on which the suit was commenced.

In our judgment, the ends of justice will be promoted by giving to the statute such a construction as will allow a recovery, notwithstanding a conveyance. The judgment must be reversed.

Judgment reversed.

Syllabus. Statement of the case.

ELIZABETH DODDS
v.
WILLIAM H. SNYDER *et al.*

1. MORTGAGE—*on two funds.* Where a person takes a mortgage on property a portion of which is incumbered at the time and a portion is not, he thereby acquires the right to satisfy his debt out of the portion not previously incumbered. And this right passes to an assignee of the debt and security. And on a foreclosure he could be compelled to resort for satisfaction, first, to lands upon which the debtor did not reside.

2. SAME—*homestead—subsequent incumbrance.* A person taking a deed of trust on the lot of ground occupied as a homestead by the debtor and also on a tract of land not so situated may resort, for satisfaction of his debt, first, to the land; nor is his right impaired by the debtor subsequently giving a mortgage on the land. The law will not compel the first incumbrancer to advance a thousand dollars to reach the surplus of the homestead before resorting to the land for satisfaction.

3. INCUMBRANCES—*different funds.* The law does not require a person having a lien on two funds, one of which is subject to a lien or incumbrance prior to his, and the other a lien subsequent to his, to remove the incumbrance prior to his, to enable the person holding the lien subsequent to his on the other fund, to obtain satisfaction. If a creditor having a lien on two funds, one of which was a homestead which is indivisible, and the other not subject to a prior lien, the court could not compel him to advance one thousand dollars, and sell the surplus of the homestead; to do so would be to make a new contract.

4. SAME—*equity of redemption.* A person taking a second mortgage on real estate, only acquires a lien on the equity of redemption, and when such mortgage is foreclosed and the property sold, the purchaser only obtains that right. And it will be presumed that such a purchaser regulates his bid with reference to the prior incumbrance, and only gave what it was worth subject to the prior lien.

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

This was a suit in equity brought by Elizabeth Dodds, in the Stephenson Circuit Court, against William H. Snyder, Jeremiah J. Piersol and Mary Jane Dodds, to enjoin the sale of eighty acres of land under a decree of foreclosure.

Statement of the case.

It appears that Samuel F. Dodds in his life-time, on the 11th day of December, 1857, being indebted to Richard H. McGoon, to secure the same, executed a deed conveying block one in the town of Sena, which was then his homestead and still is that of his family, and the W. ½ N. E. ¼ of sec. 33, T. 28, R. 6, to Chancelor Martin in trust. That McGoon subsequently assigned the debt and security to Snyder.

That afterward, about the 31st of May, 1859, Dodds and his wife, Mary Jane, executed a mortgage on the eighty acre tract of land, to secure a debt of one thousand dollars, to one Benjamin B. Provost. That Dodds died in May, 1863. That Provost in December of that year foreclosed his mortgage making the widow and heirs, parties. That the land was sold under the decree, and complainant became the purchaser at the sum of $1,332.42, and that she received a master's deed after the redemption expired.

At the September Term, 1865, of the Stephenson Circuit Court, Snyder foreclosed his deed of trust, making the widow and heirs of Dodds parties, and obtained a decree against both tracts of land for $969.20, and for a sale thereof, and required the sheriff to carry the decree into effect. That he advertised the property for sale, but refused to first offer the homestead. It appears that the estate of Dodds was insolvent; also that the homestead is indivisible. It also appears that no defense was made to the suits for foreclosure.

The court below heard the cause on bill, answer, replication, exhibits and proofs, and rendered a decree dissolving the injunction and dismissing the bill. From which complainant has appealed to this court, and assigns for error the rendition of the decree.

Messrs. BURCHARD, BARTON & BARNUM, for the appellant.

Mr. DAVID SHEAN, for the appellee.

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

When Samuel F. Dodds executed the deed of trust to secure the payment of the debt he owed McGoon, on the block of ground, and the eighty acres of land, he unquestionably gave the right to sell the land before the homestead should be subjected to its payment. There can be no doubt that the trustee could, and it may be, under the statute which declares the land on which the debtor resides shall be last taken on execution, that under a decree of foreclosure he could have been compelled to, sell that tract first. But as between the parties to the deed of trust, there can be no question that such a right existed, and when Snyder became the owner of the debt to McGoon, and the security, he without doubt succeeded to the same right. As between him and Dodds, and his heirs, he could not, either at law, in equity, or under the contract, have been compelled, before selling the land, to advance $1,000, to subject the block of ground, which was the homestead of Dodds, to sale, before resorting to the land for a satisfaction of the debt. And if he is now compelled to do so, it must be, so far as appears from this record, by reason of acts other than his own, and without his consent. In this he had the prior as well as the superior equity.

The law does not require a person having a lien on two funds, one of which is already incumbered, and the other free, to remove the incumbrance and satisfy his lien out of that fund, because some other person has voluntarily acquired a subsequent lien on the unincumbered fund; it would be inequitable to impose such an obligation. Nor does a different rule prevail, when a party has a mortgage or other lien on a tract of previously unincumbered land, and on the surplus of the homestead tract of the debtor, over $1,000, and another person holds a mortgage on the unincumbered tract. In this case, if the relief asked should be granted, Snyder would be compelled to advance $1,000 before he could sell the homestead, as it appears from the evidence not to be divisible without great injury to the property. The giving of the subsequent mortgage to Provost, did not in any degree alter the rights of Snyder; nor did its foreclosure and the sale of the land. Provost took his mortgage on

the equity of redemption only, subject to all of the rights of the holder of the McGoon debt, and the purchaser under that foreclosure obtained no other or better right.

Appellant purchased the tract of land subject to the prior incumbrance. She no doubt regulated her bid with a view to the prior incumbrance, and only gave what the land was worth, over and above what it was bound for under the deed of trust to secure the McGoon debt. Knowing of that lien, it is by no means probable that she or other bidders would give the full value of the property, and if this is the case, it is not perceived by what means she has an equity to compel other property to bear the just lien then existing upon her own. If she has had the benefit of a reduction of price to the extent of this incumbrance, every principle of justice requires that she should relieve her property from the burthen by the payment of the debt. Having been made a party to the foreclosure suit, and failing to show any equity which should have relieved the tract of land from its original liability, she should be bound by the decree, and especially so, when she has failed in her bill in this case to establish facts which should exonerate the land from this burthen.

Again, if she has equities, they are not superior to those of the widow and family of the deceased, and we have seen that Snyder's are superior to hers. Upon a careful examination of this whole record, we perceive no grounds for granting the relief sought, and the court below committed no error in dismissing the bill, and the decree must be affirmed.

Decree affirmed.

THOMAS GILCREEST

v.

WILLIAM E. SAVAGE for the use of JACOB FISHBORN.

ATTACHMENT — *garnishee.* Under our statute, a judgment *in rem* by attachment does not authorize the issuance and return of a general execution *in personam* so as to issue garnishee process thereon.

APPEAL from the County Court of La Salle county; the Hon. P. KIMBALL LELAND, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Messrs. BUSHNELL & AVERY, for the appellant.

Mr. T. L. DICKEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It appears from the bill of exceptions in this case, that Jacob Fishborn had sued out process of attachment against the property of William E. Savage, and levied on the south-east quarter of section 15 in town 32, range 4, east of the third principal meridian. A default was taken against Savage after notice by publication, at the December Term, 1865, of the County Court of La Salle county, and judgment rendered for Fishborn against that quarter section of land to pay and satisfy the sum of $175.05. A garnishee process was sued out on the 31st of January, 1866, against Thomas Gilcreest, which was served on the same day. On the same day a *fi. fa.* issued in favor of Fishborn against Savage and returned *nulla bona.*

Interrogatories were filed and answered by Gilcreest, on which the court rendered a judgment against him for $201.60 and costs. To reverse this judgment, the record is brought here by appeal and several errors assigned, which we do not deem it necessary to discuss at length, as we are satisfied the appellant was not subject to this garnishee process. The judgment against Savage was not *in personam* but was against the land, and that became the fund out of which it was to be satisfied. No general *fi. fa.* could issue. Section 22 of the attachment act provides, if judgment by default shall be entered on any attachment against the estate of the defendant in any court of this State, no execution shall issue except against the goods and chattels, lands and tenements on which the attachment may have been served, or against a garnishee or garnishees who shall have money or other property in his or their

hands belonging to the defendant. Scates' Comp. 233. Nor does the act, title "Garnishment" (id. 549) have any application to this case. The judgments treated of in that act, are judgments *in personam* and not in attachment cases. This act is the same as section 38, chapter 57, title "Judgments and executions," and has unmistakable reference to judgments *in personam* only.

The facts appear from the bill of exceptions, and show clearly, that Fishborn had no such judgment as warranted him in suing out this garnishee process.

The judgment is reversed.

Judgment reversed.

SOLOMON COLE
v.
HENRY VAN RIPER.

CONVEYANCE — *wife's separate estate.* The act of 1861, entitled "An act to protect married women in their separate property," does not empower a wife to convey her real estate without the consent and joinder of her husband in the deed, as required by section seventeen of our statute of conveyances. And although the act modifies during coverture the husband's estate by the curtesy, it does not enable the wife to divest him thereof, or prevent its taking effect after her death.

APPEAL from the La Salle County court; the Hon. P. KIMBALL LELAND, Judge, presiding.

This was an action of ejectment brought by Henry Van Riper against Solomon Cole, in the La Salle County Court to recover possession of a tract of land situate in the town of Whitfield, in La Salle county.

The plaintiff, to prove title, called George Munroe, who was sworn as a witness. Showed the witness a deed from John R. Snyder, and Elizabeth H. Snyder, his wife, to James Van Riper, of all of block number nine in the town of Whitfield, in La

Salle county, Illinois, dated July 22, A. D. 1862, and filed for record August 2, A. D. 1862.

James Van Riper went into possession, under that deed, of a store building, which stood on the east part of the block, and moved a stable from the east side of the block.

Cole, the defendant, at that time and before, was in possession of the tavern stand on the west part of the block — on the part of the block now in controversy in this suit — as the tenant of John R. Snyder; so Cole told me.

The plaintiff then offered the deed in evidence to the jury. The defendant objected. The court overruled the objection, and the plaintiff read the deed in evidence to the jury.

The plaintiff then read in evidence to the jury a deed from James Van Riper and Hannah Van Riper, his wife, to Ellen Cole.

Plaintiff then offered in evidence a deed from Helen Cole to himself.

It was agreed that the said Ellen Cole was the wife of the defendant at the date of said last mentioned deed.

The defendant objected to the giving of said deed in evidence to the jury, on the ground that Ellen Cole, being a married woman at the date of the deed, could not convey real estate without her husband, the defendant, joining with her in the conveyance. The court overruled the objection and permitted the deed to be read in evidence to the jury, and the defendant excepted.

The plaintiff then read in evidence the affidavit of A. Potter, on the back of the declaration, of the service of a copy of the declaration.

The plaintiff then called as a witness J. W. Brown, who testified:

The defendant was in possession of the premises in controversy at the time of the service of the declaration in this case on him; and just before the commencement of this suit I advised Cole to go out of this property, and he said that the property was his, and he should not go out until he was carried out.

The jury returned a verdict for the plaintiff.

The defendant moved for a new trial at common law, on the ground that the court erred in admitting in evidence the deed from Ellen Cole to the plaintiff, and in deciding that, by the laws of this State, a married woman can convey her own real estate without her husband joining with her in the conveyance.

The court overruled the motion for a new trial, and to the decision of the court in that behalf the defendant excepted.

The court then rendered judgment upon the verdict for the plaintiff.

The defendant then prayed an appeal, which was allowed on filing bond, as required by law.

Mr. OLIVER C. GRAY, for the appellant.

At common law the conveyance of a *femme covert* of her land, by deed, was absolutely void. She could only pass her freehold estate by fine or common recovery; and even if she levied a fine, without the concurrence of her husband, though it would be good against her and her heirs, it would not bind the husband, and he might avoid it. 2 Kent's Com. 150, 151; Shep. Touch. by Preston, 7; 1 Preston on Abstracts of Title, 336.

In this State the common law was changed by the seventeenth section, chapter twenty-four, Revised Statutes, entitled "Conveyances." Revised Statutes of 1845, p. 106.

But it is urged that the "act to protect married women in their separate property," approved February 21, 1861, has changed the law on this subject.

We insist that the act of 1861 does not purport or pretend to be a conveyance act; nor does it provide in any way for the conveyance, by the wife, of her separate property, nor does it contain any repealing clause.

It simply places her separate property under her sole control, to be "held, owned, possessed and enjoyed by her the same as though she were sole and unmarried," and exempts it from liability to execution or attachment for her husband's debts.

Chancellor KENT says:

"The reason why the husband was required to join with his wife in the conveyance was, that his assent might appear on the face of it, and to show he was present to protect her from imposition; and the weight of authority would seem to be in favor of the existence of a general rule of law that the husband must be a party to the conveyance or release of the wife. Such a rule is founded on sound principles arising from the relations of husband and wife." 2 Kent's Com. 152.

The record shows that Solomon Cole and Ellen Cole have children living, the issue of their marriage.

If the property in controversy became her separate property by the deed from James Van Riper to her, Cole is still tenant by the curtesy.

We insist that the act of 1861 has not repealed, by implication or otherwise, the law which gives and creates a tenancy by the curtesy.

If not, then the husband's curtesy cannot be affected by a deed executed by the wife alone; and if not, then Cole's right to a possession of the property cannot be destroyed by her deed to Henry Van Riper. But this right is effectually destroyed if Van Riper can recover in ejectment on the strength of her deed.

Messrs. J. O. GLOVER, and GEORGE C. CAMPBELL, for the appellee.

The first point made by the appellant, is upon the introduction in evidence of the deed of Ellen Cole.

The sole objection to the deed is, that it is the separate deed of a married woman, who, under the act of February, 1861, claimed the right to, and, as we say, did, by the deed in question, convey her separate property without the "control or interference of her husband."

It is insisted by appellant, that the law of 1861, which provides, that, as to the separate property of the wife, it "shall, notwithstanding her marriage, be and remain during coverture, *her sole and separate property, under her sole control, and be*

held, owned, possessed and enjoyed by her, the same as though she was sole and unmarried; and shall not be subject to the disposal, control, or interference of her husband;" does not authorize the wife *to convey* real estate without the consent of the husband, evidenced by his joining her in the deed, as required by section 17 of the 24th chapter of the Revised Statutes, entitled "Conveyances."

It is said repeals by implication are not favored in law, and this I concede; but it is equally true, that, if the evident intent of a subsequent statute cannot be carried out unless it operates to repeal by implication a prior act, it will always be held to so operate. Dwarris on Stat. 673; *The King* v. *Middlesey*, 2 B. & Adolph, 818; *Bowen* v. *Lease*, 5 Hill, 221; *Ill. & Mich.* v. *Chicago*, 14 Ill. 335; *Maus* v. *Logansport P. & B. R. R.*, 27 Ill. 82.

The question to be considered, therefore, is, whether it was the intent of the act of 1861 to allow a married woman, as one of the methods of "controlling" and "enjoying" her separate estate, to *convey* it without *the control or interference* of her husband.

If this is the intent, it is plain that it cannot be carried out, if the husband may defeat a conveyance by refusing to join in the deed.

The only decision in our own court upon this statute, is in the case of *Emerson* v. *Clayton*, 32 Ill. 493.

It seems to me that the reasoning in that case is conclusive of this.

But the rule for which we contend is not without authority, and was expressly upheld in New York, under a law almost word for word with ours. *Blood* v. *Humphrey*, 17 Barb. 660.

By the law in question it is evident that the principle of the rule fails, for the wife has the administration of her separate estate; she has not given up to her husband the control, or title to, or possession of any of it, and not being wanting in discretion, there is no reason why she should not contract.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of ejectment, and one of the questions presented by the record is, whether under the law of 1861, known as the married woman's act, a married woman can convey real estate, acquired since that time, without the joinder of her husband. That act provides "that all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture, her sole and separate property under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

The legislature has here used very sweeping language, but it must be interpreted with reference to the evil intended to be cured, and in such manner as to be made to harmonize with other statutes which are left unrepealed, so far as such harmony can be secured without disregarding the legislative intent. It is a familiar maxim, that repeal by implication is never favored.

That this statute cannot be enforced according to its literal terms without impairing, to a very large extent, the strength of the marriage tie, will be evident on a moment's reflection. By the terms of the act, the property of a married woman is to be "under her sole control, and to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried." If this language is to receive a literal interpretation, a married woman, living with her husband and children in a house owned by her, would have the right to forbid her husband to enter upon the premises, and he would be a trespasser in case he should enter against her will, and would be liable to her in damages. Such would be her rights as a *feme sole*. The wife could thus divorce her husband *a mensa et thoro*, without

the aid of a court of chancery. Or, again, suppose in a house thus owned and occupied, the furniture is also the wife's property. Can she forbid the husband the use of such portion as she may choose, allow him to occupy only a particular chair, and to take from the shelves of the library a book only upon her permission? This would be all very absurd, and we know the legislature had no idea of enacting a law to be thus interpreted. It is simply impossible that a woman married should be able to control and enjoy her property as if she were sole, without leaving her at liberty, practically, to annul the marriage tie at pleasure; and the same is true of the property of the husband, so far as it is directly connected with the nurture and maintenance of his household. The statute cannot receive a literal interpretation.

The object of the legislature was, not to loosen the bonds of matrimony, or create an element of constant strife between husband and wife, but to protect the latter against the misfortunes, imprudence, or possible vice of the former, by enabling her to withhold her property from being levied on and sold for the payment of his debts, or squandered by him against her wishes. Before the passage of this law, the husband became the owner, by virtue of the marriage, of the personal property held by the wife at the date of the marriage, or which came to her after that time, and was reduced by the husband to possession, and he was also seized of an estate, during coverture, in lands held by the wife in fee. This estate was, in the eye of the law, a freehold, as it would continue during their joint lives, and might last during his life, and was liable to be sold on execution against the husband. 2 Kent, 130. The personal property reduced to possession, and this estate in the wife's land, were at the disposal of the husband, and liable to be sold at his pleasure, for his own use, or to be levied upon and sold by his creditors. These were the evils which the law was designed to cure, and has cured. Although we held in *Rose* v. *Sanderson*, 38 Ill. 247, that where the husband's estate in the wife's lands had vested before the passage of this law, it was not divested by the act, and might be sold by his creditors,

yet where the marriage has occurred, or the land has been acquired by the wife, since that time, it would doubtless be held, that this species of estate, known as an estate during coverture, has been substantially abolished, because its existence is wholly irreconcilable with both the language and the objects of this law.

But besides this estate which the husband acquired, by virtue of the marriage, in the lands of his wife, he also, if there was issue of the marriage born alive, became tenant by the curtesy of all lands of the wife which such issue might by possibility inherit, and this estate, unlike the other, terminated only with his own life. The law termed this estate initiate on the birth of issue, and consummate only on the death of the wife, but the initiate estate could be seized and sold on execution against the husband. Up to the period of the wife's death, it was substantially the same thing as the estate during coverture above mentioned. Now, although this estate is greatly modified by the act of 1861, it is not totally destroyed. During the life of the wife, the husband can exercise no control over his wife's lands as tenant by the curtesy, nor has he an interest in them subject to execution. We refer, of course, to lands where no interest had vested before the passage of the law. This estate, then, would be totally abolished, like the estate during coverture, were it not that tenancy by the curtesy continued after the wife's death, and, indeed, at that period became most material to the husband, since, up to that time, he had the enjoyment of his wife's realty by virtue of the other species of estate. While, then, the one estate is annihilated by a necessary implication, the utmost that can be said in regard to the other is, that it is materially modified. This estate is as old as the common law. It has always been recognized as existing in this State. It is not expressly abolished by the act of 1861, and, so far from being abolished by implication, it may be recognized as taking effect on the death of the wife, without conflicting in the slightest degree with the letter, spirit, or object of that law. On the contrary, the law itself provides, that it is "during coverture" that the property of the wife is clothed with

these new qualities, thus leaving the existing law unchanged, as to the disposition of the wife's property at her death. Moreover, it is hardly to be supposed, that the legislature would totally abolish this estate, without remodeling that of dower, or that they would work so important a change in our law of realty merely by implication. But, in fact, there is not even an implication that affects this estate after the death of the wife.

We have said thus much in regard to this estate, as a foundation for our opinion that this act does not enable the wife to convey her lands without the consent of her husband, manifested by joining in the deed. At common law the wife could only convey by fine or a common recovery, and a fine levied without the husband's consent was not binding upon him unless he was a party. 2 Kent's Com. 150. A conveyance in which the husband unites has been substituted in this country, and is the mode pointed out by the 17th section of the statute of conveyances. The estate of the husband in the wife's lands could not, therefore, be destroyed or impaired by the sole act of the wife. If this section of our conveyance act is repealed by the act of 1861, it is repealed by implication, which, as already remarked, the law does not favor. But where is the implication? Not certainly in the language of the act, which gives the wife the right to hold, own, possess and enjoy her property, for the terms give only the *jus tenendi* and not the *jus disponendi*. The power to own and enjoy, is entirely different from the power to dispose of, and the latter is not necessary to the exercise of the former. Neither is the power of disposing implied in that phrase of the law directing that her property shall be under her sole control, because that term, although indefinite, must be construed in connection with the terms "own, hold, possess and enjoy." In order that she may hold and enjoy she must necessarily control. But the control of the use and enjoyment does not imply the power to sell. Strictly speaking, the land, when conveyed, would pass away from her control and enjoyment.

But the chief reliance seems to be placed on the provision, that she is to have the power of controlling and enjoying as if

she were sole and unmarried, and hence it is contended she can convey as if she were sole, and her deed would have the same effect as the deed of a *feme sole*. If she can convey at all, because of the language in the act referring to the condition of a *feme sole*, her deed would undoubtedly have this effect, and would thus destroy the husband's estate by curtesy, and prevent him from resuming possession of the lands conveyed, after her death. We have already given the reasons why this act does not annihilate the estate of a tenant by the curtesy, or place it in the power of the wife to destroy it. If we are right in that conclusion, it necessarily follows, that it was not the intention of the legislature, when they gave her the power to enjoy as a *feme sole*, to give also the right to convey as a *feme sole*, and thereby destroy the husband's estate.

There is another reason for not holding that this act enables the wife to convey by her own deed. Before the passage of the law, acts similar in their general character had been passed in several of our sister States. The law of New York expressly gave the wife the power of conveyance. The laws of Pennsylvania and New Jersey did not, but employed terms of the same general character as our own. Our legislature chose to shape our law after the latter models. It is but a just inference, that the omission of any words, in our act, expressly giving the power to convey, was the result of design and not of accident.

The Supreme Courts of Pennsylvania and New Jersey have given to the acts of these States the same construction adopted in this opinion. *Walker* v. *Reamy*, 36 Pa. St. 410; *Naylor* v. *Field*, 5 Dutcher, 287.

We should add, in conclusion, that we have not considered the question of the power of the wife to dispose of her personal property. That may depend upon different considerations. The power to sell has sometimes been considered a necessary incident to the ownership of personal property. But a majority of the court are of opinion that the act of 1861 does not authorize a married woman to convey her realty in any other manner than that pointed out by the statute of conveyances. In holding

this however, we do not question the rule laid down in *Emerson* v. *Clayton*, 32 Ill. 493, as to the right of a married woman to bring a suit in her own name. That right is a necessary incident to the law.

As the decision of this question disposes of this case, it is unnecessary to consider the other questions raised.

Judgment reversed.

BREESE, J., dissents.

GEORGE SHELDON
v.
GEORGE F. HARDING *et al.*

1. QUITCLAIM DEED—*failure of consideration.* A quitclaim deed for land, without reference to the character of title, is, in the absence of fraud, a sufficient consideration to support a contract. Money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance, unless fraud has been practiced on the grantee.

2. TRUST—*resulting or implied.* A resulting or implied trust is usually created by the purchase of land with the money of one person in the name of another without the consent of the owner of the means. Such trust is never created by agreement, but always by implication of law, from acts independent of the agreement of the parties.

3. PRACTICE—*dismissing bill.* Where a bill in chancery is not framed on a basis such as will entitle the complainant to the relief he seeks, but it is obvious to the court that he has equities which under a proper bill he could enforce, the true practice is to dismiss his bill without prejudice.

APPEAL from the Warren county Circuit Court.

The case is sufficiently stated in the opinion of the court.

Mr. A. G. KIRKPATRICK, for the appellant.

Mr. A. W. ARRINGTON, for the appellees.

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

This was a suit in equity brought by George Sheldon, in the Warren Circuit Court, against George F. Harding and Chauncey Hardin, to enforce an alleged trust and for the payment of money alleged to have been fraudulently obtained. It appears that Chauncey Hardin had a tax title on the land in dispute, and had sold the same to one Rockwell, who, through Bogguss, sold the same to complainant. Rockwell had agreed to pay $1,600 for the quarter, and he sold to complainant for $1,100. Hardin made to the latter a quitclaim deed for the land. It was afterward found that the land had been erroneously assessed for taxation, as the general government had never sold it. The bill alleges that Hardin represented the title to be good when he sold to complainant, when he knew that it belonged to the government; that he acted deceitfully and fraudulently in making the representations.

That after making the purchase, complainant fenced, broke and cultivated the land, since 1857, and in 1862, built a house on it, and moved into and occupied it; that he paid the taxes of 1854 and subsequent years; that George F. Harding, who was a cousin of Chauncey Hardin, and was colluding and confederating with Chauncey, employed Irwin McCartney and others to go on the land in the night-time, and within the inclosure, and whilst complainant was in possession, and erected a small house, to enable George F. to obtain the title by a pre-emption; that McCartney prepared and filed in the land office affidavits, and attempted to pre-empt the land by reason of having built the house; that he only remained on the land one or two days and left; that complainant had no suspicion that McCartney went upon the land for such purpose.

That about the 16th of October, 1860, complainant learned that the land was subject to entry, and soon after went to Springfield for the purpose of purchasing it of the government. On the 20th of that month he called on the register of the land office, and made application to enter the land, who

informed him that Harding and McCartney were attempting to enter it, and advised him to employ one Leonard as an attorney to assist him; that Harding, claiming the right to pre-empt the land, offered to compromise and take $1,600, and would become the purchaser, and upon that amount being paid to him, would convey to complainant; that on being informed of the proposition by Leonard, he declined it, but instructed Leonard to purchase of Harding on the best terms he could; that on the next day, which was Sunday, Harding and Leonard entered into an agreement that Harding should purchase of the government and sell to complainant, on his paying $1,600 in specified installments, and of the first he was to furnish a land warrant with which to make the entry; and on receiving payment Harding was to convey to complainant; that Leonard signed and sealed the agreement on the part of complainant without authority, but supposing he would be bound by it, when informed of its contents, complainant said he supposed he would have to stand it.

That on the next day, McCartney's application for a pre-emption was withdrawn, and complainant furnished a land warrant for one hundred and sixty acres of land, and four dollars to pay the charges for its location, and the entry was made in the name of Harding. That the land, without improvements, was not worth more than $800; that Harding knew that the representations which he made in reference to the pre-emption were untrue and were made for the purpose of deceiving complainant; that the land has been patented to Harding, and that he should be declared and treated as a trustee of complainant, so far as relates to the title to the land. There was a prayer that Chauncey Hardin be decreed to pay the money received from complainant, and that George F. Harding be decreed to convey the land to him. On a hearing, the court below dismissed the bill, and the case is brought to this court for the purpose of reversing the decree.

So far as this record discloses, Chauncey Hardin did not misrepresent his title knowingly. He had a tax title on the land. It had been returned from the general land office as

having been patented many years previously. It had been listed for taxation, and sold for the non-payment of taxes, and a deed had been made. It was regarded as patented land by the officers of both the State and general governments. And there is no evidence that he knew that the government had not sold it when he contracted it to Rockwell, or when Rockwell gave up his bond and the land was conveyed to appellant. Unless it can be shown, that he knew there had been no transfer of the title by the government, he may have supposed that his tax title was good, and he may have acted in good faith in so recommending it. Nor does it appear very distinctly, from the evidence, that Hardin represented to appellant that his title was good, before it was sold to him.

There can be no doubt that a quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance. Such deeds are made because the vendor is unwilling to warrant the title; and they are accepted because the grantee is willing to take the hazard of the title and believes it is worth the price he pays, or agrees to pay. And, unless fraud is practiced upon the grantee, the law permits such contracts to be made, and will uphold and enforce them. In this case, appellant has failed to establish fraud in the sale from Chauncey Hardin to him, and the bill was properly dismissed as to him.

On the other branch of the case, it may be truly said, that the land was in the market, and both parties, in law, had the right to enter into competition for its purchase. It is true, that, until McCartney's application for a pre-emption was disposed of, the land would not have been offered for sale. The register had intimated, and we think correctly, that his application could not be allowed. But as soon as it should have been rejected the land would, under the regulations of the department, have been put up at auction and sold to the highest bidder. But, upon the application for a pre-emption

being rejected, McCartney could have prosecuted an appeal from the decision to the department, which would have involved delay and expense to have it determined. Knowing this, appellant would naturally desire to have the matter adjusted. And, as a general rule, the compromise of any claim that is not immoral will support an agreement for a compromise.

It is urged that the arrangement entered into by the parties was a combination entered into to prevent bidding and to depress the price of land at the sale. If this was so it was a question which affected the government alone, and of which the parties to the agreement cannot object. And when the general gov ernment granted the patent for the land, and delivered it to Harding, it waived all objections to the mode in which the entry was made. If appellant were to successfully urge that the sale was illegally made, that would place him in no better condition, as by such a result the title would be again vested in the government. But Harding having purchased the land, and the patent having been issued to him, he thereby became vested with the legal title, which, so far as this record discloses, he still holds.

Was appellee a trustee for appellant? The latter furnished the means with which it was entered, the former having in fact paid nothing toward its entry. But by the arrangement he was to obtain a large sum of money for conveying to appellant the land which was purchased in appellee's name, and which appellant had previously attempted to purchase, and paid out perhaps the value of the land. There can be but little doubt that appellant was induced to give appellee the sum agreed to be paid, to save, as far as he could, some portion of the value he had imparted to the land by his labor and money. And, however strongly these facts may appeal for relief, they do not create appellee a trustee for appellant. If this was a trust it was such a trust only as was declared by the contract, and must, if at all, be executed according to the terms of the agreement entered into by the parties.

We are unable to declare this contract void, and decree the land in equity to belong to appellant. If the agreement was

annulled, it would leave the land in appellee, and nothing more than a verbal agreement for the conveyance of the land, and such an agreement would be incapable of enforcement, under the statute of frauds. In such a case it would be but a parol trust, which is prohibited by the fourth section of the act which requires all express trusts to be reduced to writing and signed by the party creating the trust.

If, however, the agreement should be set aside, as manifested by the written agreement, and the verbal agreement was held to be void, we are at a loss to perceive in what manner appellant became entitled to the land. It seems to have been entered in Harding's name by the express agreement of all parties. Appellant even did not expect that it would be entered in the name of any other person. This being so, a resulting trust was not created simply by the fact that appellant furnished the warrant with which to make the entry. A resulting or implied trust is usually created by the purchase of land with the money of one person in the name of another, without the consent of the owner of the means. In such a case, he may pursue the land for which his money was paid, and treat the holder of the legal title, with notice, as a trustee, and compel a conveyance; such a trust not being within the statute of frauds, it will be enforced in equity. A resulting trust is never created by agreement, but always by implication of law, from such acts independent of agreement by the parties. But a trust created by verbal agreement, being like any other verbal sale of lands, is prohibited by the statute of frauds, and will not be enforced in equity.

The only remedy, then, left to appellant, is by a performance of his part of the written contract, which if not made under his express authority, was ratified and confirmed by him after its execution. And inasmuch as the general government has raised no objections to its validity, the parties are bound for its performance. Appellant having purchased and paid for the tax title, and having made valuable improvements upon the land, under the belief that he was the owner, and having advanced the funds to make the entry, his equities are clear

and entitle him to relief, upon his paying the balance of the money specified in the agreement. We are at a loss to see how a case presenting stronger equities could well occur, if appellant should pay the balance of the money specified in the agreement. This being so, the court below should have dismissed the bill without prejudice, so as to have enabled appellant to file a new bill if he chose, for the purpose of obtaining a conveyance under the written agreement.

The evidence fails to establish that degree of mental weakness or infirmity which the law requires to avoid an agreement. It is, no doubt, true, that he had been in poor health, and was perhaps still physically debilitated, but we discover no evidence of mental derangement or imbecility, or even weakness of mind, such as would authorize a court to say that he was incapable of comprehending the nature and effect of his acts, or that implies that he could not comprehend the operation and effect of this contract which he entered into to effect a compromise, and to save, as far as he could, a portion of his hard earned property. He is not entitled to have the agreement set aside because he was incapable of entering into the contract.

The decree of the court below is modified, so that the bill will stand dismissed without prejudice.

Decree modified.

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY
v.
CHARLES DEMENT.

1. NEW TRIAL — *verdict against the evidence.* Although the correctness of a verdict may be doubtful, yet if it is not clearly against the evidence, or unsupported by it, the finding will not be disturbed.

2. So in an action against a railroad to recover the value of a cow alleged to have been killed by a train, the proof as to the manner in which the cow was killed was, that, when found, she was lying on her back in the railway ditch, between two and three feet from the track, bloated, and the

blood oozing from her nose. The jury found she came to her death from a passing train, and the court, though doubtful of the correctness of their finding, refused to disturb it.

3. INSTRUCTIONS — *omissions therein obviated by the proof.* Although the instructions, given in such a case for the plaintiff, omit to state that it must be proved that the road had been operated for six months prior to the accident, yet no harm could result to the defendant for such omission, when it clearly appeared from the evidence that the road had been in use for a much longer period.

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

The case is stated in the opinion of the court.

Messrs. GOODWIN & WILLIAMS, for the appellant.

Messrs. BARGE & HEATON, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the appellee against the appellant, to recover the value of a cow alleged to have been killed by a railway train. The only question in the case is, whether the cow was in fact killed by the train. When found, she was lying on her back in the railway ditch, between two and three feet from the track, bloated, and the blood oozing from her nose. She bore, however, no external marks of injury. The jury found she came to her death from a passing train.

We do not consider this a case in which we can set aside the verdict as unsupported by the evidence. It is certainly singular that the cow, if killed by the train, bore no external marks of violence. But, on the other hand, the place where she was found dead raises a strong presumption, that she had been killed by one of the several trains proved to have passed over the road the night before. Here was a mode by which the death could be explained, and no other cause is shown to have existed which would explain it. The jury probably thought an animal might be so struck by a train that death would ensue from an internal injury, without external marks of vio-

lence, and that the bloated condition of the cow, and the blood oozing from the nose, indicated such injury, and we cannot say they were in error. The question is purely one of fact, the determination of which belonged to the jury, and though doubtful of the correctness of their finding, our convictions are not sufficiently clear to justify us in setting aside the verdict. We cannot say it was clearly against the evidence or unsupported by it, and the case is not therefore of that class in which this court awards a new trial upon that ground.

It is urged that the first and second instructions for plaintiff are defective in not requiring it to be proved, that the road had been operated for six months prior to the accident. No harm, however, can have resulted to the defendant from this omission, as it clearly appears from the evidence, the road had been in use for a much longer period of time. The judgment must be affirmed.

Judgment affirmed.

TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY
v.
SAMUEL WICKERY.

FENCING RAILROADS — *injury to stock.* Where cattle are injured upon a railroad at a place where the company are required by law to fence the road, and it had been in operation several years without that being done, the company are liable for the damages resulting from such neglect of duty.

APPEAL from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding.

This was a suit commenced before a justice of the peace in Livingston county, by Samuel Wickery against the Toledo, Peoria and Warsaw Railway Company, to recover the value of a cow, the property of the plaintiff, alleged to have been killed on the defendants' road, at a place where the law required the same to be fenced, which had not been done although the

road had been in operation for several years. The cause was removed into the Circuit Court by appeal, where a trial resulted in a verdict and judgment for the plaintiff for the value of the cow. The company bring the case to this court by appeal.

Messrs. BRYAN & COCHRAN, for the appellants.

Messrs. FLEMING, PILLSBURY & PLUMB, for the appellee.

Per CURIAM: We have examined the testimony in this case, and it is conclusive on the point, that the road had been in operation several years, and was not fenced as the statute requires, and that the place where the accident occurred was a point outside of the town, where the law requires a fence.

We perceive no ground for disturbing the verdict, and must affirm the judgment.

Judgment affirmed.

JOHN NIEMEYER
v.
OPHELIA A. BROOKS.

CONTRACTS — *when not payable at a particular time — demand.* Where time of payment is not specified in a contract, the law will presume that it was intended by the parties to be paid in a reasonable time. In such case, a demand before suit is not necessary.

APPEAL from the Circuit Court of Stephenson county; the Hon. BENJ. R. SHELDON, Judge, presiding.

The facts sufficiently appear in the opinion of the court.

Messrs. MEACHAM & COCHRAN, for the appellant.

Messrs. GOODWIN & WILLIAMS, for the appellee.

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

Opinion of the Court.

It appears that appellant, on the 3d of February, 1857, obtained an allowance, in the probate court of Lee county, against the estate of Joseph B. Brooks, for the sum of $1,924.98, on a number of promissory notes which he held against deceased. A part of them were given by him alone, another for the sum of $300 was given by him and Little jointly, with one Alexander as security. And one for $300 was given by Brooks with Little as security. Afterward appellant received a dividend of 25 per cent on the allowance against the estate. Subsequently he borrowed of appellee, who was the widow of Brooks, $800, of her own funds, and to secure the same he gave to her an order on the administrator of her husband's estate for that amount with interest, to be paid out of the first dividends on the claim allowed in his favor.

The administrator having paid no further dividend, appellant went to Little and Alexander, and they, as securities upon the notes allowed against the estate, paid him $574.22, and he assigned that amount of the claim which he held against the estate to them. Appellee afterward sued appellant, in an action of assumpsit, and filed a declaration containing the common counts; to which appellant filed the plea of the general issue, and a trial was had by the court, on the consent of the parties that a jury should be dispensed with; and the issues were found for the appellee and the damages assessed at $574.22. Appellant entered a motion for a new trial which was overruled by the court, and judgment was rendered for appellee.

The evidence in this case clearly shows that appellant borrowed the sum of $800 of appellee. There can be no pretense that this sum was paid by her to purchase that amount of the allowance against her husband's estate. It was regarded by all parties as a loan and not as a sale of any portion of appellant's claim against the estate. The order on the administrator was given as a security for the loan; but does not appear to have been intended as a sale of that amount of the allowance or as a satisfaction for the money thus loaned. We can find no evidence in this record, from which it can be inferred that the

order was taken, or understood to be, in payment of the loan. No doubt the parties supposed that there would be dividends paid upon appellant's claim, and that they would discharge his debt for the money thus loaned. But the evidence discloses the fact that no further dividends were made by the administrator on the claims allowed against Brooks' estate.

It is true that no time was fixed for payment of the money when the loan was made. But the law will presume that it was intended by the parties to be in a reasonable time. This the law will imply in the absence of a time agreed upon by the parties. It appears that the loan was made about the 17th day of July, 1857, and the suit in this case was not brought until the 1st day of October, 1864, more than seven years after the loan. There was, therefore, more than a reasonable time within which the money should have been paid. The money had become due long before the suit was brought; of this there can be no question.

It may, however, be said, that a demand was necessary before an action could be maintained. As a general rule, when no time is fixed for the payment of money, or the performance of some other act, the party to whom payment should be made, or for whose benefit such act is to be performed, should, before bringing suit, make a demand. But in most cases the service of a summons is considered a sufficient demand. Chitty, in his work on contracts, 629, says, "Unless there be an express stipulation in the contract, or it be requisite from the nature thereof, that a request or demand of performance be made, such request or demand is not essential to complete the cause of action; but the party is bound to perform his contract without being required so to do, as in the common case of a contract to pay a sum of money generally, or upon a certain day."

In the case of *Gibbs* v. *Southam*, 5 Barn. & Adol. 911, which was an action on a bond for the payment of a sum of money, but no time was named, it was held on a plea that there had been no demand, that it was unnecessary. And LITTLEDALE, J., in delivering the opinion, refers to Coke's Littleton, 208 a,

where it is said, that, "In case of a condition of a bond, there is a diversity between a condition of an obligation which concerns the doing of a transitory act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in a convenient time; and when, by the condition of the obligation, the act that is to be done to the obligee is of its own nature local, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, etc., if the obligee doth not hasten the same by request." From these authorities it is apparent that when a party agrees to pay a sum of money, and no time is specified therefor, the law implies that it shall be done in a reasonable time. It then follows, that, as a reasonable time had certainly elapsed in this case, appellee had a right to maintain her action.

So far as the evidence discloses, the finding was much less than appellee was entitled to recover, but of that appellant has no right to complain. The judgment of the court below must be affirmed.

Judgment affirmed.

THOMAS TILLEY
v.
J. L. SPALDING.

NEW TRIAL—*verdict against the evidence.* A verdict against evidence can not stand. In an action to recover $180, balance due on a contract, the plaintiff proved, without contradiction, that he made and delivered to the defendant, at a stipulated price, two hundred washing machines, which were received without objection. The defendant claimed that forty or fifty of the machines were not exactly according to the pattern furnished. The jury found for plaintiff, but only gave him $45. The court refused a motion for a new trial. *Held,* that the verdict was against the evidence, and that the court ought to have granted a new trial.

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

The case is sufficiently stated in the opinion of the court.

Messrs. HAINES, STORY & KING, for the plaintiff in error.

Messrs. MOORE & CAULFIELD, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is a clear case where the jury have gone, not against the weight of the evidence, but against the evidence. The proof is uncontradicted that the plaintiff made and delivered to the defendant, two hundred washing machines, which were received without objection, and at a stipulated price of six dollars and fifty cents for each machine.

On the trial defendant claimed that about forty or fifty of the machines were not exactly according to the pattern furnished the plaintiff. Allowing forty-five of the machines were defective, and deducting the entire value of them, $292.50, and allowing all the moneys paid by defendant, which amount to $525, there would remain a balance due the plaintiff of four hundred and eighty-two dollars and fifty cents, and the jury allowed him only forty-five dollars.

The *ad damnum* in the declaration was one hundred and eighty-five dollars, and to this extent should have been the recovery. The motion for a new trial should have been allowed. *Lowry* v. *Orr*, 1 Gilm. 70; *Scott* v. *Plumb*, 2 id. 595; *Baker* v. *Pritchell*, 16 Ill. 66; *Hopkins* v. *Chittenden's Admr.*, 36 id. 112.

The judgment is reversed and the cause remanded that a new trial may be had.

Judgment reversed.

THE TOWN OF LAKE VIEW

v.

FREDERICK LETZ *et al.*

1. NUISANCE — *concerning power of certain town officers — to prevent as a nuisance the location of a cemetery.* When, by an act of the legislature, certain officers of the town of LakeView were created a board of trustees, with power, among other things, "to abate and remove nuisances, and punish the authors

thereof by penalties, fines and imprisonment, and to authorize and direct the summary abatement thereof;" and such board of trustees, under this authority, passed an ordinance, forbidding any cemetery to be opened in the town, without first obtaining their permission, under pain of a certain penalty, — *held*, that he board of trustees had no power, under this grant, to prohibit, in advance, the establishment of any cemetery except as authorized by the board.

2. DECREES — *not affected by subsequent legislation.* When, by a decree of court, a town ordinance was declared invalid, and afterward, by an act of the legislature, the ordinance in question was declared valid, such act made the ordinance valid only from the day of its own passage, and cannot affect the question of error in a decree rendered prior to that date.

3. NUISANCES — *injunction.* Where the thing complained of is not necessarily a nuisance, but may or may not be so, according to circumstances, a court of chancery will not stay a party until the matter has been tried at law, or, in special cases, by a jury, on an issue directed out of chancery.

4. And where the alleged nuisance consists in the obstruction of a street, there is, unless in rare and exceptional cases, a complete remedy at law, to which resort must first be had, and in which the right must be established.

5. So, where it is proposed to establish a cemetery in a town, a court of chancery will not interpose its preventive power, upon the alleged grounds that the cemetery will be injurious to the public health, and that it will obstruct certain streets which have been dedicated to the public.

WRIT OF ERROR to the Superior Court of Chicago.

The facts in this case are sufficiently stated in the opinion.

Messrs. GOUDY & CHANDLER, for the plaintiff in error.

Messrs. GALLUP & PEABODY, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The town of Lake View was incorporated by a special act of the legislature in 1857; and, by another act, approved February 16, 1865, the supervisor, assessor and commissioners of highways were declared a board of trustees. Various powers for municipal government were conferred upon them, and among others the power "to abate and remove nuisances, and punish the authors thereof by penalties, fines and imprisonment, and to authorize and direct the summary abatement thereof." Assuming to act under the authority here given, the board of trustees passed an ordinance in April, 1866, forbidding any

cemetery to be opened in the town without the permission of the trustees, and providing a penalty for a violation of the ordinance.

This is a bill in chancery brought by the town to enjoin the defendants from establishing a cemetery, which it is alleged, they were about to establish within the limits of the town. On the hearing the Superior Court dismissed the bill.

The decree of the Superior Court was proper. The act of the legislature authorizing the board of trustees "to abate and remove nuisances," gave them no power to pass an ordinance forbidding the establishment of a cemetery. Conceding that the power to "abate and remove," should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things that are nuisances in themselves, and necessarily so. There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is therefore impossible to hold, that a cemetery, anywhere within the limits of the town, must be necessarily a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not less beautiful than a public landscape garden, and as free from all reasonable objection. The power to prohibit the establishment of cemeteries except by the authority of the trustees cannot be considered as falling within the power to abate and remove nuisances.

Neither, for the same reason, did the power to pass this ordinance arise under that clause in the law of 1865, giving the trustees the power to regulate and restrain places "where any nauseous, offensive, or unwholesome business may be carried on." To establish a rural cemetery and to inter the dead

therein would not necessarily nor probably be a business of this character.

It may be conceded that the trustees had the right, under these grants of power, to pass an ordinance regulating or restraining the use of any specific cemetery within its limits, on the ground that its use would be injurious to public health, and therefore a nuisance, and such an official determination on the part of the town authorities would be entitled to the respect that such municipal action always receives in courts of justice. All that we decide is, that the trustees had no power, under this grant, to prohibit in advance, the establishment of any cemetery except as authorized by the trustees.

We are referred, however, to an act of the legislature, approved March 5, 1867, by which the ordinances theretofore passed by the town of Lake View, are declared valid. The final decree in this case was made on the 21st day of November, 1866, and before the passage of this law. The act would make the ordinances valid only from the date of its own passage, and cannot affect the question of error in a decree rendered prior to that date.

We cannot, therefore, reverse this decree, merely because of this ordinance of April, 1866.

It is urged, however, that independently of this prohibitory ordinance, the town has the right to invoke the chancery powers of the court to restrain a nuisance, and that the cemetery in question will be a nuisance not only because injurious to the public health, but because it will obstruct certain streets which, it is alleged, have been dedicated to the public.

We had occasion in the case of *Dunning* v. *The City of Aurora*, 40 Ill. 481, to examine the jurisdiction of courts of chancery in abating nuisances. We there held, following adjudged cases of high authority, that where the thing complained of is not necessarily a nuisance, but may or may not be so according to circumstances, a court of chancery will not stay a party until the matter has been tried at law, or, in special cases, by a jury on an issue directed out of chancery. We also held that where the alleged nuisance consists in the obstruction of a

street, there is, unless in rare and exceptional cases, a complete remedy at law, to which resort must first be had, and in which the right must be established. See also *Bliss et al.* v. *Kennedy*, 43 Ill. 67. There is nothing in the record before us to take this case out of the general rule, or to justify a resort to the preventive power of the court. It falls fully within the principle of both the cases above quoted.

The decree must be affirmed.

Decree affirmed.

CHARLES P. ALLEN, Treasurer and Collector of Bureau County, State of Illinois,

v.

THE PEORIA AND BUREAU VALLEY RAILROAD COMPANY.

1. TAXES — *special tax — to be valid must be authorized.* The levy of a special tax for purposes not authorized by the legislature, is void. Thus after the passage of the act of 1863, authorizing "county courts, for county business in counties without township organization, and the board of supervisors of counties under township organization in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed, in any one year, one per cent, upon the taxable property of any such county, to be assessed and collected in the same manner, and at the same time and rate of compensation as other county taxes; and when collected, to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court, or board of supervisors, as the case may be, in liquidation of such indebtedness," the supervisors of Bureau county passed a resolution levying among other taxes a special tax "for the purpose of liquidating the interest on any loan made, *or to be made*, and to provide for paying the indebtedness of Bureau county, for war purposes, one dollar on one hundred dollars of valuation"; and payment thereof was resisted, on the ground that the supervisors had no authority to levy a tax to liquidate interest on *loans to be made. Held*, that the levy was unauthorized, and void to the extent of *future loans.*

2. SAME — *legal not invalidated by connection with unauthorized, if separable.* The board of supervisors having authority to levy a tax to pay existing indebtedness, the levying of a tax, in connection therewith, to pay a non-existing indebtedness, does not render the entire levy void, if the authorized can be separated from the unauthorized.

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

Statement of the case.

In September, 1864, after the passage of the act of February 16, 1863, entitled "*An act to enable counties owing debts to liquidate the same*" — an extract from which will be found in the opinion of the court — the board of supervisors of Bureau county, passed the following resolutions:

"*Resolved*, That the sum of fifty cents on the $100 valuation of the taxable property in the county of Bureau, is hereby levied to defray the county expenses for the year 1864.

"*Resolved*, That there be, and is hereby levied, fifty cents on each $100 of taxable property in Bureau county, for the relief of needy families resident in said county, of persons who have and may hereafter volunteer in and from said county, into the military or naval service of the United States.

"And, also, that there be levied the sum of one dollar on each one hundred dollars of taxable property in said county, for the purpose of liquidating the interest on any loan made or to be made, and to provide for paying the indebtedness of Bureau county, for war purposes.

"*Resolved*, That the sum of forty cents on the $100 of taxable property in the county of Bureau, is hereby levied for the purpose of liquidating the indebtedness of the county to Messrs. Ruxton & Co., maturing on or before October 1st, 1865.

"*Resolved*, That the treasurer of Bureau county be and is hereby authorized to borrow a sum of money on the credit of the county, not exceeding $7,000, for the purpose of meeting such portion of the indebtedness of the county as shall mature before the next tax can be collected, for such length of time as in his judgment such sum may be required, at a rate of interest not to exceed ten per cent per annum."

Under the resolution to levy the tax to pay interest on loans made and to be made, and pay indebtedness of the county, the sum of $272, was levied on the Peoria and Bureau Valley railroad. The railroad company paid all the taxes levied upon its property except the said $272, which it refused to pay, on the ground that such tax was unauthorized. Whereupon the treasurer brought suit to recover the balance of $272 so levied, for which amount the court gave judgment, and the defendant appealed.

Mr. GEO. L. PADDOCK, for the appellant.

Mr. GEO. C. CAMPBELL, for the appellee.

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

The question is presented by this record whether the tax for which this suit was brought was authorized and legal. It appears that the board of supervisors of Bureau county, at their September session in 1864, levied five mills on the dollar of taxable property to defray the expenses of the county; five mills for the benefit of the families of volunteers; one per cent for the purpose of liquidating the interest on any debt made or to be made, and to provide for paying the indebtedness of Bureau county for war purposes; and for paying indebtedness to Ruxton & Co., four mills on each dollar of taxable value. Appellee paid all of the taxes levied upon its property, except that to meet interest on any loan made or to be made, and to pay indebtedness of the county. The tax for this purpose imposed upon appellee's property amounted to $272, which they contend was levied without legal authority and is void.

It appears, from the treasurer's report made to the board at the time this tax was laid, that there would be various sums of money required by the county to meet expenses and indebtedness. It appears from that report that the total county indebtedness amounted to $45,563.38. That relief purposes would require $25,000. The expenses of the Circuit Court would require $3,000; expenses of the county farm $2,000; expenses of the county $12,000; expenses of collecting tax, etc., $2,000; in the aggregate $89,563.38. From this sum $4,715.70 cash in the treasury was deducted, leaving a balance of $84,847.68. The various levies not in controversy, on the taxable property of the county, would produce about the sum of $57,163.15, which, deducted from the balance required as shown by the treasurer's report, would leave a deficit of $27,684.53. And the law of February 10, 1863, gave the board of supervisors power to levy not exceeding one per cent to meet this indebtedness.

A levy of sixty-eight cents on the $100 of the taxable property of the county would have produced the necessary sum, while the one per cent which was levied created about $13,000 more than the required sum, which it is claimed vitiated the whole levy of this item.

The first section of the act of 1863, under which authority to make this levy, is claimed, is this:

"That the county courts for county business in counties without township organization, and the boards of supervisors of counties under township organization, in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year, one per cent upon the taxable property of any such county, to be assessed and collected in the same manner, and at the same time and rate of compensation, as other county taxes; and when collected to be kept as a separate fund in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

It will be observed, that, by the provisions of this act, the board of supervisors had power to levy a tax, not exceeding one per cent on the assessed value of the property of the county, to pay debts that may be owing by the county. By fair and reasonable intendment this language can apply to existing indebtedness, but not future anticipated indebtedness. And the language of the latter clause of the section would seem to render it more clear and unmistakable, because it provides that when collected it shall be kept as a separate fund, and be expended in the liquidation of such indebtedness. From this provision it is manifest that it can be applied to no other purpose. And if the future indebtedness should never be incurred, as it seems to be admitted it was not in this case, then the fund becomes useless, and could only be returned to the taxpayer, involving expense, waste and loss, as many persons from

removal, absence or other causes, would never receive back the money they had thus been compelled to pay, even after deducting the expense of collecting and refunding the tax.

In this case the language of the board in laying this tax is "to liquidate interest on loans made, or to be made." It hence appears from this order, and the treasurer's report, upon which they, no doubt, acted, that both kinds of indebtedness were intended to be embraced. It is, however, said, that the tax would be legal if for a purpose authorized by law, although the purpose of the levy was not specified, or even if an improper purpose was recited. This would seem to be no answer, as it affirmatively appears that about thirteen thousand dollars of this levy was unwarranted and not authorized. This excess was, therefore, void, and there could be no rightful pretense for its collection.

It is, however, urged, that this levy was rendered valid by the sixth section of the act of the general assembly, approved January 18, 1865. Private Laws, vol. 1, p. 100. An attentive consideration of this act has satisfied us that it does not embrace this levy. It only purports to legalize taxes levied to meet appropriations made, or paying any indebtedness within the county, by reason of bounties offered to volunteers who had enlisted and been mustered into the service of the United States. This act obviously and in terms refers alone to indebtedness already incurred for the specified purposes. It will bear no other construction, and as it does not appear that the county had incurred such indebtedness, and levied this excess for the purpose of discharging the same, it was not cured by this act. Nor do we see that the ninth section of the act of the 2d of February, 1865 (Private Laws, vol. 1, p. 100), renders this excessive levy legal. It is true that it legalizes taxes levied to meet appropriations made, to meet indebtedness incurred or thereafter to be incurred by the county, by reason of bounties offered to volunteers, or for money paid to drafted men, enlisted men, or such as might be drafted, or should enlist into the service of the United States. There is nothing in this record from which it appears that any such indebtedness

had accrued, or did subsequently accrue, hence this levy is not embraced within its provisions.

Did this excess, in the exercise of this power, render the whole tax void, the legal as well as the unauthorized portion? As a general rule, subject it may be to some exceptions, where a person while exercising delegated powers, whether for the public or for private individuals, performs acts within the scope of his authority, and others beyond its scope, the acts well performed will be sustained, and those unauthorized will be held void, where they are of such a nature as to be separated without producing injury. But, on the other hand, if the acts are of such a character that the legal cannot be sustained independently of the unauthorized acts, then all must fall together as unwarranted. Then, having seen that the board were authorized to levy a sufficient sum to meet existing indebtedness, but not the excess, the question is presented whether that portion which the board had competent authority to levy, can be separated from that portion which was unwarranted.

Had an application been made for a judgment against real estate, and had the sale been made under an order of the court for the entire sum levied, there can be no question, that it would have been illegal. But had the court, on objections interposed, or otherwise, have ascertained by computation, the portion which could have been legally levied, and have rendered judgment for that portion of the whole levy, could it be said that the sale would be void for that reason? We think not. Such a separation of the legal from the illegal portion of the act would be easy and certain, and could not produce injury to any one. In the case of *Briscoe* v. *Allison*, 43 Ill. 291, where an injunction was sought to restrain a tax which was in part excessive, the excess was enjoined, and the bill dismissed as to the remainder. And we see no valid distinction between that and the case at bar. In this suit for the recovery of the tax, it is agreed no exceptions shall be taken to the form of action or the parties, and that being so, no reason is perceived why the plaintiff below may not recover. The court

can readily by computation ascertain the portion which was authorized from the portion that was unwarranted, and ascertain the amount, and render judgment for its recovery. The judgment must therefore be reversed and the cause remanded for further proceedings.

Judgment reversed.

JOHN N. BEDARD
v.
LYMAN HALL *et al.*

1. JURISDICTION — *La Salle County Court — same as Circuit Court — except as to crimes.* By an act of 1865, entitled "an act to extend the jurisdiction of the County Court of La Salle county, that court acquired equal and concurrent jurisdiction with the Circuit Court, as to all matters except crimes and misdemeanors.

2. PRESUMPTION — *that a statute was constitutionally passed.* Where an act is found among the public laws, bearing the approval of the governor, this court will presume that such act was constitutionally passed, the record disclosing no proof to the contrary. The journals of the legislature will not be examined here for the first time, to impeach it.

3. TAXATION — *public improvements — constitutionality of assessments therefor — against persons specially benefited.* Under section 5, article 9, of the Constitution, the legislature may confer upon the corporate authorities of a city the power, in cases of public improvement, which concern the whole public, to assess each lot the special benefit it will derive from the improvement, charging such benefit on the lots, the residue of the cost to be paid by equal and uniform taxation.

4. FORMER DECISIONS. In the cases of *The City of Chicago* v. *Larned*, 34 Ill. 203, and the *The City of Ottawa* v. *Spencer et al.*, 40 Ill. 211, the principles therein established are to be adhered to, and must govern in like cases.

APPEAL from the County Court of La Salle county; the Hon. P. K. LELAND, Judge, presiding.

The facts in this case are fully stated in the opinion.

Messrs. BULL & FOLLETT, and D. L. HOUGH, for the appellant.

Mr. OLIVER C. GRAY, for the appellees.

Opinion of the Court.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, exhibited in the County Court of La Salle county, by Lyman Hall and others, property owners and tax payers, in the city of La Salle, to restrain the city collector from the collection of a certain warrant issued to him, requiring him to collect the amount therein specified, which had been assessed by the city council, against certain real estate, for special benefits accruing to such property by means of certain improvements to Main street in that city. The amount sought to be enjoined was about $8,000. The bill recites the several acts of the city council in proceeding to make the assessments, and also of the commissioners and other officers of the city under those ordinances in assessing the special benefits. The bill alleges that the commissioners elected by the city council to make the assessments, reported an assessment against property benefited to the amount of about $20,000; that the report of these commissioners was filed with the city clerk, and notice given as required by the ordinance, and on objections made, the whole matter was referred to a special committee, on whose report the city council revised and corrected the assessment, reducing the same to about $14,000. The complainants alleged that their lots have a frontage on Main street, and that the assessment is not made with reference to the value of their property, and therefore is not in conformity with the Constitution; that the improvement is a public improvement, and should be assessed upon the whole taxable property of the city according to its assessed value.

The city collector put in a demurrer to the bill, and alleged a want of jurisdiction in the County Court to entertain it, as it affirmatively appeared the amount in controversy exceeded the sum of $1,000, that being the limit of the jurisdiction of that court.

The demurrer was overruled, and the injunction made perpetual.

To reverse this decree the city collector brings the case here by appeal, and assigns for error that the County Court had no

jurisdiction of the subject, and in overruling the demurrer and decreeing for complainants.

In regard to the question of jurisdiction, it is sufficient to say, that, by the act of 1865, entitled "An act to extend the jurisdiction of the County Court of La Salle county," equal and concurrent jurisdiction with the Circuit Court of that county was specially conferred in relation to all matters except crimes and misdemeanors. Sess. Laws, p. 37.

This act is found among the published laws of that session, and bears the approval of the governor, and no evidence was offered in the court below, of any matter or thing going to show that the act was not passed in conformity to the Constitution. We will not examine the journals for such purpose, but take it for true, that the act was constitutionally passed. We take judicial notice of the fact, that the law is found in the public statute book, and no evidence having been offered to impeach it, we will not look at the journals now, for the first time, to impeach it.

We pass over the other matters alleged to bear on the question of jurisdiction, as we are of opinion they make a case eminently proper for the consideration of a court of chancery, and come at once to the main and important point in controversy. Is the ordinance in question in accordance with the provisions of the Constitution on the subject of taxation, as interpreted by this court?

The sections of the ordinance bearing on the question are the following:

"SECTION 1. *Be it Ordained by the City Council of the City of La Salle*, That whenever, in the judgment of the city council, it shall become necessary to pave, grade, or macadamize any street, lane, alley or avenue in said city, or to make or construct any sewer or passage way for water, or any sidewalk, or pavement, or make any other public improvements, they shall pass an order or ordinance to that effect, which order or ordinance shall specify the nature and locality of such public improvements.

"SEC. 2. The city council shall cause the appropriate committee, or a special committee appointed for that purpose, to make an estimate of the probable cost of making such public improvement, together with the cost of levying and collecting the assessment therefor, whose duty it shall be to make such estimate as soon as practicable, and report the same to the city council, either at a regular, adjourned, or special meeting of the same, called for that purpose.

"SEC. 3. Upon the report of the probable cost of such public improvement being made as provided for by the preceding section, it shall be the duty of the city council to appoint, by ballot, three commissioners for the purpose of making a just and equitable assessment of the cost of such proposed public improvement, as hereinafter provided.

"SEC. 4. The commissioners herein before provided for shall be notified of their appointment by the city clerk, and before entering upon the discharge of their duties, shall take and subscribe to an oath of office, to be filed with the city clerk, substantially as follows:"

[The oath is here set out in full.]

The principal question arises upon the fifth and sixth sections, which are as follows:

"SEC. 5. It shall be the duty of such commissioners to examine the locality where such public improvement is proposed to be made, as well as such lots, parts of lots, blocks, or parts of blocks, and tracts of land as will be specially benefited thereby, and to determine as near as practicable, how much each lot, or part of lot, block, or part of block, or tract of land will be specially benefited by such proposed improvement, and to assess the amount of such special benefit to each lot, block, or tract of land, or part thereof, the total amount of such special benefit, however, not to exceed the total cost of such improvement, and if the amount of such special benefits shall be less than the probable amount of the total cost of such proposed improvement, they shall report that fact to the city council,

and such deficiency shall be paid out of moneys in the city treasury not otherwise appropriated.

"SEC. 6. Said commissioners shall make out an assessment roll of the real estate, in their judgment specially benefited by such improvement, in which shall appear the owners' names, as far as known, a description of the real estate benefited, the valuation thereof, and the amount assessed as special benefits, which assessment roll shall be filed in the office of the city clerk, within forty (40) days from entering upon the discharge of their duties."

That the charter of the city of La Salle confers the power upon the city council to pass this ordinance is not controverted, but it is insisted, it was beyond the power of the general assembly to confer the power upon that body.

The grant of power, it would seem, by reference to section 5 of article 9 of the Constitution, is ample for the purpose. It provides that the corporate authorities of counties, cities, etc., may be vested with power to collect taxes for corporate purposes, the only limit being, that such taxes shall be uniform with respect to persons and property. It will be perceived this section, unlike that of section 2 of the same article, does not require that the value of the property shall be ascertained and assessed according to its value, but only that the tax upon it shall be uniform. It would be unfair to the owners of property, in different parts of a city, of the same actual value as that of the property to be distinctly and specially benefited by a proposed improvement, that they should pay for the improvement by an assessment on the value of their property. The special benefit may be more than the amount of the tax assessed or the value, and it is only fair and just that the owner should be charged with such benefit.

As we said, in the case of *The City of Chicago* v. *Larned et al.*, 34 Ill. 203, in commenting on this section of the Constitution, it does not, in terms, authorize a special assessment for corporate purposes, but only to assess and collect taxes for such purposes; that a corporate purpose being ascertained and determined on by the city authorities, the principle should be

adopted in order to carry it out, equally required by the Constitution and demanded by the merest justice. Assess to each lot the special benefits it will derive from the improvement, charging such benefits upon the lots, and the residue of the costs be paid by equal and uniform taxation. Pp. 279, 280.

We do not deem it necessary to go over the ground again, occupied in the Larned case. We have recognized that case, and the principles therein established, in the subsequent case of *The City of Ottawa* v. *Spencer et al.*, 40 Ill. 211, which was for the construction of a sidewalk. The charter of the city required the owners of each lot to make the sidewalks, at their own expense, within a certain time after notice. The owners failing to make the sidewalks, they were constructed by the city and the expense reported to the common council, by whom it was assessed against the respective lots in front of which the sidewalk was built. A warrant for its collection was issued and placed in the hands of the city collector, who returned it, no property found, out of which to make the assessment. The usual notice was then given, that a judgment would be applied for before the County Court of La Salle, against the lots for the amount of the assessment, and for an order to sell the lots. The court refused the judgment, and, on appeal to this court by the city, the judgment was affirmed. In that case, special reference was made to Larned's case, and we said, that although in the one case, which was for an expensive improvement known as the "Nicholson pavement," while in the other it was for a plank sidewalk, of comparatively small expense, that the same principles govern both. In either case, the owner of the property fronting an improvement may use and enjoy the benefits of it, in common with all other persons. In the one case as in the other, the improvement is made for the benefit of the public. In neither case has the owner of the property fronting on the improvement any exclusive or greater rights in the improvement than has any other individual in the community." Hence, the public should pay for the improvement, the property owner specially benefited by the improvement, to be charged only with the special benefits conferred on him by the improvement.

We are of opinion section five of the ordinance is in strict accordance with the principles established in these two cases, and we have no desire to depart from them. The contemplated improvement being for the benefit of the whole public, that public should pay the cost of it, on the principle equally just and equitable, of charging the owner of the property specially benefited with the amount of such benefits, if any there be, and taxing the public for the deficiency by an equal and uniform assessment. This is substantially done by the fifth section, the deficiency, over and above the special benefit to be paid out of the money in the city treasury, and which money is presumed to be the avails of equal and uniform taxation.

The decree of the County Court is reversed and the cause remanded, with directions to sustain the demurrer to the bill and to dissolve the injunction, so that the collector can proceed on his warrant.

Decree reversed.

HUGH MAHER, impleaded, etc.,

v.

MARIA BULL, Administratrix.

1. DISSOLUTION OF PARTNERSHIP — *in chancery — for default of one of the partners.* Where the articles of co-partnership between several persons, provide that one of the partners shall furnish a supply of the commodity in which the firm is to trade, and the others are to make the sales and pay over at certain stipulated periods, out of the proceeds of the sales, to the partner furnishing such commodity, the amount of the cost thereof, a failure on the part of those members of the firm whose duty it was to do so, to pay over the proceeds of the sales as required by the contract, will authorize the partner injured by such failure to maintain a bill in chancery for a dissolution of the partnership.

2. SAME — *whether mutual failure to comply with covenants will be considered.* The partners thus being in default in not paying over the proceeds of sales, as agreed upon, would not be entitled to damages in such proceeding, for a failure on the part of the partner who had agreed to supply the article, to furnish what was necessary for the business.

3. SAME — *of fraudulent conduct on the part of one partner.* And the partners who failed to pay over the money as stipulated, would be cut off from

any claim for damages by reason of the other partner failing to supply what was necessary of the commodity to be furnished for the business, if they made a colorable sale of the stock on hand, inconsistent with the legitimate purposes of the partnership.

4. SAME — *statement of account between the partners — upon what basis.* In stating the account between the partners in such a case, where it appeared that the partners who had control of the sales, had made a sale of a part of the stock of the firm, in fraud of the rights of the other partner, such sale should be considered as a sale for cash, and charged against the partners making it, accordingly.

5. If the firm should become liable for, and pay damages by reason of the failure of the partners controlling the sales to fulfill their contracts of sales, no portion of such damages should be charged against the other partner in stating the account between them, as the partners whose special duty it was to see that such contracts were complied with should not take advantage of their own wrong.

6. Where there are debts due the firm, and uncollected, at the time of stating the account between the partners, such debts should not be considered in making up the statement, unless they are of such character, that, under the contract, they are specially chargeable to one of the partners.

7. RECEIVER *to collect debts.* In such a case, on bill filed by one partner for a dissolution, and to enjoin the other partners from collecting debts, a receiver will be appointed to collect the debts, and be directed to make proper distribution of the sums received by him

8. ALLEGATIONS AND DECREE — *must correspond.* Parties can only recover on the case made in their pleadings.

9. So upon bill filed by one partner against another for a dissolution of the partnership, and for an account, the complainant cannot be allowed damages against the defendant for a failure in duty on the part of the latter, unless there are allegations in the bill upon which such relief can be based.

10. Nor can the complainant have specific relief based upon a sale made by the defendant in fraud of the complainant's rights, except the latter furnish the basis for such relief by appropriate allegations in his bill.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

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

Messrs. D. C. & I. J. NICHOLES, for the appellants.

Messrs. HERVEY, ANTHONY & GALT, for the appellee.

Opinion of the Court.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 16th of April, 1860, Cadwallader Bull, of Buffalo, now deceased, and whose wife, as his administratrix, is the appellee herein, entered into a partnership in the coal business with Maher & Kelly of Chicago, who were then engaged in that trade. By the articles of copartnership, Bull was to furnish coal from Buffalo; Maher was to provide a coal yard, fixtures, and carts, and Kelly was to give the business his personal attention and supervision. The expenses of the business were to be divided equally between the parties, except the salary of the book-keeper, which was to be paid by Bull. Maher & Kelly were to bear all losses arising from sales to irresponsible parties. After payment of expenses all moneys arising from sales were to be paid over weekly to the book-keeper for Bull, to the amount of the cost of the coal. Bull was to furnish all the coal needed for the business. On the 1st of September a supplemental article was entered into, providing that Bull was to have no interest in coal not furnished by him.

On the 11th of October, 1860, Bull filed a bill in chancery against Maher & Kelly, praying for a dissolution of the partnership, an account, and an injunction against Maher & Kelly restraining them from making further sales or collections. An injunction was granted, and the case coming on for a final hearing at the March Term, 1866, of the Superior Court, Maher & Kelly were decreed to pay to the complainant six thousand six hundred and seventy-six dollars and eleven cents. The defendants appealed.

The bill prays a dissolution because of an alleged failure to pay over the proceeds of sales as required by the articles of partnership. The decree of the court below finds such failure to have been shown, and finds, we think, correctly. It appears by the testimony of Hunt, the book-keeper, that Maher & Kelly were in arrears to a considerable amount. The report of the master states the cash receipts, to the time of filing the bill, at less than the deposition of Hunt; but, as the deposi-

tion on this point is positive, and given from the books of the firm, and not contradicted, and as the quantity in tons stated in the report is very nearly the same as the total of all the sales given by the witness in pounds, we presume the difference in value is a clerical error on the part of the master.

There having been this failure to pay on the part of Maher & Kelly, Bull had the right to file his bill, and Maher & Kelly can take nothing by the cross-bills filed by them, in which they claim damages for failure on the part of Bull to furnish the coal necessary for the business. They were themselves in default, and, besides, the proof shows a sale by them to Roberts, on the 2d of October, 1860, under circumstances which would effectually cut them off from a claim of this character. It was evidently a merely colorable sale, and inconsistent with the legitimate purposes of the partnership.

But while the Superior Court did not err in decreeing for the complainant, the decree was for too large a sum, and proceeds in some respects upon an incorrect basis. No damages can be allowed Bull for the failure of Maher & Kelly to deliver all the coal claimed by Bouton, because there are no allegations in the bill upon which such relief can be based. The sale to Bouton is not mentioned in the bill, and parties can only recover on the case made in their pleadings. The only relief in regard to the Bouton sale which can be given, is to charge Maher & Kelly, in stating the account, with the value of the coal which they failed to deliver at the same rate at which it was charged to Bull when he took the Bouton notes, that is, the price at which it was sold to Bouton.

So as to the sale to Roberts. No specific relief can be based upon the fact that it was fraudulent, for there are no allegations in the bill upon which such relief can be given. The complainant, if he desired special relief on this ground, should have amended his bill on discovering the facts connected with the sale, and thus have brought the question properly before the court.

The decree of the court below must be modified, and should be made upon the following principles:

The cost of the coal furnished by Bull was.....	$6,879 41
The total profit on all the coal as reported by the master was $1,962.11 of which one-third belongs to Bull, being.....	654 03
	$7,533 44

On the other hand, Bull is chargeable with cash paid to him including the Bouton notes.....	$3,150 06
One-third of the expenses estimated by the Superior Court in full at $1,202.98, of which one-third is.....	400 99
Salary of book-keeper to be paid by Bull.....	247 02
Wastage and shrinkage on coal, estimated at 2 per cent or 30 tons, of which one-third is chargeable to Bull.....	50 00
	$3,848 07

Deducting this sum from the $7,533.44 we have a balance in favor of Bull of $3,685.37 with interest from October 11, 1860, to date of decree. While, however, this amount is due Bull from the partnership assets, it would be obviously improper that a decree should be pronounced against Maher & Kelly personally for such sums as they may have been restrained by injunction from collecting, and perhaps may never collect. The court below will therefore direct another reference to the master for the purpose of ascertaining what amount is still uncollected, if any, on the coal sold by Maher & Kelly, and furnished by Bull, and if there is any thing uncollected a receiver will be appointed to make the collections, and one-third of the amount when collected will be paid over under the order of the court, to the administratrix of Bull. If, on the report of the master, it shall appear that all the accounts have been collected by Maher & Kelly, their agents or otherwise, then the court will decree the payment by Maher & Kelly of the above sum of $3,685.37, with interest at six per cent from October 11, 1860. If it shall appear that a part of said accounts

are still unpaid, then the court will deduct one-third of the amount of accounts unpaid from this sum of $3,685.37, and will render a decree against Maher & Kelly for the remainder. In estimating the amount of coal sold on credit and unpaid, the court will consider the sale to Roberts for $2,600 as a sale for cash. If it shall appear that any of the coal has been sold to irresponsible parties, the court will treat Maher & Kelly as responsible for the amount of such sales, and this question can be referred to the master. To the sum of $3,685.37, above directed to be paid, must be added the value of the coal which Maher & Kelly failed to furnish Bouton, and which they should account for to the complainant, since the Bouton note is included in the $3,150.06 charged to Bull as cash. Bouton swears that the amount furnished by Bull, after the failure of Maher & Kelly to supply him, was 137,155 pounds of Lehigh and 77,935 pounds of Blossburgh. No damages are to be allowed, but the value of this coal is to be ascertained at the rate per ton which Bouton was to pay by the terms of his purchase, and interest at six per cent from October 11, 1860.

So far as this proposed decree goes, the obligation of Maher & Kelly is clearly joint. They were doing a coal business as partners independently of Bull, and the articles of partnership not only make them jointly responsible for bad debts, but their joint answer is a clear admission that the coal from Bull was received and sold by them jointly. No attempt is made to sever their liability. The decree is reversed and cause remanded for further proceedings.

At the September Term, 1867, a rehearing of this cause was granted, upon the petition of the appellant, in order that the court might further consider of the mode in which the account between the parties should be stated, and the following opinion was filed, in respect thereto:

Per CURIAM: A rehearing having been granted in the case for the purpose of permitting the mode in which the account should be stated to be again brought to the consideration of the court, we have again examined the questions involved, and

the opinion of a former term will still stand as the opinion of the court, subject to the following modification: The Superior Court, in stating the account, will direct the master to allow to Maher & Kelly a credit on the balance due Bull for one-third of all the debts and liabilities of the firm at the time of the commencement of this suit, if such debts and liabilities grew out of matters as to which the Superior Court shall deem Bull to be justly chargeable. He is not, however, to be charged with any part of the damages which Maher & Kelly may have paid for non-delivery of coal according to their contracts. To allow them contribution for such damages would be to allow them to take advantage of their own wrong. Their inability to deliver coal upon their contracts must be attributed to their failure to keep their covenants in their articles of co-partnership with Bull, and to their fraudulent sale of their stock of coal to Roberts.

Decree reversed.

HIRAM PITTS *et al.*

v.

PHILANDER L. CABLE *et al.*

1. MORTGAGE — *what constitutes.* The mere execution of a deed absolute on its face, and a bond for the reconveyance of the premises, upon certain conditions, does not of itself stamp the transaction as a mortgage; and when in such case, the proof shows that the parties intended an absolute sale, with right to repurchase simply, such intention must govern.

2. USURY — *when paid — cannot be recovered back.* A party cannot recover back, either at law, or by bill in equity, usurious interest which he has paid.

3. CHANCERY PRACTICE — *pleadings must conform to relief asked.* When a complainant in chancery seeks a specific performance, his bill must be framed with that view.

4. PURCHASER — *bona fide — without notice of equity.* Where a party purchases, without notice of an outstanding equity in another, he is not affected by such equity.

APPEAL from the Circuit Court of Rock Island county; the Hon. IRA O. WILKINSON, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. A. W. WEBSTER, for the appellants.

Mr. GEORGE W. PLEASANTS, for the appellees.

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

This was a bill in equity, filed by Hiram Pitts, Elias S. Gilbert and Daniel Phelps, in the Rock Island Circuit Court, against Philander L. Cable, Ransom R. Cable, and Stillman W. Wheelock, to redeem from a mortgage on certain real estate in Rock Island county. It appears, that complainants were indebted to Mitchell and Cable in a large sum of money, and that they were the owners of this and other property, and owed other debts. That, for the purpose of paying the same, other portions of the property were sold to other parties, and all of their debt was paid to Mitchell and Cable except $3,556. The bill alleges, that to secure this sum it was agreed that complainants should execute a mortgage on the property in controversy, and that to cover usury which entered into the transaction it was arranged that complainants should execute to Philander L. Cable, a warranty deed for the premises in controversy, which seems to have been done. And that he was to execute to them a bond for a reconveyance upon their paying him that sum with ten per cent per annum, from the first of the previous September, with all taxes, and ten per cent interest thereon, and any sum he might expend in fencing the premises in a cheap manner — the payments to be made by the 1st day of September, 1860. Also to convey any corner lot upon paying to him $200, or any other of the lots on the payment of $150 each. The bond was executed upon these terms, on the 19th of October, 1858. It also contained a provision, that if Cable should comply with the bond it should be void, and that it should be void after the first of September, 1860, and that Cable might sell the property without reference to the agreement, as he gave them no further time to buy the property or any part of it.

Cable, in his answer, denies that the transaction was intended to be a mortgage, or to secure a pre-existing debt. He insists that it was intended to be, and became, a valid purchase, with an agreement for a resale, in good faith. The answer was not under oath, as it had been waived by the bill. He admits that there was usury in the original debt, but denies that it was more than one-half as much as charged. He admits that the note was assigned to him by his firm after its maturity, but claims that the assignment was not made to conceal the usury and says "that in those days he had become so hardened in violating the usury laws of the State that he openly avowed his disregard of the provisions of the statute, in that case made and provided."

It appears that when the note held by Cable, against complainants, was paid, it was surrendered up, and no other was taken, nor was any obligation to pay the purchase money given by them. Pitts was in the occupancy of the land, and paid a portion of the taxes, and delivered to Cable some apples grown on the place, but no money was paid for the purchase or redemption of the lots within the limited time. After the first of September, 1860, it appears that Hiram Pitts occupied the premises until 1864, after which time Cable and Wheelock occupied them. On the 29th of April, 1864, Cable conveyed the premises to Bennett and wife, for the consideration expressed in the deed of $2,500, which was recorded before Cable's bond was placed on record. On the 5th of May following, Bennett and wife conveyed the premises to Ransom R. Cable, and he, in September of the same year, sold a portion of the premises to Wheelock.

On the question of the intention of the parties at the time this deed was made (and this whole controversy turns upon their intention), there seems to be some conflict in the evidence. But when we consider the testimony of Reed, it seems to be better supported by the circumstances and entitled to more weight than that of other witnesses. He had the most ample means of knowing their design in entering into the arrangement. He acted for complainants and others in negotiating

and arranging the details and in consummating the arrangement. He says, that he then understood that it was a sale and not a mortgage. That the property was taken as a payment of $3,556 of the debt and not as a security for that sum. He says that such was his understanding at the time and still was when he testified; that he got it from appellants. He says, that he learned from them during the summer previous that Cable would take lots in payment of the debt, and afterward understood from them that they had conveyed these lots on account of the debt. He testifies that they conveyed a large tract of land to White and others for the purpose of paying debts to a large amount, about eleven or twelve thousand dollars of which they owed Cable and Mitchell. That the sale was not sufficient to pay all of the debts, and they had to provide for the sum for which the conveyance was made to Cable, in some other mode. That out of the sale to White and others all of that debt was paid except this $3,556, which was satisfied by the conveyance of these lots. He states, that the bond came to be given from the fact that Hiram Pitts insisted that the property was worth a much larger sum than the sum for which it was sold, and Cable contended, that it was worth no more. It was finally arranged, that if it was worth more, appellants should have the benefit of the difference, and should have until the 1st of September, 1860, within which to repurchase by paying the consideration and taxes with ten per cent interest per annum and the cost of fencing it, or by paying the prices as specified to acquire the title to any lots embraced in the conveyance.

This evidence is clear and specific that it was intended as a sale, and not as a mortgage or security for a debt. And the fact that the note was given up and canceled after the other payments were made, and no other notes or obligations were taken by Cable, supports this view of the case. Had Cable retained the note after the other payments were made, that would have been a strong circumstance to establish the transaction a mortgage. But if such was the design, it is strange that Cable left the transaction in the position that there was no

mutuality. He had nothing by which he could have enforced payment of the balance had the property proved insufficient on a foreclosure, had this in fact been a mortgage. If the trans action on its face could be held a mortgage, still we think the evidence abundantly shows that it was not so intended by the parties. Reed was the attorney of appellants in negotiating and closing this sale, and of all others must be presumed to have known what was their intention in making the deed.

It is urged that the fact that Hiram Pitts continued in pos session, and paid taxes, is evidence that the parties understood the transaction to be a mere security for the prior indebtedness. The character of that possession does not clearly appear. Appellees claim that he was but a tenant, and that this is evidenced by the payment of taxes and the delivery of a portion of the apples grown upon the premises. This evidence is too loose and inconclusive to overcome the clear and explicit testimony of Reed. Even if it appeared that he remained in possession, not as a tenant, but in continuance of his former occupancy, it would not be sufficient to have that effect. On the whole case we must hold, that this was a sale with a right to repurchase, and not a security.

This, then, disposes of the question of usury. The whole debt, usury as well as the principal, having been paid, appellants cannot now recover it back either at law or by a bill in equity. Nor can they insist, under this bill, upon a specific performance, as the bill is not framed with that view. But if it were, it seems from the evidence that Bennett purchased in good faith, for a valuable consideration, and without notice. So that in any view we can take of the case, as it is now presented, we can perceive no grounds for granting the relief sought, and the decree of the court below must be affirmed.

Decree affirmed.

JOHN STOETZELL *et al.*
v.
ALEXANDER N. FULLERTON.

1. ABATEMENT — *death of co-plaintiff — suggestion of matter of form—design of statute relative to.* The statute relative to the abatement of suits by the death of parties, was designed to prevent abatement in any case where the cause of action would survive, on the suggestion of the death, which suggestion is a matter of form, and may be made by either party.

2. SAME — *when suit does not abate.* In a joint action of assumpsit, on account, by two plaintiffs, where one of them, pending the suit, died, and judgment was afterward rendered therein, and without suggestion of such death having been made, — *held,* that the suit did not abate; the survivor, on the death of his co-plaintiff, being entitled to prosecute the action to final judgment.

3. SAME — *defendant should avail himself of the death of plaintiff by plea in abatement — failure to do so — effect of.* In such case, the defendant to have availed himself of the fact of the death of one of the plaintiffs, should have pleaded it in abatement; but having failed to do so, and allowed the cause to be tried upon the merits, under the plea of *non assumpsit,* under which plea such death could not have been proved, he is bound by the judgment rendered therein, and cannot afterward question it in a collateral proceeding.

APPEAL from the Superior Court of Chicago.

The facts in this case are fully stated in the opinion.

Messrs. BECKWITH, AYER & KALES, for the appellants.

Mr. W. T. BURGESS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of ejectment brought in 1858, to the Cook county Court of Common Pleas, by Alexander N. Fullerton against John Stoetzell, and others, to recover the possession of part of lot four, in block eleven, in Wolcott's addition to Chicago.

A verdict was found for the plaintiff, and a motion for a new trial having been denied, judgment was entered on the

verdict, to reverse which the defendants bring the record here by appeal.

It was conceded on the trial, that Charles Butler, on the 26th of June, 1837, was the owner in fee of this lot, and on that day sold and conveyed the same to the plaintiff. This was the plaintiff's title.

The defendants read in evidence, subject to all legal exceptions, the record and proceedings in the Circuit Court of Cook county, wherein Charles R. Reed and Nathaniel Church were plaintiffs, and Alexander N. Fullerton was defendant, from which it appeared that a writ of summons in an action of assumpsit, was issued in that cause, on the 11th day of February, 1839, and served on Fullerton, by reading, on the next day. The declaration was filed, containing the common counts, on the 21st of that month, the damages being laid at six hundred dollars.

The copy of the account attached to and filed with the declaration, was in the name of C. H. Reed & Co. to invoice August 1, 1837, $914.80, with credits attached, showing a balance due of $340.75, with interest to be computed. The general issue was filed on the 14th of March, 1839, and at the March Term, 1841, the cause was submitted to the court for trial, who found for the plaintiffs, and assessed the damages at the sum of $388.73, and rendered judgment accordingly. On this judgment an execution was issued January 24, 1842, and levied on the premises in question, and on the 9th of May following they were bid off by the plaintiffs' attorney, and the execution indorsed satisfied in full. A certificate of sale was issued to Reed and Church, on the 11th of May, 1842, and on the 22d of September, 1843, a deed was executed by the sheriff to them for the premises. The defendants then produced in evidence a quitclaim deed of the same premises to Charles R. and Harriet Church, two of the defendants, dated February 18, 1857. It was admitted that Stoetzell was in possession of the premises, and that the other defendants claimed title to the same. This was the defendants' case.

The plaintiff then proved that Nathaniel Church died in

Troy, New York, in the fall of 1839, on some day between the 29th of September and the 10th of November, of that year, and then insisted, that as Church, one of the plaintiffs in the action of Reed and Church against him, was dead at the time the judgment was rendered in the action, the judgment and all proceedings under it were void, and no title passed to Reed by the sheriff's deed; and of this opinion was the court, and accordingly found the defendant guilty, and that the plaintiff was the owner of the fee.

This decision of the court is the point in the case.

The appellee contends that inasmuch as Church, one of the plaintiffs, was dead at the time of the entry of the judgment, and no suggestion of the death upon the record, as required by statute, the suit abated at common law and the judgment was a nullity.

This rule was not universal at common law, as appears from the case cited by appellee's counsel— *Underhill* v. *Devereux*, 2 Saunders, 72 (note *i*), as in a *quare impedit* by two, or in an *audita querela* by two; or in debt by two executors, when one was summoned and severed and dies, the writ did not abate; and when one of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both, the plaintiff was permitted, even after a motion to set aside the proceeding for this irregularity, to suggest the death of the other on the roll and to amend the *ca. sa.* without paying costs. *Newnham* v. *Law*, 5 Term, 577.

The statute of 8 and 9 William III, ch. 11, as well as our own, was designed to prevent the abatement in any case where the cause of action would survive, on the suggestion of the death, which suggestion is a matter of form and may be made by either party. The cases cited show that it has been often allowed to make the suggestion *nunc pro tunc*, and it should be allowed in furtherance of justice and in support of the right. *Newnham* v. *Law*, *supra*; *Hamilton* v. *Holcomb*, 1 Johns. Cases, 29. That was a case of error *coram vobis*, and the court, recognizing the doctrine in *Newnham* v. *Law*, said courts of law have adopted the practice of granting all amendments

to which the party would have been entitled as of course, provided it be of no prejudice to the other party, and these cases were cited as authority in a similar case. *Dormond* v. *Carpenter*, 2 Johns. 184.

The death of Church pending the suit was a fact which might have been pleaded in abatement, but the defendant chose rather to try the cause upon its merits under the plea of non-assumpsit. It is very clear that, under this plea, he could not give in evidence the death of one of the plaintiffs. *Camden et al.* v. *Robinson*, 2 Scam. 507. If this be so, then surely he ought not to be allowed to give the fact in evidence in another action, and by that proof nullify the judgment. To avail of the fact of death, the defendant should have pleaded it in abatement.

The error, if it be one, was an error of fact, which could only be corrected by a writ of error *coram vobis*.

By the common law, before our statute, or that of William III, the general rule was that, whenever the death of any party happened pending the writ, and yet the plea was in the same condition as if such party were living, then such death made no alteration, for where the death of the parties makes no change of proceedings, it would be unreasonable that the surviving parties should make any alteration in the writ; for if such proceeding were changed it would set rights but in the same condition they were in at the time of the death of the parties, and it would be absurd that what made no alteration should change the writ and process on the proceeding. 1 Bacon's Abr. 11, 12.

And the rule is the same in equity, where, if the interest of a party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, the suit does not abate; or if the interest of a party dying survives to another party; or if a surviving party can sustain the suit, as in the case of several creditors plaintiffs on behalf of themselves and other creditors. For the reason, that the persons remaining before the court either have in them

the whole interest in the matter in litigation, or, at least, are competent to call upon the court for its decree.

In the action of assumpsit by Read and Church against appellee, it would seem from the account filed, on which the suit was brought, that it was a partnership demand, although in the declaration they are not alleged to be partners, yet it was sued on as a joint demand, and *pro hac vice* survived to Reed upon the death of his co-plaintiff. Proceeding to judgment after the death of Church, placed no right of the defendant in peril, for he could never be liable to another action for the same cause if brought by Reed as survivor, or by the administrator of Church. It would then be unreasonable to hold, as the defendant failed to plead the death in abatement, that now he should be permitted to set up that fact to nullify a judgment obtained by defendants' own consent to the issue, on such merits as the issue then made up presented.

It is urged by appellee's counsel, if an amendment is allowed here, *nunc pro tunc*, such amendment would change the whole face of the proceedings, and show no title in appellants, on the principle that the judgment, execution and sheriff's deed must conform.

This point would be well taken, if an amendment was made, but we take the ground that there is no necessity for any amendment, for the reasons we have given. The judgment was a valid judgment, and cannot be rendered null in any collateral action.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

JOSEPH LINESS

v.

ANTHONY C. HESING.

EX TURPI CAUSA NON ORITUR ACTIO. Where a person sends money to another with the object of inducing the latter to use his influence to get the former nominated for an office, without reference to the fitness of the applicant for the position he seeks, or the public good, and the party receiving the money does not use his influence for such applicant, but against him, the transaction on the part of him who sends the money is of such improper character that the law will afford him no remedy to recover it back.

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

This was a suit commenced before a justice of the peace in Cook county, by Joseph Liness against Anthony C. Hesing. The cause was removed into the Circuit Court by appeal, where a trial resulted in a judgment in favor of Hesing. Liness thereupon sued out this writ of error.

Messrs. HAINES, STORY & KING, for the plaintiff in error.

Mr. JOHN LYLE KING, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Liness being desirous of procuring the office of clerk of the police court in the city of Chicago, sent to Hesing the following letter:

"A. C. HESING, Esq., CHICAGO, April 7, 1865.
"Present — (Private.)
"DEAR SIR: Inclosed please find twenty dollars, for which please use your influence to get me nominated for police court clerk; if I get the nomination, call on me for twenty more.
"I am, sir, very truly yours,
"JOSEPH LINESS"

Hesing used his influence not for Liness but against him, whereupon the latter brings this action to recover the twenty dollars. The object of sending this money was to secure the nomination and election of the plaintiff to a public office of trust and responsibility without reference to his fitness for the position or the public good. It was an attempt to influence, by monied considerations, the action of the defendant, in a matter where every person should be governed solely by a regard for the public welfare. The principle is well settled that courts will lend no sanction to transactions of this character, by recognizing them as the basis of legal obligations. *Ex turpi causa non oritur actio.* We must leave these parties as we find them.

Judgment affirmed.

MICHAEL DIVERSY
v.
EPENETUS B. KELLOGG.

1. AGENCY — *evidence of, for the jury.* Where a party is shown to have been the agent of another in a particular business, and continues to so act within the scope of his former authority, it will be presumed that his authority still continues, and will bind his principal unless the persons with whom he acts have notice that his agency has ceased.

2. SAME. An agent for a commercial house who travels and solicits orders for his principal, in the absence of proof will not be presumed to have authority to rescind his contracts and take back goods furnished by the house for which he is agent, when they prove unsatisfactory to the customer.

3. SALE — *of goods — delivery and acceptance.* If the party of whom goods have been ordered shall ship within a reasonable time, the amount and quality ordered, and in the manner directed, the property thereupon vests in the purchaser and is thenceforth at his risk. If after such shipment a portion of the goods are abstracted and others of an inferior quality substituted so as to render the whole of an inferior quality, in that case the loss must be borne by the purchaser. As soon as such goods are delivered to the carrier the title vests in the buyer subject only to stoppage *in transitu.*

4. SAME. Even if a different kind from that ordered, should be shipped, and is received by the purchaser and he appropriates it, the title thereby vests in him, and he must pay what it is reasonably worth. He would not in that case

be bound to receive it, but, on learning its quality, he should in a reasonable time give notice that he declined to receive it, and thereby avoid liability. In such a case the title would vest in him until he accepted it. In such a case it is for the jury to say from all the circumstances whether he did accept it.

5. AGENT — *general and special.* It is not error for the court to instruct the jury that a party could only recover by showing that the person receiving goods for his principal was his general agent and acted within the scope of his authority, or was his special agent to receive the goods in dispute, unless it was shown that his general agency was continued after his principal ceased to do business. Such an instruction excludes the fact that the person may have the general agency of his principal before he quit business and the seller not notified that he had ceased to be his agent.

6. SALE — *on order — notice of shipment.* A party on shipping goods on an order is not bound to give notice thereof to vest the title in the purchaser, or a failure to do so does not relieve the purchaser from the acts of his former agent, or from giving notice that the agency had ceased.

7. EVIDENCE — *admissions of a party.* As a general rule, where admissions of a party are received in evidence generally they are proper for all purposes, and should be considered by the jury and receive such weight as they may deem proper to give them.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit brought by Ebenetus B. Kellogg, in the Superior Court of Chicago, on the 25th of February, 1864, against Michael Diversy, to recover the price of a pipe of Cologne gin. The declaration contained the common counts. The defendant pleaded the general issue, with notice of recoupment and set-off. On the 4th of September, 1866, a trial was had before the court and a jury.

It appeared on the trial, that, on the 29th of September, 1862, one James M. Combs, a traveling agent to solicit orders for Kellogg, a wholesale liquor dealer in New York, while in Chicago, received an order from Rose, the son-in-law and general agent of defendant, having charge of his store, and doing business for him. The order was for three-fourths of a pipe of Cologne gin, and the directions were to ship it by the Western Transportation company's line. The order was filled by plaintiff shipping the gin to defendant. The pipe contained one

hundred and thirty-eight gallons, and was shipped by the transportation company as directed.

The gin reached Chicago by way of the Michigan Southern railroad, before the 18th of November, 1862. After lying some days in the depot, it was sent to the warehouse of Keogh, the agent of lost freight. He mailed a notice to defendant, and the next day Rose went with the notice, representing himself as acting for defendant, paid the charges, receipted for it in defendant's name, and took it away. He at first objected to the charges and threatened to replevy the gin. On the 18th of November, in raising the cask to an upper story of Myers & Turney's store, it fell, and was bursted, and the liquor was lost. It was taken from the freight house to Myers & Turney's, to whom defendant had previously sold his stock.

It appears, that Rose was there after the sale, still engaged in settling the business of defendant, up to the time the gin was lost. Shufeldt says, that at the time it was destroyed, Rose was still acting to all appearances as he had before for defendant, and that he purchased of defendant, or Rose, a pipe of gin about that time. Turney swears that Rose obtained of him permission to store the gin in their house. Shufeldt swears that at the time he purchased the pipe of gin, Rose said that he and defendant had another cask which had fallen through the hatchway. Rose seems to have called on other parties to examine the gin to see if it was according to the sample.

There was testimony that the gin was of inferior quality, and not worth more than one dollar per gallon, instead of two and a quarter, the contract price. Cowles swears, that the gin shipped was of the quality ordered, and worth the sum agreed to be paid. There was testimony, that after the gin was taken into possession by Rose, Combs tried to sell the gin to other persons, saying that it was not satisfactory to defendant.

Defendant asked a number of instructions, the fifth and tenth of which the court refused to give. They are these:

"5. The plaintiff can only hold Mr. Diversy for the acts of Mr. Rose, by showing that, at the time when Rose received the

gin, he was either Diversy's general agent, acting within the scope of his authority, or else that he had specific authority to receive that particular pipe of gin on Diversy's behalf; and unless the jury find from the evidence, that Rose's general agency was continued after Diversy had sold out his business and store to Myers & Turney, or that Rose was specially authorized by Diversy to go to Keogh's and get that particular pipe of gin, Mr. Diversy is not holden for his acts or declarations in the premises, and the law on this point is for the defendant."

"10. If the transaction was merely a conditional order to send a certain quality of gin, if they could find it, and Diversy received no advice of shipment, he was not compelled to notify plaintiff that Rose's agency had ceased, in order to relieve himself from responsibility for Rose's unauthorized acts, after Diversy had sold out to Myers & Turney."

The defendant's ninth instruction, as asked, is this:

"9. If a party produces a document containing certain statements which are uncontradicted by other evidence in the case, such uncontradicted statements are, as against the party producing the document, evidence of the facts so stated. If, therefore, Mr. Diversy's affidavit, produced by plaintiff, states that the contract was rescinded, or that Rose's agency had ceased, or any other fact material in the case, such statement of fact is to be presumed to be correct, unless the contrary is proved in the case. The plaintiff can only use Mr. Diversy's affidavit to show admissions against the defendant, and not for the purpose of attacking the defendant's veracity."

The court, however, modified it before it was given by striking out of the latter part of it, this clause:

"The plaintiff can only use Mr. Diversy's affidavit to show admissions against the defendant, and not for the purpose of attacking the defendant's veracity."

The jury found a verdict in favor of plaintiff for $138. Defendant thereupon entered motions for a new trial and in

arrest of judgment, which were overruled and judgment was rendered upon the verdict; to reverse which he prosecutes this appeal, and urges a reversal, because of the refusal to give his fifth and tenth instructions and in modifying his ninth before it was given; because the verdict is against the evidence; and because the motion for a new trial was overruled.

Mr. EDWARD MARTIN, for the appellant.

Mr. G. W. BRANDT, for the appellee.

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

It is first insisted that Rose was not, at the time he received the liquor, paid the charges, and gave the receipt in appellant's name, his agent. The evidence clearly establishes the fact that he was his agent, and had authority to order the liquor in September. And whether he was acting as such, or whether his authority had been revoked when he received this consignment, was a question for the determination of the jury. On that question, the evidence was conflicting. He says it had ceased, but others state that he was attending to appellant's business in closing it up, and he evidently assumed to have authority to act for him, in giving the receipt to the warehouseman in appellant's name, and removing the liquor to his late place of business. Nor does it appear that any person was informed that he had ceased to act as appellant's agent during the time all these transactions were occurring. We are therefore of the opinion, that the jury were warranted in finding that his acts were binding upon appellant.

Whether Combs was authorized to, or did, rescind the contract, and receive the liquor from Rose for appellant, were also questions for the consideration of the jury. And on the first of these questions there seems to be no evidence, unless it can be inferred, that an agent who travels to solicit orders for a commercial house, also has authority to cancel his contracts, and receive back goods shipped to and not satisfactory to a

customer. The nature of the employment would not seem to embrace such authority, and we can not judicially know that it does, and in the absence of proof we can not hold, that it was within the scope of his agency. On the other question, if it were conceded that such an agency embraces the authority to take goods back, after an order has been filled, the evidence is uncertain. Combs seems to have offered to sell the liquor as the property of appellant and not as that of appellee; while Rose says he did take the liquor back. In this conflict it was for the jury to determine, and we are not disposed to disturb their finding.

It is again urged that the liquor was not of the quality ordered, and appellant was not, therefore, bound to accept it.

If appellee shipped, within a reasonable time, the amount and quality of liquor sold to appellant, in the manner directed, the property vested in the latter, and it was at his risk from the time it was shipped. If after shipment, a portion was drawn out by others, and it was filled with other spirits, so as to render it of an inferior quality, then the loss must fall upon the purchaser. As soon as goods are delivered to a carrier, under a contract of sale, the title vests in the purchaser, subject to stoppage *in transitu*, but with no other lien, unless expressed in the terms of the sale. In this case, Combs states, that he knew a good article of imported gin was shipped to appellant, as directed, and if this be true, and the jury seem to have so found, no reason is perceived why appellant should not pay for it.

Or even if a different kind from that which was ordered was shipped, and appellant received it and appropriated it, he thereby made the property his own, and must be held liable to pay what it was reasonably worth, under the common counts.

If it was a different quality from that purchased, he was not bound to accept it, but might, upon learning its quality, within a reasonable time, give notice that he declined to receive it, and thereby avoid liability.

In that case the property would not become his until he accepted it with a knowledge of its quality, or after having a reasonable opportunity of determining its quality. In this

case there is evidence strongly tending to prove an acceptance, and it was for the jury to say whether the appellant did, by his agent, receive the liquor, and retain it an unreasonable time after acceptance, without giving notice that it was rejected. There seems to be no evidence which explains why it was taken from the warehouse, if, as Rose says, "he did not know whence it came." He knew that he had given the order, and must have known the character of the contents of the cask, and we cannot believe, unless some explanation was given, that he did not know that it was from appellee, and he does not pretend that he notified him that the liquor was rejected.

It is insisted that the court erred in refusing to give the fifth instruction asked by appellant. It asserts that appellee could only recover by showing that Rose was appellant's general agent, and acted within the scope of his authority, or was his special agent to receive this pipe of gin; and, unless he proved that his general agency was continued after appellant sold his store to Myers & Turney, or that Rose was specially authorized to receive the particular pipe of gin. This instruction ignores entirely the fact that if Rose was the general agent of appellant, and as such was acting within the scope of his authority when he ordered the gin of appellee, his acts would still bind appellant within the scope of that authority, after it ceased, until appellee was informed of that fact.

This instruction was therefore properly refused by the court.

The tenth instruction asked by appellant and refused by the court, asserts that if the transaction was merely a conditional order to send a certain quality of gin, if it could be found, and appellant received no advice of shipment, he was not compelled to notify appellee that Rose's agency had ceased, in order to relieve himself from responsibility for Rose's unauthorized acts, after appellant had sold to Myers & Turney. We do not perceive upon what principle the failure of appellee to notify appellant of the shipment, could release him from the acts of his former agent, or relieve him from giving notice that his agency has ceased. We do not know, as a matter of law, that appellee neglected any duty in failing to give notice of ship-

ment, when the goods came in the regular time of transportation. The goods were ordered, shipped and received, so far as we can see, in the usual course of trade, and the failure to advise appellant, in such a case, that the goods had been shipped, released appellant from no liability or duty. We therefore perceive no error in refusing this instruction.

The last clause of the ninth instruction asked by appellant, was not improperly stricken out before it was given. When the admissions of a party are introduced in evidence by the opposite party, as evidence generally, they are proper for all legitimate purposes. When admitted, if inconsistent and contradictory, they might be entitled to but little weight, or if they showed a want of veracity, that would be his misfortune. But in this case his veracity was not in issue, and we do not perceive that this clause of the instruction was pertinent to any issue before the jury. We do not see that any injury resulted to appellant from the modification of the instruction.

After a careful examination of this entire record we perceive no error, and the judgment of the court below must be affirmed.

Judgment affirmed

R. WILDER GATES

v.

THE CITY OF AURORA.

1. SUMMONS—*for violation of ordinance of the city of Aurora.* The charter of the city of Aurora prescribes the mode in which suits shall be brought before the police magistrates of the city for a violation of any of its ordinances, requiring it to be stated in the summons the ordinance alleged to have been violated.

2. SAME—*the allegations and proof must correspond.* And where in such a case, the ordinance named in the summons, as having been violated, is excluded upon the trial, the city cannot proceed against the defendant on another ordinance of a different character. The ordinance stated in the summons to be violated is the cause of action, and it cannot be shifted, without consent, to another cause, even if the magistrate has jurisdiction of that other cause.

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

This was a proceeding commenced in the name of the City of Aurora against R. Wilder Gates, before one of the police magistrates of that city. The cause was taken by appeal to the Circuit Court of Kane county, and, before final trial, was removed into the Circuit Court of Kendall county, where a trial resulted in a judgment for the defendant, from which he appealed to this court.

The opinion of the court sets forth the alleged ground of error.

Messrs. WAGNER & CANFIELD, for the appellant.

Mr. C. J. METZNER and Mr. B. F. PARKS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

We have not deemed it necessary to consider any other point made on this record than the one first made and argued on the brief of appellant, and it is this: The city charter prescribes the mode in which suits shall be brought for a violation of a city ordinance, stating in the summons, the ordinance violated. This action was brought for a violation of the ordinance entitled "streets and alleys." On trial, this ordinance was excluded from the jury, and the city was allowed to proceed against the defendant on another ordinance of the city of a different character, and against the objections of the defendant.

This we think was error, on the familiar principle, that a defendant must be apprised of the nature of the accusation or claim against him, unless where that is dispensed with by some statute, as in proceedings before a justice of the peace, when filing an account, is held as a sufficient statement of the cause of action. But the charter of the city provides that the summons shall state the ordinance violated. This, then, is the

cause of action, and it cannot be shifted, without consent, to another cause, even if the magistrate had jurisdiction of that other cause.

The judgment is reversed.

Judgment reversed.

FREDERICK W. STORING
v.
OLIVER W. ONLEY.

1. PRACTICE IN THE SUPREME COURT—*entering final judgment therein.* Where, in a proceeding by distress for rent, a general judgment was rendered and execution awarded upon the finding of the jury, the Supreme Court will reverse the judgment for the error, and remand the cause with directions to the court below to enter a final order in conformity with the statute; but the final order will not be entered in the appellate court.

2. FORMER DECISION. In *Alwood* v. *Mansfield*, 33 Ill. 452, which was a case of similar character, the final order was entered in the appellate court, but it is considered the better practice to remand the cause and let the final order be entered in the court below.

WRIT OF ERROR to the Circuit Court of Ogle county; the Hon. WILLIAM W. HEATON, Judge, presiding.

The opinion of the court states the case.

Messrs. LELAND & BLANCHARD, for the plaintiff in error.

Mr. GEORGE C. CAMPBELL, for the defendant in error.

Per CURIAM: The only error complained of in this cause by the counsel for plaintiff in error is that a general judgment was rendered and execution awarded upon the finding of the jury, the proceeding being distress for rent. It is admitted by the counsel for defendant in error that this was error, and that the judgment must be reversed, but he asks that a final order be entered in this case as was done in *Alwood* v. *Mansfield*, 33 Ill. 458. It was afterward found, however, in that very case, that some practical inconveniences grew out of the

entry of the order in this court. We deem it the better practice and more convenient for parties, to reverse the judgment and remand the cause with instructions to the Circuit Court to enter a final order in conformity with the statute as explained in *Alwood* v. *Mansfield*, above cited. The judgment as entered is, therefore, reversed and the cause remanded, and the Circuit Court on the filing of the order of this court will enter the proper final order.

Judgment reversed.

Joseph McPherson
v.
Murray Nelson *et al.*

1. Practice—*bill of exceptions should contain all of the evidence to be examined.* Where the bill of exceptions fails to state that it contains all of the evidence, the court will not examine to see whether that which appears in the record does sustain the verdict. In such a case it will be presumed that the finding is correct until it is rebutted by evidence in the record, as the presumption must be indulged that there was other evidence sufficient to warrant the verdict.

2. Allegations and proof. Where the declaration contains no averment of a tender but a readiness and willingness to perform, plaintiff need only show such readiness and willingness to perform. A tender need not be proved.

3. Contract—*excuse for not performing.* Where a party through his agent purchases grain to be delivered at a future day and he fails to furnish his agent with means to pay for it, and it is proved that the property would not have been received if a tender had been made, and that the grain was ready for delivery under the agreement and offered to be delivered, and it was refused, then there was a right of recovery. With such evidence before the jury a judgment would not be reversed on account of instructions unless they were clearly erroneous and must have misled the jury.

4. Rehearing *in the Supreme Court.* Where a party brings a record to this court, assigns error thereon, and submits the cause for decision upon the transcript as it then stands, a rehearing will not be granted at his instance, after the cause is tried and a judgment rendered, upon the ground of an alleged mistake committed by the clerk below in making the transcript of the record.*

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* See also *Boynton* v. *Champlin*, 40 Ill. 63.

Statement of the case.

Appeal from the Superior Court of Chicago; the Hon. John M. Wilson, Judge, presiding.

This was an action of assumpsit brought by Murray Nelson and Enoch B. Stevens, partners under the firm name of Murray Nelson & Co., against Elias B. Stiles and Joseph McPherson.

The declaration contained three special counts on a contract for five thousand bushels of oats purchased on the 25th of February, 1865, at sixty-one and a half cents, to be delivered by plaintiffs to defendants during the month of March, 1865. It is averred in the second count that plaintiffs had the oats and were ready and willing to deliver the same at all times during the month of March, 1865; but the defendants did not nor would take and receive the oats. The common counts were added. A plea of the general issue was filed by Stiles in person, and a like plea by McPherson by his attorneys.

A trial was afterward had before the court and a jury. Evidence was heard, tending to prove the sale of the oats; that plaintiffs had oats to the amount of the contract, and sought the agent of defendants to tender him warehouse receipts for the oats, on the 31st day of March, 1865, but he was not found. The bill of exceptions however fails to show that it contains all of the evidence. After the evidence was heard plaintiffs asked, and the court gave, this instruction:

"The jury are instructed that in contracts for the sale and delivery of five thousand bushels of oats, at buyer's option, during a certain period, it is unnecessary in order to entitle the seller to maintain an action against the purchaser for damages sustained by reason of the non-acceptance of the oats during such period, to prove an actual tender of five thousand bushels of oats to the purchaser. It is sufficient to show that the seller was, at all times, during such period, ready and willing to deliver the same to the purchaser." To the giving of which defendants excepted.

The defendants asked a number of instructions, all of which the court refused to give but the first. Of the instructions

which were refused, a portion announced in a variety of forms, that plaintiffs to recover were bound to prove a tender, and that a readiness and willingness to deliver was not sufficient.

The jury found a verdict in favor of plaintiffs for $1,075. Defendants entered a motion for a new trial which the court overruled, and rendered judgment on the verdict. To reverse which defendants prosecute this appeal, and assign, as errors, that the court gave improper instructions, refused proper instructions, and rendered judgment for plaintiffs, when it should have been for defendants.

Messrs. Scates, Bates & Towslee, for the appellants.

Messrs. Williams & Thompson and Mr. F. H. Kales, for the appellees.

Mr. Chief Justice Walker delivered the opinion of the Court:

It appears from the record in this case that there were not any exceptions taken to the refusal of the court below to give appellants' instructions. Again, the bill of exceptions does not show that it contains all of the evidence. The court will not, therefore, examine the instructions to ascertain whether or not they were improper. Appellants, failing to except, waived all objection to them, and come too late, in this court, to urge any objections for the first time. When the bill of exceptions fails to show that it contains all of the evidence, as we have uniformly held, we will not examine the evidence on a motion for a new trial, which it is presumed sustains the verdict. The presumption is, until the contrary is shown, that the finding is correct, and that there was evidence which may not be in the record that warranted the finding.

The question then arises, whether the judgment should be reversed, upon the instruction given for the appellees, in view of the evidence which the record contains, and such as this court must infer was given on the trial below.

In the second count of the declaration there is an averment that appellees were at all times, after making the agreement,

ready and willing to deliver the oats at the contract price. This count contains no averment of a tender. Appellees under the other counts attempted to prove a tender, but so far as the evidence is disclosed in the record, they seem to have failed. They, however, seem to have held warehouse receipts, for perhaps the amount of oats embraced in the contract, and a tender need not have been proved.

It also appears from the evidence that appellants had not furnished their agent, who made the purchase, with means to pay for the oats, if they had been offered on the last day of the contract, and he expressly states, that had they been tendered, he would not have received them. And the fact that oats had declined fully one-third in price, between the time of purchase and the last day of March, would indicate that they were not so ready to receive them, as if they had risen to the same extent. If appellees had proved that they had the oats, of the quality specified, on the 31st day of March, and that they saw appellants and offered to deliver, and they refused to receive them, there would be no question of the right to recover. And as the bill of exeptions fails to state that there was no other evidence than that embodied therein, we will presume that this or other evidence pertinent and sufficient to sustain the verdict was given. With such evidence before the jury, whether the instruction given for appellees was correct or not, it would not be ground of reversal, unless it would necessarily mislead the jury. We do not think this instruction was of that character, and is sustained by *Lassen* v. *Mitchell*, 41 Ill. 101. For these reasons the judgment of the court below is affirmed.

Judgment affirmed.

At the September Term, 1867, the appellant presented his petition for a rehearing of this cause, which was refused, for reasons given in the following opinion:

Per Curiam: The petition for a rehearing in this case is based upon the supposition, that the bill of exceptions does state that it contains all of the evidence heard on the trial

below. The transcript filed in this court contains this statement: The defendants "did then and there propose the aforesaid exceptions to the opinion of the said court, and requested the said judge to put his seal to this, his bill of exceptions containing the said several matters so produced, and on the evidence given in the trial of said cause." And it was so printed in the abstract filed by appellants. There is no other statement in reference to the bill containing the evidence heard on the trial; and appellees made and urged in their printed argument the point, that the record did not show that it contained all of the evidence. On the record as it was then presented the case was determined. We are now referred to the original bill of exceptions which is brought here from the court below, in which, it is contended, the word is written "all," and not "on," as in the transcript and abstract. We have looked into it, and find that it may be read according to the sense "all," but in fact resembles more the word "on" than it does "all." It will be seen, that if read "all" it would be sufficient, but if read "on" then it fails to state that all of the evidence is in the bill of exceptions. We were bound to decide the case as it was then presented by the record, and the issues were formed.

Can we, then, after a trial and judgment rendered, grant a rehearing according to the established practice of the court? Such has not been the practice, but, on the contrary, such applications have been uniformly denied. No case occurs to the court where a rehearing has been granted for such a reason. A time must come when litigation must come to an end. To allow a rehearing in this case, to render it availing, leave would have to be granted appellants to withdraw the assignment of errors, to ask for, and obtain an amended record, and to form new pleadings in the case as then presented. Such a practice would open a door to the granting of rehearings, that would prolong litigation, and in many cases to the delay of justice. We feel constrained to adhere to the practice as it has previously obtained and governed the court. We must therefore deny the petition.

Rehearing denied.

MARY MANNY
v.
WILLIAM H. RIXFORD.

1. PLEADING—*pleas amounting to general issue.* Where the general issue and special pleas are filed, and the matter of the special pleas can be given in evidence under the general issue, the special pleas are obnoxious to demurrer, and may be stricken from the files.

2. GIFT—*husband and wife.* At law, a gift from husband to wife is ordinarily void, and, being so, can be revoked by the husband. Courts of equity will, in certain cases, support such gifts, but require clear and incontrovertible evidence.

APPEAL from Circuit Court of Winnebago county; the Hon. BENJ. R. SHELDON, Judge, presiding.

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

Messrs. LATHROP & BAILEY, for the appellant.

Mr. CYRUS F. MILLER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This record presents this case: On the 11th of February, 1865, appellee was united in marriage to Mary E. Rixford, he having a few days previously enlisted into the army of the United States, receiving thereon a bounty of four hundred dollars. On the 21st of February, Mary E., his wife, loaned of this money three hundred and sixty-five dollars, with interest, at ten per cent, and payable on demand, to appellant, for which she executed her note to Mary E. Rixford.

The declaration was in assumpsit, counting on this note, and the common counts were added.

The defendant demurred to the first count of the declaration, assigning, for cause, that the plaintiff was not a party to the promise, and it was not shown he had any interest in the same.

The demurrer was overruled, and thereupon the defendant pleaded the general issue, and five special pleas to the first count, setting up, substantially, that the note was her separate property, and that she was living separate and apart from her husband, conducting her own business, and that the consideration of the note was received from Mary E. Rixford, as her separate property, and the note was made and delivered to her as her separate property.

The sixth special plea alleged, in substance, that the note was made for money loaned of Mary E. Rixford, which money she had received in good faith from some person other than the plaintiff, and that the note was her sole and separate property, and not the property of the plaintiff.

To each of these special pleas there was a special demurrer, assigning, for cause, that they amount to the general issue, and are not responsive to the declaration.

The court sustained the demurrer, on the ground that the general issue having been pleaded, the matter of the special pleas could be given in evidence under that plea.

There was a trial by jury, and a verdict for plaintiff for three hundred and twenty dollars, the balance due upon the note. A motion for a new trial was overruled, and judgment rendered on the verdict.

To reverse this judgment the defendant brings the case here by appeal, and assigns several errors, the most important of which will be noticed.

As preliminary, we have to say, that the objection taken to the proceedings of the court, to compel the production of the note as evidence in the cause, does not involve in any degree the merits of the controversy, for the question was still before the jury as to the ownership of the note.

No point is made in appellant's brief on the first error assigned, which was, in sustaining the demurrer to her special pleas and striking them from the files. The ruling of the court was correct in this particular, for the matter of those pleas could be given in evidence under the general issue, and were inquired into on the trial, as the record shows.

The main controversy arises upon the instructions given for the appellee and in refusing the seventh and last instruction asked by the appellant. They involve the whole merits of the case, and to them we have directed our attention.

The plaintiff's instructions were as follows;

"That a note made payable to a married woman is, in law, payable to her husband, and that he is entitled to sue in his own name and recover upon it, unless the consideration for said note was for money or property, either personal or real, belonging to her as her sole and separate property before or at the time of her marriage; or for money or property which she has acquired in good faith since her marriage from some person other than her husband, by descent, devise or otherwise, or for rents, issues or profits thereof.

"That, if the jury believe, from the evidence, that the note in question was given for money loaned to defendant, and that the money so loaned to defendant was, while belonging to the plaintiff, put into the possession of the wife of the plaintiff, by the plaintiff, after their marriage, and was by her loaned to the defendant, and the note in controversy in this cause taken therefor, that then the plaintiff is entitled to recover.

"That, if the jury believe, from the evidence, that the consideration of the note in controversy in this cause, was for money given by the plaintiff to his wife, upon the occasion of his departure into the army as a soldier, and after their marriage, that it did not thereby become her sole and separate property, by virtue of the law of February 21st, 1861, so as to enable her to sue for and recover it in her own name; but that the plaintiff, as her husband, is entitled to sue for and recover the same."

The seventh instruction asked by appellant and refused is as follows:

"That, as between themselves, gifts of money and personal property from husband to wife are lawful, and, when made, become the separate property of the wife if not prejudicial to

the creditors of the husband. And should the jury believe, from the evidence, that the plaintiff gave to Mary E. Rixford the money for which the note in question was made, and that afterward she loaned such money to the defendant, and took therefor the note in question, and that the note was made and delivered to her, and has ever since been in her possession; then the said note became and was her, Mary E. Rixford's, property, and the plaintiff has no right to recover in this action upon said note against the will of said Mary E. Rixford."

It is insisted by appellant that these instructions given for appellee, especially the first and third, entirely ignore the first clause of the act of 1861, and the whole doctrine of gifts from the husband to the wife, and on the same theory, the appellant insists, her seventh instruction was refused.

The married woman's act of 1861 has been considered by this court in several cases. The first was *Emerson* v. *Clayton*, 32 Ill. 493, in which it was held that a married woman might sue alone to recover her own property, "the sole control" over it being vested in her by that act.

In the case of *Rose* v. *Sanderson*, 38 Ill. 347, it was said this act provided for three classes of cases, first, for property "belonging to any married woman as her sole and separate property," at the time when the law took effect; second, for the property of women thereafter to be married; and, last, for property thereafter to be acquired by a married woman in good faith through some source other than her husband.

In *Farrell* v. *Patterson*, 43 Ill. 52, the same classes were recognized.

It is very manifest, we think, that the claim of the wife in this case cannot be arranged into either of these classes. The proof is satisfactory, that this money the wife loaned to appellant, for which the note was given, was money left with her by appellee, her husband, on his entering the army, and that he demanded the note as his property on his return. His wife refused to surrender it, claiming that he had given her the money, which he denied.

Now, on the hypothesis that this money was a gift from the husband to the wife, such gifts are ordinarily void at law, and being so can be revoked by the husband. Courts of equity will, in certain cases, support such gifts, and most of the cases in which this question has been debated and decided, are cases where the heir at law or devisee was claiming against the wife. Even in those cases clear and incontrovertible evidence is required to establish such gifts as a matter of intention and fact. 2 Kent Com. 163; 2 Story Eq. Jur. § 1374. Here, such proof is wholly wanting, and the proceeding is at law.

The court, therefore, properly gave to the jury the first and third instructions, and properly refused the defendant's seventh instruction, because, if it was a gift from the husband, it was void in law and subject to revocation by the husband.

In the case of *Farrell* v. *Patterson*, *supra*, it was held, when the wife sets up this statute and claims rights under it, the burden of proof, as in all other cases where an affirmative fact is alleged, is on the wife to maintain the issue.

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

Judgment affirmed.

JULIUS STUHL
v.
JOSEPH A. SHIPP

1. JUDGMENT BY CONFESSION — *in vacation — where to object for want of proof.* Where a judgment is entered by confession in vacation, under a power of attorney, more than a year and a day after the power of attorney was executed, it is necessary for the defendant to apply to the court in which the judgment was entered, to set the same aside, and to show some equitable reason therefor, before it will be reversed on the ground that no affidavit was filed showing the defendant was still alive, and that the debt was due and unpaid.

2. SAME — *where the judgment is entered for too much.* And when the judgment is within the *ad damnum* laid in the declaration, it will not be reversed because it may appear to be for an amount greater than the sum due upon the note which was the basis of the confession, no application having been made in the court below to correct the error.

Statement of the case. Opinion of the Court.

WRIT OF ERROR to the Circuit Court of Livingston county.

On the 16th day of February, 1865, Julius Stuhl executed his promissory note as follows:

"$200.00. PONTIAC, February 16, 1865.

"Thirty days after date, for value received, I promise to pay to the order of Jacob Countryman, $200, with interest at ten per cent per annum until due, and if not paid when due, then at the rate of ten per cent per annum, as liquidated damages, until paid. JULIUS STUHL."

On the same day, the maker of the note executed, in the usual form, a power of attorney to confess a judgment on the note.

The payee assigned the note to Joseph A. Shipp, who caused a judgment by confession to be entered thereon, in vacation, on the 23d of April, 1866, more than a year and a day after the maturity of the note, and the date of the power of attorney.

The defendant brings the record to this court by writ of error. It does not appear that any affidavit or other proof was presented in the court below, that the maker of the note was alive at the time the judgment was entered, or that the debt remained unpaid; and the absence of such proof is one of the grounds of error alleged.

The judgment was entered for $254.54, and costs, and it is claimed this is more than was due by the face of the note.

Mr. CHARLES J. BEATTIE, and Messrs. DICKEY & RICE, for the plaintiff in error.

Mr. GEORGE C. CAMPBELL, for the defendant in error.

PER CURIAM: The case of *Hinds* v. *Hopkins*, 28 Ill. 351, was so far modified in *Rising* v. *Brainard*, 36 Ill. 80, as to render it necessary to apply to the court below to set aside a judgment by confession, and to show some equitable reason therefor, before this court will reverse on the ground that the power of attorney was more than a year and a day old, or its execution

not duly proven. This court also held in *Iglehart* v. *Morris*, 34 Ill. 503, that when the judgment was within the *ad damnum* laid in the declaration, it would not be reversed because it might appear to be for an amount greater than the sum due upon the note, which was the basis of the confession, no application having been made in the court below to correct the error. On the authority of these cases this judgment must be affirmed.

Judgment affirmed.

JAMES S. DWEN, Executor, etc., *et al.*

v.

THATCHER BLAKE, Executor, etc.

1. MORTGAGE — *what constitutes — intention of parties governs.* To ascertain whether a transaction between parties amounts to a sale or a mortgage, courts of equity will look beyond the mere forms with which it is clothed, and although it be a sale in form, if it clearly appears by proof to have been a loan or debt and security for its payment, it will be treated as a mortgage.

2. SAME — *when in form a sale — proof must be clear to change its character.* Where parties give to a transaction all the forms of a sale, the proof must be clear that it was intended as a mortgage, in order to change its character. Slight, indefinite evidence is not sufficient.

3. SAME — *what will be considered* a *mortgage.* T., desirous of entering certain lands, applied to M., an agent of G., for the purchase of land warrants, for such purpose; whereupon an agreement was made between them, whereby, M. sold to him certain warrants, for which T. executed to him his notes for the purchase price, the payment of which was secured by entering the lands in the name of M., M. giving to T. his bond for the conveyance of the same to him, upon the payment of the notes. T. failed to pay the notes, and G., the principal, having died, M. quitclaimed the lands to G.'s heirs. Subsequently, the premises were sold on execution against T. who was in possession, on a judgment in favor of J., and B. redeemed from the sale, as a judgment creditor of T. On a bill to redeem filed by B., *held*, that the transaction amounted to a sale of the warrants, and the entry of the lands in M.'s name, was intended as a security for the payment of the notes, and must be treated as a mortgage; that M. held the land in trust for G.'s heirs, subject to T.'s equity of redemption, and that the deed by him to them was without consideration, and received by them merely as such heirs, and not as *bona fide* purchasers; and that B. by his purchase under J.'s execution succeeded to all of the rights of T.

4. TENDER—*in a bill to redeem—not required.* The law does not require a mortgagor to make a tender before he can compel a redemption. He is only required to pay the sum found due by the court, within the time limited by the decree.

5. SAME—*equity not bound by fixed rules—concerning the tender of money.* Courts of equity are not bound by any fixed rules in relation to the tender of money, but they will not allow the ends of justice to be perverted or defeated, by the omission of an unimportant or useless act, which nothing but a mere technicality would require.

6. PLEADING IN CHANCERY—*bill to redeem—of allegation of tender.* In a bill to redeem, a tender being unnecessary, an allegation in the bill of a tender, unproved, can not defeat the pre-existing right.

WRIT OF ERROR to the Circuit Court of De Kalb county; the Hon. ISAAC G. WILSON, Judge, presiding.

The facts in this case are fully stated in the opinion.

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

Mr. JAMES M. WIGHT, for the defendant in error.

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

This was a bill in equity filed by Francis Burnap in the Circuit Court of De Kalb, against John S. Green, Mary Ann Green, Elizabeth Green, Adelia Green and Albert G. Green, to redeem certain lands from a mortgage. The bill alleges, that in 1849, Thomas R. Green was engaged in Chicago, in selling and locating land warrants; that Henry A. Mix was his agent in Ogle county, and conducted the business in his own name. In the month of September of that year, Asa Talmadge was desirous of entering the land in dispute, and applied to Mix for the purchase of land warrants for the purpose. That he sold to Talmadge warrants for three hundred and sixty acres for the sum of $432.25, to be paid in one year. That to secure the payment the warrants were located in the name of Mix, who gave to Talmadge two bonds for conveyances of the lands by warranty deeds, upon the payment of the several installments with interest, the last falling due one year from the

15th of September, 1849, for which Talmadge gave his notes. The bonds recite a sale of the lands.

In the month of October, 1849, Talmadge paid on the note first maturing, $145. Between that time and the 18th of June, 1852, Green died, leaving the defendants his heirs at law. That John S. Green was appointed administrator. Mix delivered the notes to him, and conveyed the lands by a quitclaim deed to the heirs of Green, on the 1st day of June, 1852. That Albert G., on the 21st of August, 1852, conveyed his interest in the lands by quitclaim deed to John S. Green. These deeds were duly recorded in that year.

Talmadge recorded his bonds on the 31st of January, 1854, but that there was a mistake in recording. That by mistake the bonds described the lands as being in range three east of the fourth, instead of the third, meridian. That on the 27th of February, 1854, John S., Elizabeth and Adelia E. Green, quitclaimed their interest in part of the lands to Mary Ann Green. And John S., Adelia E. and Mary Ann quitclaimed a part of the lands to Elizabeth Green. And on the 23d of September, 1856, Albert G., Adelia E. and Mary Ann quitclaimed to John S. Green, except one quarter section, which deed was recorded in January, 1858. That in the year 1858, Talmadge tendered to John S. Green, as administrator of Thomas R. Green, the full amount of principal and interest on the notes, and he refused to receive the tender. That he inclosed the premises in 1858, took possession, and retained it ever since.

That on the 4th of September, 1858, all of the premises except forty acres were sold on an execution against Talmadge, on a judgment in favor of Johnson; that Burnap redeemed the lands from that sale under a judgment which he had against Talmadge, and then sold on his execution, became the purchaser, and procured a sheriff's deed for the same; that Mary Ann Green commenced a suit in ejectment in the Circuit Court of the United States against Talmadge to recover the lands, which was still pending when this bill was filed; that the legal title was in Green's heirs; that Talmadge had held

possession, which was notice of his claim. Complainant claims, as the purchaser of Talmadge's title, the right to redeem, and offers to pay the principal and interest on the notes upon being allowed to do so by decree. Prays an account and relief.

John S. Green answered, and denies that Thomas R. Green sold the land warrants, or employed Mix to do so, on credit or otherwise; denies that Mix sold Talmadge any warrants; alleges that when these lands were entered Green was in the business of entering and selling for his own profit, and Mix was employed for a like purpose; that Mix entered the land with warrants which belonged to Green, and in which Talmadge had no interest, and with the understanding and belief that Green should be the purchaser and owner thereof for his sole use and benefit; that after the lands were entered, he admits the bonds were given to convey the same as therein provided; admits the payment on the note; the death of Thomas R. Green; the heirship as stated in the bill, and that respondent became administrator; that Mix conveyed these with other lands to the heirs of Green; denies all knowledge of any claim by Talmadge to the lands; admits the conveyances among the heirs in pursuance to an amicable partition; alleges the death of Elizabeth Green; denies tender by Talmadge, and insists that he had forfeited all rights before Mix conveyed to the Greens, and the contract had been treated as abandoned.

Admits that Mary Ann Green commenced the ejectment suit, as alleged, and charges that she recovered a judgment against Talmadge for the lands; that he has no knowledge of the alleged mistakes, or whether Talmadge had fenced the lands, or that he claimed the lands. Denies all right to redeem. A bill of revivor was subsequently filed against James G. Dwen, executor of John S. Green, who had died after the suit was brought. On the hearing, the court decreed the relief prayed, and this writ of error is brought to reverse the decree.

The tender does not seem to have been proved. The only allegation that is contested, is, whether the charge of a sale of the warrants which the lands were entered with has been

proved. This entire controversy turns on that question. If the warrants were not sold, then the transaction cannot in any sense be regarded as a loan, or an indebtedness, and a security for its payment. On the face of the transaction it is a sale and not a mortgage. But courts of equity will look beyond the forms with which transactions are clothed, to ascertain the true nature of the transaction. And, although it be a sale in form, if it clearly appears to have been a loan or a debt and security for its payment, it will be held and treated as a mortgage. The parties having, however, deliberately given the transaction all of the forms of a sale, slight, indefinite or unsatisfactory evidence should not be permitted to change its character. It should only be by proof which clearly shows that the intention of the parties was that it should be a mortgage and not a sale.

In this case, Mix, who transacted the whole business, and is familiar with the transaction, says that the land warrants were sold and located in his name, which was done at Green' instance, supposing that by that means better prices could be obtained. That Talmadge applied to him for the purchase of the warrants, and on the 15th of September, 1849, he sold him two for 160 acres each. For one he was to pay $156.25 in seventy days; for the other $201.25, in one year. That he gave to witness his notes for those sums; that the notes were to be secured by the location of the warrants in the name of witness. That on the 26th of the same month, he sold to Talmadge a warrant for forty acres for the sum of seventy-five dollars, which was secured in the same way, by the title to the land. That the lands were so entered, and he gave to Talmadge bonds for the conveyance of the lands, upon payment of the notes. That he only paid sixty-five dollars at one time, and eighty-one dollars at another. That Talmadge never made any tender to him, but, on the contrary, he pressed payment for years without success. That Talmadge came to him, and said he desired to enter the lands, and wished to negotiate with witness to enter them for him. That it was then agreed that witness should make the entries, and give him a contract. That

the notes were given after the entry of the land. That the price was agreed upon before the entry was made, and the notes and bonds given afterward. That the terms were agreed upon before the entry.

Had Mix used money to enter these lands under the same agreement proved in this case, it is not probable that any one would, for a moment, doubt that it was a loan and security for the payment. Nor could any other conclusion be arrived at, if Mix had delivered these warrants to Talmadge and he had made the entries under their agreement. The price of the warrants had been fixed, the time of payment agreed upon, and the mode of securing the payment specified before the entry was made. It appears that the transaction will bear no other construction but that it was a sale of the warrants, and the entry of the land in Mix's name was intended as a security. Mix does not say that he or Green desired the land; on the contrary they were selling land warrants, and had adopted this mode of securing the payment of their price when sales were made on time, as Mix says they generally were. We are compelled to hold, from the evidence in the case, that the parties intended at the time that this should be a sale of the warrants for the sum for which the notes were given, and the entry of the lands should be as a security for their payment, and in equity it must be treated as a mortgage.

And the maxim, "once a mortgage always a mortgage," must apply in this case. The rights of innocent purchasers or creditors have not intervened. Plaintiffs in error hold as volunteers, and not as *bona fide* purchasers. They paid no consideration but received the conveyance as heirs of Thomas R. Green, for whom Mix held the premises in trust, subject to Talmadge's equity of redemption. The latter, then, had the right to redeem, and Burnap, by his purchase under execution, succeeded to all of his rights. If plaintiffs in error had desired to change the relation of the parties they should have filed their bill to foreclose. But they did not, so far as we can see, even return Talmadge's notes, or give him notice that they considered the contract abandoned, as they allege it was. While that would

not have operated as a foreclosure, it would have shown that they were relying upon an abandonment of the transaction.

It is urged, that there is no evidence of a tender. We do not understand that the law requires a mortgagor to make a tender before he can compel a redemption. All that is necessary is, that he pay the sum found by the court to be due within the time limited by the decree. A court of equity is not bound by any fixed rules in relation to the tender of money, but it will not allow the ends of justice to be perverted or defeated by the omission of an unimportant or useless act, which nothing but a mere technicality could require. *Webster* v. *French*, 11 Ill. 254; *Barnard* v. *Cushman*, 35 id. 451. A tender being unnecessary to give the right, the allegation of the tender unproved could not be held to defeat the previously existing right. The evidence fully sustains the decree of the court below, and it must be affirmed.

Decree affirmed.

AMOS HART

v.

THOMAS WING.

1. FRAUD—*jury to judge whether transaction fraudulent.* The court will not disturb the verdict of a jury upon the *bona fides* of a transaction properly submitted thereto.

2. SALE—*delivery of property sold.* Upon a sale of personal property no other delivery is necessary than such as the article sold is susceptible of.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The case is sufficiently stated in the opinion of the court.

Messrs. FLEMING, PILLSBURY & PLUMB, for the plaintiff in error.

Mr. A. E. HARDING, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It appears by the testimony in this record that a portion of the corn in controversy was bought by Mott with Wing's money, and Wing, therefore, had an equitable right to be protected as a creditor, and to be preferred by Mott over other creditors not so situated. Mott was in insolvent circumstances, and parties were engaged in removing this corn when he transferred it to Wing. The *bona fides* of the transaction was fairly submitted to the jury on the evidence and on the instructions, and they have found it was not a fraudulent transaction, and we perceive no grounds to doubt their conclusion or to justify an interference with their verdict.

Upon the question of delivery of the corn, it appears it was in cribs, in the ear, and was susceptible of no other delivery than that which was made and accepted. Such possession of it was given to Wing as its nature admitted. An actual removal of the entire mass of corn in the crib, or of any other cumbrous article, is not necessary to constitute a delivery and change of possession. *May* v. *Tallman*, 20 Ill. 443.

The judgment must be affirmed.

Judgment affirmed.

MADISON Y. JOHNSON
v.
J. RUSSELL JONES *et al.*

1. PERSONAL LIBERTY—*how a citizen may be deprived thereof—power of the President of the United States, in that regard.* A citizen has a right to his personal liberty, except when restrained of it upon a charge of crime, and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal.

2. The President of the United States has no rightful power, *in time of peace,* to cause a marshal to arrest a citizen of one State, without process, and without any charge of crime legally preferred, and convey him to another State, and there imprison him, without judicial writ or warrant, in a military fortress.

Syllabus.

3. In time of war, any soldier has the right to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose even unto death. This is the law of war.

4. But the status of any person, as to the question of belligerency, depends upon his citizenship or nationality. A belligerent is a subject of the hostile power, and his character, in that regard, depends upon that of the community to which he belongs.

5. So in the late war of the rebellion, the people of the rebel States were recognized as belligerents, but the citizens of the loyal States, resident and remaining therein, and not engaged in the war, were not belligerents or subject to arrest as prisoners of war, notwithstanding they may have been domestic plotters against the government, in full sympathy with the rebels and rendering them their moral co-operation and aid.

6. Military law, as distinguished from martial law, consists of the rules prescribed for the government and discipline of troops, which apply only to persons in the military or naval service of the government, whereas martial law, when once established, applies alike to citizen and soldier.

7. But martial law is in truth and reality no law, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer.

8. Martial law must be permitted to prevail on the actual theater of military operations, in time of war, as an unavoidable necessity. So, if a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, he can arrest and detain him so long as may be necessary for the security or success of his army.

9. But, beyond the enforcement of martial law on the actual field of military operations, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through the civil tribunals, and render a resort to the military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government, there seems to be no ground upon which it can be properly exercised. A state of war does not, of itself, suspend, at once and everywhere, the constitutional guaranties of the liberty of the citizen.

10. And, though the government be engaged in war, in the suppression of a ebellion in certain parts of the country, in those portions not engaged in the ebellion, where the civil courts, in the midst of loyal communities, are in the undisturbed exercise of their ordinary jurisdiction, martial law cannot properly exist, and the federal executive has no power to cause the arrest of citizens in such communities, for alleged disloyal practices therein, under his authority as commander-in-chief, and as incident to a state of war, and any person mak ing such arrest by direction of the President, must respond in damages to the party so illegally deprived of his liberty.

Syllabus.

11. POWER OF CONGRESS *over rights in the States.* Congress has no power to interfere with the remedies furnished by State laws, through State tribunals, for the injury of one citizen by another.

12. So where a person was illegally deprived of his liberty, under an order of the President of the United States, the remedy given by the laws of the State, in favor of the injured party against the person making the arrest, cannot be taken away by any subsequent act of congress.

13. MITIGATION OF DAMAGES — *in trespass for an illegal arrest and false imprisonment.* In an action of trespass against a civil officer for illegally arresting and imprisoning the plaintiff, while it is no bar to the action for the defendant to plead that the arrest was made under the order of the President, in time of war, for alleged disloyal practices of the plaintiff, yet such alleged facts may be proved in mitigation of vindictive or exemplary damages, and for the purpose of rebutting the presumption of malice. Mr. Justice BREESE dissenting.

14. PRACTICE — *where a part of several defendants in trespass plead specially — rights of the other defendants.* An action of trespass is several as to each defendant, and each has a right to make his own defense and to have it tried without being compelled to rely upon a defective defense made by a co-defendant.

15. Where one of several defendants in such action pleads specially such matter as shows the plaintiff cannot maintain his action against either, and the other defendants plead the general issue only, upon a demurrer to the special plea being overruled, and the plaintiff abides by his demurrer, — the defendants pleading the general issue have their option, either to claim the benefit of the judgment on demurrer in favor of their co-defendant, or to insist on a trial of the issue made by their own plea.

16. If the defendants who plead the general issue only, seek to avail themselves of the judgment of the court on the special plea of their co-defendant, and the court permits it, the plaintiff can except, and preserve against them in the record, the same question raised by his demurrer to the special plea.

17. But, if those defendants pleading the general issue insist upon a trial of that issue as to them, notwithstanding the ruling upon the demurrer to the special plea of their co-defendant, then, on such trial, a verdict and judgment may be had according to the proof.

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.

Mr. M. Y. JOHNSON and Mr. DAVID SHEEAN, for the appellant.

Mr. C. BECKWITH, with whom were Mr. B. F. AYER and Mr. F. H. KALES, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trespass brought by Madison Y. Johnson against J. Russell Jones, Elihu B. Washburne, John C. Hopkins, Oliver P. Hopkins and Bradner Smith. The declaration alleges that on the 28th day of August, 1862, in the county of Jo Daviess, and State of Illinois, the defendants with force and violence assaulted and arrested the plaintiff, and conveyed him on board the railway cars; that they transported him by the cars to Chicago, where they restrained him of his liberty for the space of two days; that they then conveyed him by force to the city of New York; that he was there imprisoned in Fort Lafayette for the space of two months; that he was then taken to Fort Delaware, in the State of Delaware, where he was imprisoned for the further space of three months, when he was set at liberty without trial or examination or any offense being charged against him.

All the defendants pleaded not guilty. The defendants Jones, Hawkins and Hopkins also filed special pleas, in which they set up the then existence of the rebellion, and aver that the plaintiff was an active member of a disloyal secret society known as the "Knights of the Golden Circle;" that this society was in league and sympathy with the rebels, and was a co-operating branch of the rebellion in the northern States, and plotting with the rebels for the overthrow of the government; and that said plaintiff was deeply engaged in aiding said society in their treasonable purposes, and was in fact levying war against the United States. The pleas further aver that the defendant Jones was at that time United States marshal for the northern district of Illinois, and that said defendants Hawkins and Hopkins were his deputies; that as such marshal he was ordered by the President of the United States to arrest said plaintiff, as a measure proper for the suppression of the rebellion, and convey him to Fort Lafayette; and that he did so arrest him and convey him to said fort in a comfortable

manner, and there delivered him to the custody of the officer in command of said fort, after which time the plaintiff was not in the custody of the defendant.

Another plea sets up the issuance of the President's proclamation of July 4, 1862, calling for three hundred thousand volunteers, and avers that the plaintiff was actively engaged in discouraging and preventing volunteering.

To these special pleas the plaintiff demurred. The demurrer was overruled, and, the plaintiff abiding by it, the court rendered final judgment on the demurrer in favor of the defendants who pleaded specially. The court then, on motion of those who had only pleaded not guilty, and against the objection of the plaintiff, impaneled a jury to try the issue made by that plea, and, the plaintiff offering no evidence, a verdict and judgment were given for those defendants. The plaintiff has brought the record to this court.

It will be observed that, when the arrest was made for which this suit was brought, there had been no general suspension of the writ of *habeas corpus*. We are not, therefore, under the necessity of considering the effect of a suspension of that writ upon the right of the government to make military arrests — a subject upon which eminent jurists have widely differed. This plaintiff was arrested on the 28th of August, 1862. The first proclamation of the President applicable to the State of Illinois, and to all persons anywhere arrested by the military authorities, was issued September 24, 1862. Doubts having been expressed as to the power of the President to suspend the writ without the authorization of congress, that body, on the 3d of March, 1863, passed an act authorizing the President to suspend it wherever, in his judgment, the public safety should require it. Acting under this authority, the President issued his second proclamation of the 15th of September, 1863. We refer to these historical facts, merely for the purpose of showing that the present case must be adjudged without reference to the question of what power the President had to make arrests during the late rebellion after the writ had been suspended.

Do these pleas, as above set forth, justify the alleged trespass?

That the President of the United States has the rightful power, *in time of peace*, to cause a marshal to arrest a citizen of Illinois, without process, and without any charge of crime legally preferred, and convey him to a distant State, and there imprison him, without judicial writ or warrant, in a military fortress, is a proposition which no one would have the hardihood to assert. That such power, in a season of peace, cannot be safely intrusted to any government by a people claiming to be free, is a political truism lying beyond the domain of argument. The right of the citizen to his personal liberty, except when restrained of it upon a charge of crime, and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal, is one of those elementary facts which lie at the foundation of our political structure. The cardinal object of our Constitution, as it is the end of all good government, is to secure the people in their right to life, liberty and property. The more certainly to attain this end, the framers of our Constitution not only proclaimed certain great principles in the bill of rights, but they distributed governmental power into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department it belongs to declare the causes for which the liberty of a citizen may be taken from him, to the judicial department to determine the existence of such causes in any given case, and to the executive to enforce the sentence of the court. If a citizen can be arrested, except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our government, so far as it relates to the protection of private rights, is overthrown.

But on this question we are not left merely to arguments drawn from the general spirit and object of our Constitution. Our forefathers had fresh in their memory the struggles which it had cost in England to secure those two great charters of

freedom, the magna charta of King John's time, and the bill of rights of 1688, and they incorporated into our fundamental law whatever was most valuable in those instruments for the security of life, liberty and property. They provided in article 4 of the amendments, that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." They further provided, in article 5, that "No person shall be deprived of life, liberty or property, without due process of law," and in article 6, that "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

It cannot be denied, that when this plaintiff was arrested without writ or warrant, and conveyed by the marshal to the city of New York, and there delivered, not into the custody of the law upon a criminal charge, but to a military officer to be imprisoned in a military fortress without judicial investigation, and without even the charge of crime, the letter and the spirit of all the foregoing provisions of the Constitution were plainly violated, unless, under the state of facts set forth in the pleas, their operation as to the plaintiff had been temporarily suspended. Was such the fact? On the answer to this question must depend the decision of this case.

It is urged by the counsel for the defendant, that, although the government cannot lawfully make an arrest of this character in time of peace, the power is necessarily incident to a period of war, when exercised in regard to those who are giving aid and comfort to the enemy. The argument, briefly stated, is as follows: The facts set up in the plea, and admitted by the

demurrer show, that the plaintiff was co-operating with the rebels. The rebellion was more than an insurrection. It was a public war, as decided by the Supreme Court of the United States, in the prize cases, reported in 2 Black, 635, at least after the passage of the act of congress, of July 13th, 1861. Being a public war, the government could exercise both belligerent and sovereign rights. While the rebels did not cease to be rebels, they were at the same time public enemies, and the government had the right so to treat them, notwithstanding they were citizens of the United States. It could exercise against them as public enemies all the powers given or recognized by the laws of war, and if the plaintiff was co-operating with them in the manner stated in these pleas, he too was a public enemy, and liable, not merely to prosecution in the civil courts, but to be arrested and imprisoned by the military power as a prisoner of war, or a belligerent.

We have tried to state the argument of the defendants' counsel fairly. Its fallacy consists in the assumption, that the plaintiff, by virtue of the facts alleged in the pleas, could be regarded as a belligerent in any such sense as to make him a prisoner of war. There is, it is true, in the third plea, an allegation that "the plaintiff was in fact engaged in levying war against the government of the United States," but this averment is too vague and general to be regarded by the court in any other light than as the conclusion or inference drawn by the pleader from his previous averments, in the plea, of specific facts. These averments are, that there was a secret political organization known as the "Knights of the Golden Circle;" that this organization was hostile to the government, and in close counsel and sympathy with the rebels, and a co-operating branch of the rebellion in the Northern States; that it was constantly planning and plotting with the rebels for the success of the rebellion, and that the plaintiff was an active member of said society, at the county of Jo Daviess and State of Illinois, and deeply engaged in aiding it in its treasonable purposes, and was in fact levying war against the government in the county aforesaid.

On the familiar principle that a pleading is to be construed most strongly against the pleader, all that the court can intend from this plea is, that the plaintiff was an active member of a disloyal secret society at the North, whose purposes were treasonable, and whose object was to aid the rebellion, and that said society, and the plaintiff as one of its members, were holding counsel with the rebels and plotting for their success. The first special plea avers that the plaintiff was discouraging enlistments, but the foregoing is the one relied on, and comprises the substance of the defense. It will be observed that the offenses which this plea charges against the plaintiff are laid as committed in the county of Jo Daviess and State of Illinois. It is, also, to be observed that the plea nowhere charges the plaintiff with being in the service of the rebel government, or with being in any manner connected either with the rebel army or the rebel government, except so far as through his membership of this alleged disloyal society at the North, he and the rebels were working for a common purpose. But no *act* of co-operation is averred against him, nor is it alleged that he furnished information or supplies to the rebel forces. It is not averred that he took up arms against the government, or committed any overt act of war or had ever done so. The substance of the plea is, that he was a domestic plotter against the government, in full sympathy with the rebels, and rendering them his moral co-operation and aid.

The plaintiff, if guilty of these offenses, merited not only the condemnation of all loyal and honorable men, but the severest legal punishment. On the 17th of July, 1862, which was prior to his arrest, congress had passed a law designed to reach cases of this character. The act authorized imprisonment not exceeding ten years, and a fine not exceeding ten thousand dollars, in the discretion of the court, to be pronounced against any person found guilty of giving aid and comfort to the rebels. Under this law a warrant might have been sued out in legal form against the plaintiff, by virtue of which the marshal could have arrested him and delivered him into the custody of the law for trial in the United States Court for the Northern Dis-

trict of Illinois. But do these offenses, charged in these pleas, make the plaintiff a belligerent, to be captured and held as a prisoner of war?

If the plaintiff was a belligerent, as insisted by the defendants' counsel, the order of the President was wholly unnecessary to authorize the arrest. Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose — even unto death. This is the law of war, to which the defendants appeal for their justification. Have counsel considered to what this theory of belligerency among our own citizens would have led, if reduced to practical application in the late war?

It is however a contradiction in terms to speak of a citizen of a loyal State, remaining in such State, and not engaged in the war, as a belligerent. A belligerent is a subject of the hostile power, and his character, in that regard, depends upon that of the community to which he belongs. In the case *Ex parte Milligan*, recently decided in the Supreme Court of the United States, the same point was made, and set at rest by the court in the following language:

"But it is insisted, that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years; was arrested there, and had not been, during the late troubles, a resident of any of the States in rebellion. If, in Indiana, he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"

This was the language of the majority of the court, speaking through Mr. Justice DAVIS, and although on another

point there was a dissenting opinion, on this there was entire unanimity. It will be remembered that Milligan having been charged with offenses of the same general character with those alleged against this plaintiff in the pleas, and tried before a military commission, and sentenced to be hung, had presented a petition to the Circuit Court of the United States for the district of Indiana, praying for his discharge under the provisions of the act of congress of March 3, 1863. By the express terms of the law he was entitled to the benefit of its provisions, or to his discharge under it, if held as a prisoner of war. This question, then, lay at the foundation of the case. The majority of the court dispose of it in the words above quoted. The minority, speaking through the chief justice, use language on this point not less emphatic. They say, "Milligan was imprisoned under the authority of the President, and was not a prisoner of war," and they held him entitled to his discharge under the act of congress, as he would not have been if held as a belligerent or prisoner of war.

This is decisive authority as to whether the plaintiff in the present case can be considered as having been arrested and imprisoned as a belligerent or prisoner of war. The principle indeed had already been settled by the same court in the prize cases above quoted, where they held, that all persons residing in the rebel States, whose property might be used to support the hostile power, were liable to be treated as enemies without reference to their personal loyalty. This is the settled doctrine, that the status of any person, as to the question of belligerency, depends upon his citizenship or nationality. The late rebellion grew to such consistency and magnitude, that our own as well as foreign governments recognized the people of the rebel States as belligerents, but the citizen and resident of a Northern State, did not become a belligerent, whatever may have been his sympathies, or however wicked his plots.

So far, then, as it is sought to justify the arrest of the plaintiff by assuming that he was arrested as a belligerent, and held as a prisoner of war, the argument is untenable. He was not a prisoner of war.

The foundation of the argument predicated upon the alleged belligerency of the plaintiff thus failing, it remains to be considered whether his arrest can be justified as an exercise of martial law applied to a citizen of Illinois, not in the military service. It is to be remarked, that the order for the arrest of the plaintiff is alleged to have been issued by the President as commander-in-chief, through the judge advocate general of the armies of the United States, though addressed to, and executed by the marshal of the northern district of Illinois, who is merely a civil officer. To what extent is martial law incident to a state of war?

As the phrases, "martial law" and "military law," are sometimes carelessly used as meaning the same thing, it is proper to point out the broad distinction between them. The Constitution authorizes congress to raise and support armies, and to make rules for the government thereof. Acting under this authority, congress has passed divers acts prescribing the rules and articles of war, and providing for the government and discipline of the troops. These rules constitute the military law, and are directly sanctioned by the Constitution, but they apply only to persons in the military or naval service of the government.

What is called martial law, however, has a far wider scope and application. When once established, it is made to apply alike to citizen and soldier. To call this system by the name of law seems something of a misnomer. It is not law, in any proper sense, but merely the will of the military commander to be exercised by him only on his responsibility to his government or superior officer. Sir Matthew Hale said (Hist. C. L. 54), "It is in truth and reality no law, butsome thing indulged rather than allowed as law." In the famous petition of right in the reign of Charles I., it was solemnly enacted, that ne commission should issue to proceed in England according to martial law, and the principle was re-asserted in the bill of rights of 1688. In the case of *Grant* v. *Gould*, 2 Hen. Blackst. 99, decided in the year 1792, Lord LOUGHBOROUGH said, that martial law, in the sense in which we are now considering it, did not exist in England, was contrary to the Constitution, and

had been for a century totally exploded. We make these references merely to illustrate how odious this system is to the spirit of liberty and good government.

That martial law must be permitted to prevail on the actual theatre of military operations in time of war, is an unavoidable necessity. It results from the very nature of war, which is simply an appeal to force, and where it is being waged, it necessarily suspends and displaces the ordinary laws of the land by those usages which are known as the laws of war. If a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, he can arrest and detain him so long as may be necessary for the security or success of his army. He can do this under the same necessity which will justify him, when an emergency requires it, in seizing or destroying the private property of a citizen. The authority to do either by military force is indispensable on the actual theatre of war. The want of such authority might lose a battle or peril the issue of a campaign. The power to do these things is implied in the power to wage war, and springs from an overruling necessity.

This is the power of a military commander on the actual scene of military operations, and where hostile armies are confronted with each other. We may, for the purposes of the present case, go further, and admit, that, if, in a district remote from the theatre of military operations, the popular sentiment is so disloyal to the government that one who aids and abets the public enemy, cannot be rendered powerless for mischief, and brought to justice by the arm of the civil law, that fact would justify the government in treating such district as virtually attached to the theatre of military operations, and in enforcing therein martial law or the laws of war, so far as might be necessary to the public safety. We may concede the right to do this as the exercise of a constitutional power, resulting from the power to wage war. Whether this right belongs to the President as commander-in-chief, or whether he must receive authority thus to act from congress, is a question not necessary for us to consider.

But beyond the enforcement of martial law on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through the civil tribunals, and render a resort to military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government, we know of no ground upon which its exercise can be defended. It is the result of an absolute necessity during a period of war, and should terminate with the necessity itself. The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the Constitution, and is inconsistent with every principle of civil liberty and free government.

But the admission that the government, by the joint action of congress and the President, or by the single action of the latter, may rightfully extend the limits of martial law beyond the actual theatre of military operations, and establish it in districts where the civil authorities are powerless to protect the public welfare against disloyal persons, does not aid the pleas in the case before us. These pleas do not aver that the plaintiff was arrested where the war was raging, or that the civil courts were not in the peaceful and uninterrupted exercise of their jurisdiction, or that the civil authority was in any degree impaired, or that martial law had been proclaimed. Neither can we presume such a condition of affairs to have existed. Indeed, it is a part of the public history of the war, of which we may well take judicial notice, that no organized rebel force ever trod the soil of Illinois, that the usual administration of the laws in this State was at no time suspended or interrupted, and that in that part of the State where this arrest was made the people were eminently distinguished for their devotion to the government and to the prosecution of the war. Neither had there, at the time of this arrest, been any official action by any department of the government establishing martial law, or suspending the writ of *habeas corpus* in the State of Illinois.

We must assume, both from the absence of any averment to the contrary in the pleas, and from the public history of the time, that this plaintiff might have been arrested by the ordinary legal process, and brought to trial before the ordinary civil tribunals, and if guilty, subjected without let or hindrance, to a merited punishment.

In the face of all these facts, how is it possible to hold that the plaintiff was legally subjected to the administration of martial law?

It is undeniable, if the government had the right to arrest him without a warrant, and imprison him without a trial, or charge of any criminal offense, it had an equal right to send his case before a court martial or military commission. The right to do the one necessarily implies the right to do the other, because both rest on the same theory of power to be exercised by the government in time of war. If it was lawful to arrest and imprison the plaintiff without any form of judicial investigation, it would certainly have been not less lawful to do the same thing upon the finding and sentence of a military tribunal. It can hardly be said that the laws of war could be applied to the plaintiff for the purposes of punishment, but not for the purposes of trial.

That he could not have been legally brought to trial before a military tribunal has been recently decided by the Supreme Court of the United States in the case *Ex parte Milligan*, already quoted. On the question whether congress has the constitutional power to establish military tribunals and martial law, in time of war, in districts where the war is not being actually waged, the court was divided. But on all those principles which govern the case now under consideration, there was entire unanimity. The majority held the imprisonment of Milligan illegal, and discharged him, on the ground that in a State where no war prevailed, and the jurisdiction of the civil courts was undisturbed, neither congress nor President, nor both united, could constitutionally create a military tribunal, or enforce martial law. The minority of the court while they dissent from this proposition, in its full extent, do nevertheless

concur in the judgment of the court discharging Milligan, on the ground that congress had not in fact authorized the creation of military tribunals in Indiana, and because the sentence of such a tribunal, passed upon Milligan, was void, and his imprisonment illegal. The power of the executive department to try and imprison Milligan by virtue of the laws of war, and in the absence of congressional authorization is thus directly denied by the entire court.

The majority of the court say, "Martial rule can never exist where the courts are open and in the proper and uninterrupted exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion, it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana where that authority was never disputed and justice was always administered."

The minority of the court used the following language:

"Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

"We by no means assert that congress can establish and apply the laws of war where no war has been declared or exists.

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."

As to the main fact, that martial law did not lawfully exist in Indiana, and that the trial and imprisonment of Milligan

were illegal, the court was not divided. That case is really decisive of the one before us. The case of Milligan was the weaker of the two, in this, that, at the time of his arrest and trial, in 1864, the writ of *habeas corpus* had been suspended by authority of congress, which furnished the counsel for the government an argument in support of the theory of martial law.

A case involving in some degree the question of martial law arose in the Supreme Court of the United States in 1851. *Mitchell* v. *Harmony*, 13 How. 134. During the war with Mexico, Colonel Mitchell, acting under the orders of Colonel Doniphan, had seized the private property of Harmony, for the service of the expedition, commanded by the latter officer. Harmony, who had been following the march of the army as a trader, after arriving in the Mexican province of Chihuahua, desired to stop there, but was compelled by the commander to accompany the expedition with his wagons, mules and goods. The property was eventually lost, and an action was brought against Colonel Mitchell to recover its value. The defendant urged that it was seized and impressed into the public service from necessity, also to prevent it from falling into the hands of the enemy. The court on this point say:

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

"But we are clearly of the opinion that in all these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is the emergency which gives the right, and the emergency must be shown to exist before the taking can be justified."

The court held the plaintiff entitled to recover.

The case of *Smith* v. *Shaw*, decided by the very able bench that constituted the Supreme Court of the State of New York in 1815, was a suit brought by a citizen against an army officer for false imprisonment during the war of 1812. The defense set up was that the plaintiff was a spy. The court said:

"If he was an American citizen he could not be charged with such an offense. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy."

It is urged that the power of the government to wage war is crippled unless it can arrest and imprison, by military force, disloyal persons. The necessity of arresting them is conceded, and, where the civil law and civil tribunals have been rendered powerless, we concede the right to use such military force. But, when the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, the appeal to the military arm or to martial law is needless. It is in the power of congress to enact laws which shall define offenses of this character, and bring to severe and merited punishment all persons guilty of aiding a public enemy. As already remarked, such a law was upon the statute book when this plaintiff was arrested, and it is not alleged, either in plea or argument, that he could not have been brought to an impartial trial in the northern district of Illinois. If congress should deem it necessary in time of war, it might go further, and enact, that a person arrested by the civil authorities on a sworn charge of giving aid and comfort to the enemy, should be held without bail until the meeting of the court and grand jury. It is not easy to see how the power of the government for successful war would be crippled, when furnished with such means of arresting disloyal persons, even though not able to arrest by means of military force in districts undisturbed by the war.

It is a fearful power that is claimed for the government by the counsel for the appellee, and one which no free government ought to possess. Even in England, in the latter part of the

last century, when secret political societies were formed hostile to the government and in league with the French revolutionists, or supposed to be so, although the country was at war with France, yet, while the high Tory administration of Mr. Pitt arrested, prosecuted, and punished with a pitiless vigor, it acted only through the ordinary agencies of the civil courts, and made no use of the military arm under the pretense that the offending persons were belligerents or public enemies. If this plaintiff was guilty of the charges made in the plea he merited arrest and a severe punishment, but he should have been punished in conformity to law. It is to be remembered that the question before us is one of power simply on the part of the executive, and not of deserving on the part of the plaintiff. If the President could rightfully arrest him by military force and consign him without process or trial to a fortress in the harbor of New York, he could do the same thing to any other person in the State of Illinois, however innocent of crime. This plaintiff may have been disloyal, and seeking to aid the rebels, but the most loyal citizen might have been arrested and sent away in the same summary manner. As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the State, from the governor down to the humblest citizen, would hold his liberty at the mercy of the military officer in command. For it is to be borne in mind that this power is not one to be exercised only by the highest officers of the government, in whose hands it might be exercised with moderation. It is claimed for the President, as commander-in-chief, and as incident to a state of war. But if it exists at all it exists as the law of war or martial law, and may be exercised by the military officer in command of any district without reference to his rank, as rightfully as by the President himself. He might be afraid to exercise it without orders from his superior, but if it exists at all it belongs to him as well as to the President. This theory, then, pushed to its logical results, is this: That whenever the government is engaged in suppres-

sing a rebellion in Florida, or waging war on the frontiers of Maine, martial law may be enforced in Illinois, where there is neither war nor public enemy, and where the courts are daily administering justice; and every citizen of the State shall hold his liberty and property at the whim and discretion of the military officer in command. The proposition thus stated in its nakedness may well startle us, when we remember how liable we are to be involved in war. But it is not true, for it is utterly at variance with the most cherished objects of the Constitution and its most solemn prohibitions.

We are not unconscious of the fact that the decision which we are obliged to make in the present case, on the facts appearing in the record, attributes to our late lamented President the unlawful exercise of power, and therefore implies a certain degree of censure. None can have a higher appreciation than the members of this court of the unselfish patriotism and purity of motive of that great magistrate. If he exercised a power not given by the Constitution, he undoubtedly did so under a full conviction of its necessity in the extraordinary emergencies wherein he was called to act. But neither our honor for his memory, nor our confidence in his honesty, can be permitted to sway our judgment here. The questions presented by this record must be decided by us as questions of abstract law. If this plaintiff has been wrongfully restrained of his liberty, he has the right to call upon us so to declare, without fear, favor or affection. It is unfortunate that cases having a political or partisan character should come before the courts, but when they do so we must declare the law as we believe it to exist. If we can know any other motive than the simple wish to truly expound it, or if, when our convictions are clear, we should hesitate to declare them without reference to what party it may please, or what offend, we should betray the solemn trusts which the people have committed to this court, and bring dishonor on the administration of justice.

Our attention has been called by the counsel for the defendants to two acts of congress, the first of which, passed March 3, 1863, provides in its fourth section:

"That any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest or imprisonment made, done or committed, or acts omitted to be done, under and by virtue of such order or under color of any law of congress; and such defense may be made by special plea or under the general issue."

The other act, passed May 11, 1866, provides in its first section that any arrest or imprisonment during the rebellion, by virtue of the order of the President, secretary of war or any military officer in command in the place where such arrest had been made or imprisonment had been inflicted, should come within the purview of the first act for all purposes of defense.

That it is the duty of congress to indemnify out of the public treasury any person who has been compelled to pay damages for an act performed by him in good faith, under the command of the President, for the purpose of suppressing the rebellion, is a proposition which few persons would deny. But the denial by congress, through a retrospective law, of all redress to a person whose property or liberty was illegally taken under a military order, is a mode of discharging obligations, which, however convenient, is not reconcilable with the principles of the Constitution. The Constitution confides to congress only legislative power, and that to be exercised only for specific purposes. When, therefore, it undertook to determine, in 1863 and 1866, that no injury to person or property committed prior to that time gave to the injured party a vested right of action, if committed under a military order, it assumed a judicial function which it is not authorized to perform. Whether this plaintiff was illegally arrested and imprisoned in 1862, depends solely upon the acts done and the laws in force, at that time; and these are facts to be determined by judicial investigation, and facts which no act of congress can change. If his personal liberty or property was illegally taken from him, then at once accrued to him a right to redress in the

courts, which no subsequent act of congress can take away. The rights of person and property are equally secured by the constitutional provision, borrowed from magna charta, that no person shall be deprived of them without due process of law. That congress has no power, by its own act, to divest these rights, is universally conceded, and we are unable to perceive the difference in principle between an act seeking to divest them directly, and one providing that, where they have been divested by unlawful violence, no remedy shall be had against the wrong-doer. Suppose congress should pass a law that no action should lie against United States marshals for any illegal acts theretofore done by them under color of their office, and a marshal should be sued for having, before the passage of the law, illegally taken the goods of one person under an execution against another. Can it be supposed such an act would be a defense to a suit brought for the trespass? And there is no difference in principle between such legislation and that now under consideration.

In 1862, on the facts disclosed by this record, one citizen of Illinois committed a trespass upon the rights of another for which the laws of Illinois then gave, and now give, a right of action. Since that time, congress has said, the action shall not be maintained. We must respectfully ask, whence comes the power to interfere with the remedies furnished by the State laws, through the State tribunals, for the injury of one citizen by another? There is really nothing to be said in support of this legislation. With all our respect for congress, we must hold these acts beyond its constitutional authority. If they are not so, its power over persons and property is limited only by its own discretion, and constitutional government is merely a theory.

There remains to be disposed of a question of practice. As has been already stated, only a portion of the defendants pleaded the special pleas. After judgment against the plaintiff had been rendered on the demurrer, and he had elected to abide by his demurrer, the court, against his objections and at the instance of those defendants who had pleaded only the general

issue, impaneled a jury to try that issue as to them. The plaintiff declined to offer any evidence, and thereupon the jury found a verdict for these defendants. The plaintiff contends that they were not entitled to a trial of this issue, which is final as to them, but that judgment should have been rendered in their favor on the demurrer to the special pleas of their co-defendants, so that in the event the judgment of the court on the demurrer should be overruled, he might then have his recourse against all the defendants. The rule is stated by Tidd, page 895, as follows:

"In actions of tort, as trespass, etc., where the wrong is joint and several, where the plea of one defendant is such as shows the plaintiff could have no cause of action against any of the defendants, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default — but when the plea merely operates in discharge of the party pleading it, then it shall not operate to the benefit of the other defendants."

By this we understand that the defendant who has pleaded the general issue only, may at his option claim the benefit of a judgment on demurrer in favor of his co-defendant who has pleaded specially, if such plea showed the plaintiff could not maintain his action against either. We do not understand, however, that he is obliged to do so. He has the right to insist on a trial of the issue made by his own plea, and the plaintiff cannot compel him to claim any benefit from the judgment on the demurrer.

In the present case the plaintiff, on the trial of the general issue, should have proved the trespass. If, under the rule quoted from Tidd, the defendants had sought to avail themselves of the judgment of the court on the special plea of their co-defendants, and the court had permitted it, the plaintiff could have excepted, and preserved against them in the record the same question raised by his demurrer to the special plea. If they had not sought to do this, but the evidence had failed

to show their participation in the trespass, they would have been entitled to a verdict and judgment.

This judgment must be reversed and the case remanded. In order, however, that our decision may not be misconstrued, we deem it proper to add, that although the matter of the special pleas is not a bar to the action, yet, on the trial, the defendants will be permitted to prove the facts alleged in them in mitigation of damages, and for the purpose of rebutting the presumption of malice. For the purpose of enabling the jury to determine justly the *quantum* of damages to which the plaintiff may be entitled, the matters set up in these pleas will be, if proved, a proper subject of consideration.

Judgment reversed.

Separate opinion by Mr. JUSTICE BREESE:

I concur in much of the reasoning, and generally, in the conclusions reached in the above opinion. I cordially concur in the sentiment, that the Constitution of the United States was designed by its framers, and has been hitherto so understood by the people, to be the same protecting instrument in war as in peace; that a state of war does not enlarge the powers of any one department of the government established by it, nor has any one of these defendants any right to urge "necessity," or "extraordinary emergencies," as a plea for the usurpation of powers not granted. The first is the tyrant's plea, and the other places the dearest rights of the citizen at the mercy of a dominant party, who have only to declare "the emergency," which they can readily create, pretexts for which, bad men are keen to find and eager to act upon. There can be, and there should be, no higher law for the conduct of the government in its relations to the citizen, than the Constitution of the United States.

I cannot accede fully to the doctrine declared in the last clauses of the opinion. Holding, as we do, that the executive order under which the defendants attempt to justify their conduct, was illegal and void, it ought not to go in evidence for any purpose — it is not in the case. A subordinate ought not

to be permitted to extenuate his offense by the allegation, his superior ordered him to commit it. The marshal was not bound to execute the order, he knowing it was arbitrary and had not the sanction of the law. He should take all the consequences of his obedience.

In these disjointed times, under this ruling of the court, a jury might very easily be impaneled, who would not assess more than nominal damages for one of the greatest outrages ever perpetrated in a country claiming to be governed by a written constitution and having a code of laws.

But I do not suppose pecuniary considerations influenced the plaintiff to bring this action, but rather to vindicate that Constitution and the laws so grossly violated in his person. This he has effectually done, by the unanimous judgment of this court, in holding, that the proceedings of which he complains were without any warrant of law, and in direct and palpable violation of the letter and spirit of the Constitution.

At the September Term, 1867, the appellant entered his motion, that the foregoing opinion of the court be amended, so far as relates to the question of practice therein decided, whereupon the court delivered the following additional opinion:

Per CURIAM: A motion has been made in this case by the appellant, that the court amend the opinion filed herein, so far as relates to the question of practice on the trial of the general issue pleaded by a portion of the defendants. The motion is overruled. The proper practice is correctly stated in the opinion. As therein stated, the defendants who pleaded the general issue had the right to have that issue, as to them, tried, and by insisting on such trial, to disclaim any benefit they might have claimed from a mistaken ruling of the court on the special plea. Their co-defendants had no right, by pleading a defective special plea, to compel them also to rest their defense upon a plea which they did not file, and thus be made liable to be brought again before the court for trial by a reversal of the judgment on the special plea, which might be had at any time

before the statute had barred a writ of error. An action of trespass is several as to each defendant, and each has a right to make his own defense and to have it tried, without being compelled to rely upon a defective defense made by a co-defendant. Counsel for appellant err in supposing they would not have been entitled to a judgment against the defendants who pleaded only the general issue if they had proved the trespass. When these defendants went to trial on that issue, declining to shelter themselves under the judgment of the court on the special plea, the court would have told the jury to find upon that issue only, and to assess the damages if they found the defendants guilty, and on that verdict the court would have rendered judgment. In remanding the case we reverse only the judgment on the demurrer. The judgment upon the verdict, as to those defendants who pleaded the general issue, and which is an entirely distinct and independent judgment, must stand.

We take this occasion to say, that the opinion hitherto filed in this case, in which the court below is directed to receive evidence of the facts set up in the special plea in mitigation of damages and to rebut the presumption of malice, must be construed as referring to vindictive or exemplary damages.

Motion overruled.

DAVID SHEEAN
v.
J RUSSELL JONES *et al.*

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

Mr. M. Y. JOHNSON, and Mr. DAVID SHEEAN, for the appellant.

Mr. C. BECKWITH, with whom were Messrs. AYER and KALES, for the appellees.

Syllabus.

Per CURIAM: This case is identical in principle with that of *Johnson* v. *Jones*, *ante*, and the judgment will be reversed for the reasons given in the opinion filed in that case.

Judgment reversed.

ISRAEL B. HOLMES
v.
JOHN H. HOLMES.

1. A, a minor, purchased his time from his father, and afterward by his own labor, and during his minority, earned a land warrant, with which he entered 160 acres of land in his own name. In a suit in chancery, brought by his father, to compel a conveyance to him of one-half of the land, upon an alleged verbal agreement, made with A before the entry of the land, that the same should be entered in A's name, but that when he arrived at majority he should convey to him one-half of the tract, the bill alleging that at the time of such entry complainant was entitled to the services of A, and therefore owned the warrant with which the land was entered, — *held*, that the land belonged to A, the proof showing that complainant was not entitled to A's services at the time he earned and obtained the warrant with which the entry was made.

2. CONTRACT — *verbal — for conveyance of lands — when confers no title.* A mere naked promise by a party to convey lands, supported by no consideration, if not afterward executed by a conveyance, confers no title, either legal or equitable, in the premises.

3. TRUSTS — *resulting — when cannot be raised.* A resulting trust cannot be created, unless the money of the *cestui que trust* was used in the purchase of the property in which the trust is claimed to exist.

4. SAME — *cannot be created by contract.* A resulting trust cannot be created by a contract or an agreement.

5. CONTRACT — *for conveyance of lands — when within the statute of frauds.* In this case, if a trust of any kind was created, by the agreement, between A and complainant, to convey the land, it was an express trust, and, there being no proof of the payment of the purchase money, the contract was void, being within the statute of frauds.

6. SAME — *when may be taken out of the statute.* A verbal contract for the sale of real estate may be taken out of the statute of frauds, by a payment of the purchase money, being let into possession, and the making of lasting and valuable improvements.

7. SAME—*payment of purchase money indispensable.* While all of these acts may not be required to take a case out of the statute, yet payment of the purchase money is regarded as essential to have such effect.

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

This was a suit in chancery, instituted, by the appellee in the court below, against the appellant, to obtain the conveyance from appellant and wife of the legal title to the east half of the north-west quarter of section 26, T. 26, R. 10, E. of the 4th P. M., in Winnebago county, Illinois, upon the ground that appellant held the legal title to the same, as trustee for the use and benefit of appellee. The further facts in this case are fully stated in the opinion. The court below entered a decree in favor of appellee, to reverse which the case is brought to this court by appeal.

Messrs. LELAND & BLANCHARD, for the appellant.

Messrs. BROWN & TAYLOR, for the appellee.

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

It appears, from the evidence in this case, that appellant, in April 1849, entered in his own name, at the land office in Dixon, with a land warrant, the premises in controversy. It appears that he was a minor at the time of the entry, but that he had by his own labor earned the warrant with which the land was purchased. Also, that in 1847, appellant had worked two months for Smith, and nine months in 1848, for which Smith was to pay him $100, with which it was agreed that a land warrant should be purchased, and appellee to pay whatever that sum might lack in paying for it, and with it the land was to be purchased, each to have one-half of the land when entered. Smith hired appellant at that time of appellee. After the labor was performed appellee wanted Smith to indorse a note for him for the amount of the wages, but he declined

unless appellant would consent. He however objected that the money should be thus appropriated, until his father, appellee, agreed to emancipate him then, if he would give him the $100, and would permit him to work for himself and appropriate his future earnings to his own use. This arrangement was made.

Appellant worked again for Smith in 1849, and earned and obtained the warrant with which the land was entered. He acted for himself in making the contract for his wages that year. He went to the land office, and entered the land in person and in his own name, with the full concurrence and under the advice of his father.

There was some evidence tending to contradict the evidence of Smith, that appellee had told him that the land was entered by appellant with his own means, and that it was his. Some members of the family testify that it was the understanding of the parties that half of the quarter was to belong to each at the time appellant left for Dixon to enter the land. But we think there is no doubt that the warrant with which the entry was made belonged to appellant. This is proved by Smith, who was cognizant of the agreement, that if appellant would give up the $100 first earned by appellant, that his father would give him his time, and that he might do as he pleased with his earnings. Also, by the statements of the father to different persons, that the land belonged to appellant. Nor is there any evidence as to how the father became entitled to any portion of the warrant, or of the land with which it was entered.

If the land warrant belonged to appellant, and of this we think there is no doubt, the land must have been his, as it was entered with the warrant and in his own name. A mere naked promise, if one was ever made, if not afterward executed by a conveyance, would confer no title, either legal or equitable. And so far as we can see the means employed in entering the land was the property of appellant; and if he offered to convey one-half to his father after he should make the entry, no consideration was then or subsequently paid to support the promise. It is true, that there is evidence that appellant called the east

half of the quarter his father's, but there is also proof that he proposed to convey it to his father for life only, and that there was such an arrangement at one time, hence he would naturally call it his father's. The mere fact that his father occupied the east eighty would naturally induce him to speak of it as his father's. Without proof of a consideration paid, this evidence would not establish ownership in appellee.

It cannot be claimed that there is a resulting trust in favor of appellee. First, because the evidence fails to show that any portion of his money was employed in the purchase of the land. Such a trust is never raised unless the money of the *cestui que trust* was used in the purchase of the property in which the trust is claimed to exist. In the next place, a resulting trust cannot be created by a contract or agreement. And the claim in this case is based upon the alleged agreement that one-half of the land should belong to appellee, and that it should be divided after the entry was made and the patent was obtained. If this could be construed into a trust of any kind, it would be an express and not a resulting trust. And if it was such, then the statute of frauds would present a question for consideration.

In this case the statute was set up and is relied upon to defeat a recovery. Then does this case fall within the statute? A sale of real estate may be taken out of the statute, by a payment of the purchase money, being let into possession, and the making of lasting and valuable improvements. While the cases may not all go to the length of requiring all of these acts to constitute such a part performance of the contract as to require a decree for the specific execution of the contract, still we are aware of no well considered case which has dispensed with the payment of the purchase money. This is regarded as essential to take a case out of the operation of the statute. As we have seen in this case there is no evidence, that appellee has paid the purchase money or any part of it for the premises in controversy. This being so, there is no ground for holding that the case is not within the operation of the statute. Even if the contract was proved, which we think is not, as there is not a preponderance in favor of appellee, still there is no evidence that he paid

the purchase money. There was much evidence, and it is conflicting, as to who made the improvements and paid for them on the eighty in controversy. It may be inferred that both contributed money and labor, and that the greater portion of the time the house was occupied by both parties as their residence. In the absence of proof of a sale and payment of the purchase money, or of a resulting trust, we must conclude that appellee contributed to the making of these improvements under some other arrangement, such as the right to occupy until compensated or for a lease for life.

We are of the opinion that the proof fails to sustain the decree, and that it must be reversed and the cause remanded.

Decree reversed.

THORNTON CUMMINGS
v.
OTIS C. TILTON.

1. CONTRACTS—*for the delivery of personal property—failure to deliver—when purchaser must show willingness, readiness and ability to pay.* In an action for the non-delivery of goods or personal property, which were to have been paid for upon delivery, the plaintiff must not only aver, but he must also prove, not only a willingness to pay, but a readiness and ability so to do.

2. SAME—*what will excuse a party from offering to deliver.* And in such case, if the purchaser informs the vendor that he cannot pay the money agreed to be paid upon the delivery of the article, the vendor is excused from offering to deliver it.

3. SAME—*performance—a question of fact to be determined by a jury.* The fact of the readiness and willingness of a party to perform his contract, is a question solely for the jury to determine, and which it is error for a court to attempt to pass upon, by its instructions.

APPEAL from the Circuit Court of Bureau county; the Hon. G. S. ELDRIDGE, Judge, presiding.

This was an action brought by the appellee against the appellant, in the court below, to recover for the alleged breach

of a contract between the parties, by which appellee claims to have purchased a large number of hogs from appellant, and which he refused to deliver. The case was tried by the court and a jury, and a verdict found for the plaintiff for $162.10; upon which judgment was rendered, whereupon an appeal was prosecuted to this court.

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

Messrs. ECKELS & KYLE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The weight of the evidence in this case, seems to be in favor of the appellant, that he did not deliver the hogs because appellee had told him he had not all the money to pay down for them. We infer from the proof, it was a cash trade, the money to be paid on delivery. If, then, the party who is to receive, informs the party who is to deliver, that he cannot pay the money, the latter is excused from offering to deliver.

It appears from the testimony of Wicks, that this was the reason why appellant did not offer to deliver the hogs, but we do not make a point on this, as there was other testimony before the jury, and they seem to have considered that of Plumby, for appellee, of more force and entitled to more favorable consideration than that of Wicks.

The appellant has assigned as error, giving the instructions asked by appellee. They were four in number, and we think the first was erroneous, as it required of appellee proof only of a willingness to pay on delivery. We hold a party should show, in such a case, not only a willingness to pay, but a readiness and ability to pay. *Hungate* v. *Rankin et al.* 20 Ill. 639; *Frink* v. *Hough*, 29 id. 145.

Readiness and willingness to perform, is a question of fact for the jury. It was therefore error in the court to pass upon the weight of evidence on that question, as it seems to have done in plaintiff's third instruction. Whether the facts proved by appellee, "showed his readiness and willingness to perform

the contract," was for the jury and not for the court. This instruction was, to that extent, erroneous. We see no objection to instructions two and four, except, as it regards four, we are not prepared to say the qualification "slight," should have been allowed. In all cases, and on all the points of a case, a jury is required to have sufficient evidence to satisfy them on the point made.

The cases above referred to but recognize the general rule recognized in actions for non-delivery of goods or personal property to be paid for at the time of delivery. The plaintiff must not only aver he was ready to pay at the time, but he must prove he was ready. Until this is done, a defendant is not bound to show performance, or a readiness to perform, on his part. *Topping* v. *Root*, 5 Cowen, 404.

For the error in giving the instructions one and three, the judgment must be reversed, and the cause remanded.

Judgment reversed.

JAMES MIX, impleaded, etc., *et al.*

v.

PEYTON R. CHANDLER *et al.*

1. PLEADING AT LAW—*joinder in demurrer a mere formality.* It is no objection that a demurrer was taken up and disposed of without a formal joinder, and judgment rendered thereon. A joinder in demurrer is unnecessary.

2. PRACTICE — *rules of — established by inferior courts.* This court will not reverse a judgment, merely on the ground, that the court, in rendering it, disregarded one of its established rules of practice, unless such violation be plain, and likely to result in injustice. A court is the best interpreter of its own rules.

3. SAME — *construction of the thirty-fourth rule of the Superior Court.* Under the thirty-fourth rule of practice, adopted by the Superior Court of Chicago, it is proper for the court to dispose of a demurrer in a cause when reached upon the docket for trial, without any notice; it being the duty of counsel to be present, and prepared for its disposition, whether upon an issue of fact or law.

APPEAL from the Superior Court of Chicago.

This was an action of assumpsit, brought by the appellees, Peyton R. Chandler, Samuel L. Keith, and Thomas Snell, against the appellant, impleaded with Benjamin F. Murphy, Leander E. Murphy, and Robert P. Murphy, at the May Term, 1865, of the Superior Court of Chicago. The further facts in this case are stated in the opinion.

Messrs. KALES & WILLIAMS, for the appellants.

Mr. GEORGE GARDNER, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

In this case the defendants demurred to the plaintiffs' replication. There was no joinder. When the cause was regularly called for trial the demurrer was heard and overruled, and damages assessed by a jury, upon whose verdict a final judgment was rendered. At a subsequent day of the term, one of the defendants moved to set aside the verdict and judgment, which motion was overruled.

It is urged for the appellants, first, that judgment was improperly rendered on the demurrer without a joinder, and, second, that the case was heard in violation of the rules of practice established by the Superior Court.

As to the first point, it is only necessary to say, as has often been said before, that a joinder was unnecessary.

As to the second, we would remark, that, as the Superior Court establishes its own rules of practice, and has the legal authority so to do, it must itself be their best interpreter, and we should not reverse a judgment merely on the ground that one of those rules had been disregarded, unless the violation was very plain and likely to result in injustice. In the present case we perceive no departure from the rules. The appellant insists that he was entitled to one day's notice of the argument of the demurrer. But the thirty-fourth rule provides that causes shall be disposed of as they are called numerically for trial, and all unexpired rules shall terminate on the call of the

cause for trial. It is the duty of counsel to be in court when their case is regularly reached upon the docket for trial, and prepared for its disposition, whether upon an issue of fact or law, and they cannot complain if, issue being joined, the court disposes of it in their absence. The one day's notice required by the rules was, no doubt, intended to apply only to those cases in which a demurrer is to be argued in advance of the calling of the cause for trial. Such seems to be the construction placed by the court on its own rules, and it seems to us not unreasonable.

Judgment affirmed.

THE CHICAGO AND NORTH WESTERN R R. COMPANY
v.
CHARLES L. WILLIAMS.

NEW TRIAL—*verdict against the evidence.* When the proof, though slight, supports the verdict, and is uncontradicted, this court will not disturb it.

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

This was an action on the case brought by the appellee, against the appellant, in the court below, to recover for two thousand two hundred and sixty-nine pounds of iron, alleged to have been delivered to it as a common carrier, to be transported from Chicago to Harvard, Illinois, and which was lost. The facts in the case are fully stated in the opinion.

Mr. JAMES M. WIGHT, for the appellant.

Messrs. LATHROP & BAILEY, for the appellee.

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

The only question presented by this record is, whether the evidence sustains the verdict of the jury. There is no dispute

that one of the roads is liable to appellee for the value of the iron which was lost. And it is equally clear, that the Pittsburgh, Fort Wayne and Chicago railroad company had the iron in possession, and brought it to Chicago. It is contended, that it was transferred by that company to the cars of appellants, which were near to the transfer house of the first named company, for the purpose of being placed therein. Appellants, on the contrary, contend that it was not placed in their car for further transportation, or otherwise.

Reynolds swears, that, previous to and at the time the iron came to Chicago, he was in the employment of appellants, acting as their agent in transferring freight from the Pittsburgh, Fort Wayne and Chicago Railroad company, to the cars of appellant; that he received this freight from that company; gave a receipt to the other company for it, and entered it in his check book. That he afterward got the receipt back, but that he invariably gave a receipt for freight when it was loaded into appellants' cars from the transfer house of the other company. That it was the usage of the other company not to permit freight to leave their grounds without a receipt. That it was his business to receive freight, and give receipts therefor at the depot of the other company; and he was not in the habit of giving receipts until the freight had been checked out at appellants' depot. This evidence, uncontradicted, is amply sufficient to sustain the verdict.

Crowley, another employee of appellants, testifies, that when he checked out the freight at their depot, the iron was not in the car and was not found, and that it did not reach appellants' depot. That he remembers the iron was billed by Reynolds as transferred to the car, but when he checked the freight out of the car, the iron was not there, and that he at once gave notice to Reynolds and the other company, that the iron was short. Reynolds swears, that he remembered that the iron was transferred; remembers the number of bundles, and the mark on the bundles. We think the fact, that when appellants' agents some days afterward came to unload the car they did not find the iron, does not overcome the evi-

dence of Reynolds that it was placed by him in the car. The evidence of the two witnesses does not conflict in any particular. The testimony of both may be, and no doubt is, true. After the iron was placed in the car, it may have been, and no doubt was stolen, or otherwise wrongfully taken from the car. But having gone into the possession of appellants, they are liable to account for the property. We think the evidence sufficient to sustain the finding of the jury, and the judgment of the court below must be affirmed.

Judgment affirmed.

ISAAC COOK
v.
JOSHUA L. MARSH.

1. SURETIES — *obligation of, in a supersedeas bond.* The obligation of a surety upon a supersedeas bond, is limited to the prosecution of the writ of error with effect, and his undertaking is, that if the writ is not so prosecuted he will pay all resulting damages.

2. SAME. In an action of debt upon a supersedeas bond, the declaration assigned as breaches of the condition, that the writ of error had not been prosecuted with effect, but that the decree had been affirmed; and that the property mentioned in it had deteriorated in value since its rendition. The defendant filed a demurrer, which the court overruled, and gave judgment for the amount of the penalty in the bond, and nominal damages *only*, refusing to hear any evidence in support of the breaches assigned of deterioration of the property. *Held*, that it was error for the court, after having adjudged the declaration good on demurrer, to reject evidence offered to show the deterioration of the property; that the overruling of the demurrer was a recognition of the claim.

3. SAME — *extent of deterioration — the measure of damages.* The extent of the deterioration of the property would constitute the damages, which the plaintiff would be entitled to recover.

4. SAME — *rents from realty — when will not be allowed.* And in such case, a claim by the plaintiff for the rents received by the defendant from the real estate, after the rendition of the decree, will not be allowed, plaintiff having no right, by the decree nor under the law, to its possession or the rents thereof.

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

The opinion states the case.

Mr. W. T. BURGESS, for the appellant.

Mr. E. A. STORRS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court.

This was an action of debt brought in the Cook Circuit Court, by Isaac Cook against Joshua A. Marsh, on a supersedeas bond, in the penalty of $1,500.

The breaches assigned were, that the writ of error was not prosecuted with effect, but, on the contrary, the decree was, by the Supreme Court, affirmed; that the personal property mentioned in the decree, after the rendition thereof, became deteriorated in value to the amount of $1,500; that the real estate, after the rendition of the decree, and before its affirmance, deteriorated in value $1,500; that the then plaintiff in error, being in possession of the real estate, received $500 for rents after the decree was rendered, and upon its affirmance suffered the same to be sold for taxes levied on the premises to the amount of $200, etc.

A demurrer was interposed to the declaration, which was overruled, and, defendant abiding by his demurrer, a default was entered for want of a plea, and final judgment entered for $1,500, the penalty of the bond, to be discharged by the payment of six cents damages, assessed by the court. Exception was taken to the decision of the court, and the cause brought here by appeal.

It appears from the bill of exceptions that at the time of the assessment of damages by the court for breaches of the condition of the bond assigned in the declaration, the plaintiff having read in evidence the bond, the decree of court and order of affirmance, as set out in the declaration, offered, and was proceeding to call other evidence, under such assignment, to testify before the court; whereupon the court being of the opinion that the only breach of the condition of the bond that was well and legally assigned in the declaration was, that the writ of error had not been prosecuted with effect, and that under that assign-

ment the plaintiff was entitled to nothing more than nominal damages, and the defendant objecting to hearing such testimony, the court refused to hear it, and refused to assess any damages by reason of any such breaches, other than the one above, and upon that, to assess no more than nominal damages. To this the plaintiff excepted.

It was certainly right to hold that the responsibility of the defendant was limited to the prosecution of the writ of error, with effect, for that is the extent of his obligation; but he was liable to the plaintiff to respond to him in damages, for all the injury sustained by him, by reason of not prosecuting the writ of error with effect. The surety did not undertake to pay the amount of the decree, but he did undertake, virtually, if the writ was not prosecuted with effect he would pay all the resulting damages.

The declaration, with the breaches assigned, of this deterioration of the property, had been adjudged good on demurrer; it followed, therefore, it was competent to offer evidence to sustain the breaches, and in rejecting such evidence the court erred. We hold the court should have received evidence of this deterioration, and the extent of it would be the damages to which the plaintiff was entitled and ought to have recovered.

Had no supersedeas been obtained the plaintiff here would have had the right, under the decree, to have the dredging machines delivered to the master in chancery, within five days after the decree was entered, in the same condition they were in at the time of the decree, and the master was required to sell them and the real estate, which he would have done had not the supersedeas intervened. The proceeds of this property, when sold, would go to the plaintiff here, and if either suffered deterioration, by reason of the delay caused by the supersedeas, the defendant is bound to make it good.

These are claimed in the declaration, and the claim recognized by the court in overruling the demurrer.

The judgment of the Circuit Court is reversed and the cause remanded with directions to that court to hear evidence on the question of deterioration of the property, both real and per-

sonal. The claim for rent of the real estate cannot be allowed, inasmuch as the plaintiff here had no right, by the decree or under the law, to its possession or to the rents. There is no claim made by the plaintiff for the value of the use of the personal property.

Judgment reversed.

JOHN H. P. JONES

v.

HANNAH MILLER.

CHANCERY—*rescission of contracts.* Jones, the owner of certain lands which were incumbered by deeds of trust, conveyed the same to one Lloyd, subject to all recorded mortgages, for which Lloyd executed to him his note for $4,200. Subsequently Jones and Lloyd effected a settlement with the owner of the incumbrances, by which Jones and Lloyd and wife quitclaimed the premises to the mortgagee, Lloyd and the mortgagee at the same time executing a contract whereby the latter agreed to convey the lands to Lloyd upon the payment of $2,330.30, the amount found to be due to the mortgagee upon such settlement, in ten years at ten per cent interest. *Held,* that this transaction between the parties must be regarded as a rescission of the sale of the premises by Jones to Lloyd.

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

This was a bill in chancery filed in the court below by the appellant against the appellee and Charles D. Boynton, John Lloyd, Catharine R. Lloyd, and Samuel Boynton, to charge certain real estate with the payment of a note for $4,200, given by Lloyd to appellant as the purchase price upon a sale of the same by him to Lloyd. The facts in the case are fully stated in the opinion.

Mr. B. F. PARKS, for the appellant.

Messrs. KELLUM & LOWELL, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The facts in this case, as nearly as they can be ascertained from the somewhat unsatisfactory evidence contained in the record, are as follows:

Jones was the owner of a half section of land in De Kalb county, worth about twenty dollars per acre, and incumbered by deeds of trust in favor of one Boynton. The land was sold under the deeds of trust, and Boynton became the purchaser. He was nevertheless willing to let Jones redeem, and on the 28th of June, 1859, an account was stated between them, and the indebtedness agreed upon at $1,425. The land was also incumbered by a deed of trust to Hannah Miller, and on the day last named, at the request of Jones, she paid Boynton the $1,425, and he conveyed to her the land. On the 14th of November, 1861, Jones conveyed the land to Lloyd, his son-in-law, by deed of warranty, but subject to such mortgages as were duly recorded. The consideration of this deed was $4,200, for which Lloyd executed to Jones his promissory note. There is nothing in this record to indicate when the note was to mature. It was left by Jones in the custody of his daughter, Mrs. Lloyd, and has doubtless been destroyed. Mrs. Miller began to assert her title, and on the 1st of January, 1862, Jones and Lloyd had a settlement with her, and agreed upon $2,330.33 as the amount due. Jones and Lloyd, with the wife of the latter, thereupon executed a quitclaim deed to Mrs. Miller for the premises, and at the same time a contract was executed by Mrs. Miller and Lloyd, by which the latter agreed to pay her the said sum of $2,330.33 in ten years, with ten per cent interest, and on the payment of said sum she agreed to convey to Lloyd said premises. The evidence is not very satisfactory, but we must regard it as sufficiently proven by the testimony of Mrs. Miller and Mary Jones, that this arrangement was made on the part of Jones and Lloyd as a rescission of the sale by Jones to Lloyd. The inducement to Jones to make this arrangement seems to have been, that by this new contract, Lloyd agreed to support Jones during his life. and furnish a home to his minor

children during their minority, and on procuring a deed from Mrs. Miller, Jones was to convey the north-west quarter of the land to said minor children. On the other hand Jones agreed he would help to pay for the land.

This bill was filed by Jones, on the theory that the original contract between himself and Lloyd was still in force, and prays that a vendor's lien be decreed upon the land, and Jones' interest sold in payment of his note. It is apparent from what we have stated, as the just inferences from the testimony in the case, that the Circuit Court did not err in denying the relief prayed. That contract must be considered as rescinded by the new agreement between the parties, and the conveyance by Jones and Lloyd to Mrs. Miller. If Lloyd refuses to perform his part of this contract Jones can pursue his legal remedies under the new agreement, but his rights under the old one are gone. In the view we have taken of the case, the question of usury on the part of Mrs. Miller, does not arise. The decree of the Circuit Court dismissing the bill is affirmed, but it will stand dismissed without prejudice.

Decree affirmed.

ELISHA RUCKMAN *et al.*
v.
HUGH M. ALWOOD *et al.*

1. ERRORS — *what may be pleaded as a release of.* Where a party recovering a judgment, or decree, voluntarily accepts the benefits thereof, knowing the facts, he is thereby estopped to afterward reverse such judgment or decree. The acceptance operates, and may be pleaded, as a release of errors.

2. ATTORNEY AND CLIENT — *relations of — powers of attorney.* An attorney usually has the power to receive his client's money in a case in which he is employed, and this, by virtue of his retainer. The fact of employment implies such authority, unless limited, and even then a client would be bound, unless the party paying the money to the attorney, had notice of the limitation.

3. SAME — *power of attorney ceases with the termination of the relation.* The power of an attorney ceases upon the termination of the relation, after which any, and all acts of an attorney, whether in the matter of receiving the benefits of a judgment, or decree, releasing errors of record, or otherwise, are unwarranted, being without authority, and therefore do not bind the client.

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

The opinion states the case.

Mr. B. S. PRETTYMAN, for the plaintiffs in error.

Messrs. WEED & JACK, for the defendants in error.

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

This was a bill in chancery filed in the court below by defendants in error, against plaintiffs in error, to redeem the lands described in the bill, from a conveyance claimed to have been a mortgage. On the hearing below, the deed was declared to be a mortgage, and the sum loaned, with interest, was decreed to be paid, and a conveyance to defendants in error. To reverse that decree, a writ of error was prosecuted by defendants below. On filing the record in this court they assigned errors.

The defendants in error appeared and filed a plea of release of errors. It averred that they, in pursuance to the decree, had paid the money found by the court, into the hands of the circuit clerk for the use of plaintiffs in error. That they afterward, on the 17th day of October, 1862, accepted and received from the clerk $500, a part of the sum so paid into the hands of the clerk, whereby they released the errors in the record in this case. To this plea a replication was filed by plaintiffs in error, denying that they received that or any other sum of the money so in the hands of the clerk. An issue was joined to the country, and an order was entered referring it to the court below to impanel a jury, and try the issue thus formed. The record of the pleadings and order of this court was certified to the court below, and a jury was impaneled, and a trial was had, and the jury returned a special verdict, which is certified to this court.

The jury, by their special verdict, finds that Purple was of counsel for plaintiffs in error on the trial in the Circuit Court; that he was discharged by plaintiffs in error before the money

was paid to the clerk; that plaintiffs in error designed to take the case to the Supreme Court, and refused to receive the money when it was paid to the clerk; that Purple afterward sued plaintiffs and levied on their lands for his fee; that Purple afterward got the money of the clerk with full knowledge of all of these facts, but claiming to do so as attorney of plaintiffs in error; that Purple had no directions or authority from plaintiffs in error to receive the money; that they never ratified the act; did not know of it at the time, and never designed to accept the money, but designed to reverse the decree in the Supreme Court.

The evidence returned with the special verdict fully sustains all the facts which the jury have found. The question then arises whether the facts sustain the plea. It is the settled doctrine of this court, that where a party recovering a judgment or decree, accepts the benefits thereof voluntarily and knowing the facts, he is estopped to afterward reverse the judgment or decree on error; that the acceptance operates as and may be pleaded as a release of errors.

It is a rule of uniform application, that what a person does by another he is considered as doing by himself. But to be binding, that other must be fully empowed to act. If such authority is wanting, the act will not be binding on the person for whom it purports to be done. An attorney usually has power to receive his client's money in a case in which he is employed. And he may do so by virtue of his retainer. The fact that he has been employed implies the authority, unless it has been limited, and even then he will be bound by the acts of the attorney unless the party paying the money has notice that he does not have authority to act. But inasmuch as the power grows out of the relation of attorney and client, the power, of course, ceases when the relation ceases. After it has terminated, the attorney has no more power to act than any other person.

It is only by virtue of a power that one person can bind another. As to the latter, unauthorized acts are not binding. It is true, that cases may exist where the power does not exist,

and still the principal has so acted that power will be inferred, and he will not be heard to deny it. But in this case the jury find that there was no such power, and that the relation of attorney and client had ceased; that the attorney had acted contrary to the wishes of his client, and that the receiving of the money was never ratified or approved. The act being unauthorized, it must be treated as any other unwarranted act. The fund was deposited with a receiver of the court for the use of a party to the suit, and the receiver was bound to see to it when he parted with the fund that the person to whom it was paid was invested with authority to receive it. It would be a dangerous power to confer upon an attorney who had ceased to act as such in a case, afterward, without a new retainer, to release errors of record, by receiving the fruits of a decree without any authority. No one would say, that, had Purple, at the time he received this money, executed a release of errors and delivered it to defendants in error, it would have been binding. And no difference in principle is perceived in the two cases. There would be equally a want of authority in both cases, and they would be invalid. The facts found by the jury fail to sustain the averments in the plea. And the issue is for plaintiffs in error, and, defendants in error having failed on their plea, the decree of the court below must be reversed and the cause remanded.

Decree reversed.

JOHN KILEY *et al.*

v.

MARIA BREWSTER *et al.*

TRUST-DEED — *construction of a particular provision in.* Under a trust-deed containing a provision to the effect that it should be lawful for the grantee, in case of default, to enter in and upon the premises conveyed, and to sell and dipose of the same at auction, after having given notice, etc., it is not necessary, in order that a legal sale of the premises may be had by the trustee, that an entry or demand for possession should first be made by him. Entry in such case is not a condition precedent to the making of the sale.

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

The opinion states the case.

Messrs. GOUDY & CHANDLER, for the plaintiffs in error.

Messrs. SNOWHOOK & GRAY and Mr. ROBERT HERVEY, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of ejectment brought in the Cook Circuit Court by John Kiley and others against Maria Brewster and others to recover possession of part of lot 13 in block 2, Kinzie's addition, in which was a trial and verdict and judgment for the defendants. A motion for a new trial was denied. To reverse this judgment the record is brought here by writ of error, and presents a question of the first impression in this court, and of considerable importance, though lying in a small compass.

The controversy grows out of the construction to be put on this clause in the deed of trust under which the plaintiffs claimed title, and the instruction of the court thereon:

"It shall and may be lawful for the said party of the second part, his personal representative or his attorney, duly authorized, by virtue hereof, to enter into and upon all and singular the premises herein granted, or intended so to be, and to sell and dispose of the same, etc., at public sale at such hour and place as the said party of the second part may appoint, etc., and to make and deliver to the purchaser a deed of the premises," etc.

It was admitted the sale was regular, and that no entry on the premises had been made prior to the sale, or demand made for the possession.

On these facts the court instructed the jury "that no entry or demand of the possession of the premises having been proved

before the sale, to have been made by the trustee, that the sale so made was invalid. No title passed by the trustee's deed to the Kileys, and the jury should find for the defendants."

This instruction makes an entry upon the premises a condition precedent to be performed by the trustee, and it is so insisted here by the counsel for the defendant in error, on the authority entirely of the case of *Roarty* v. *Mitchell*, 7 Gray, 243.

We have examined that case, and it is like this in all essential particulars, but we cannot regard it as authority. There are no reasons given by the court for its conclusion, and the conclusion is not satisfactory. No similar case by any other court has been cited, and with our view of the law of the case, we cannot follow it for reasons which we will give.

It may be asked, of what use is an entry in any such case under our law which permits a sale of land by a party out of possession?

Next, what was the intention of the parties to this deed of trust as manifested by its terms? Certainly that the premises should be appropriated to the payment of the debt secured by the deed, and for that purpose the party of the second part could enter upon them and hold them as his own until the debt should be discharged. If that course was not deemed advisable, then the party of the second part could sell them. There is nothing in the deed requiring him, before he could sell, that he should enter. He is permitted to enter and take possession — nothing more. The right to enter, and the right to sell, are distinct modes of enforcing payment of the debt, to either of which resort might be had. We see nothing in the deed requiring us to hold that the entry was a condition precedent.

The sale being regular, the title passed to the plaintiffs in error, and they should have recovered the premises in the action. The instruction of the court prevented a recovery, and it being erroneous, the judgment of the Circuit Court must be reversed and the cause remanded, with directions to award a new trial.

Judgment reversed.

NATHANIEL S. PIERCE

v.

JULIA ANN MILLAY, by her next friend, etc.

1. DAMAGES — *vindictive in trespass cannot be given — malice being absent.* In an action of trespass, for personal injuries, when the act complained of is without malice, vindictive damages cannot be given.

2. SAME — *compensatory damages, only.* In such case, full compensation for the pain and suffering, loss of time, expenses incurred for medical treatment, and compensation for the injury, if permanent, is all that should be given.

3. NEW TRIAL — *excessive damages.* In an action of trespass, when the right of recovery is limited to compensatory damages merely, and a verdict for vindictive damages is given, a new trial will be granted.

APPEAL from the Circuit Court of La Salle county.

The opinion states the case.

Messrs. DICKEY & RICE, for the appellant.

Messrs. BOWEN & SHEPHERD and O. C. GRAY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of trespass, assault and battery, brought in the La Salle Circuit Court, by Julia Ann Millay, against Nathaniel S. Pierce, and a verdict recovered of $4,000 damages.

To reverse this judgment, the defendant has appealed to this court, and has assigned various errors, among which is, that the damages are excessive.

It appears from the record, that the plaintiff below, at the time of the alleged trespass, was quite a child, not more than six years of age, and under the care of her mother, who lived in De Kalb county, separate from her husband, whose residence, if he had any, was at Leland, in La Salle county. It seems the plaintiff, with an elder sister, were sent by the rail-

road, on the passenger train, from De Kalb county to Leland, by George Bennett, their brother-in-law, who was living with their mother at Somanauk, in De Kalb county. They reached Leland about noon, and went to the house their father had occupied, and found no one there. They were seen by defendant, Pierce, who told them to go over to the other house, which is understood to be the house occupied by Susan Pierce, a daughter of the defendant, he (Pierce) having taken possession of the Millay house, under a sale of it to him by Millay. It was proved by Isaac Target, an uncle of plaintiff, that he was at the train when the girls arrived, and he asked them where they were going, and they said their mother had sent them over to Leland, and told them to go to Mrs. Pierce's, and while he was talking to the girls he saw Mrs. Pierce on the opposite side of the street, and pointed her out to the girls, and went with them at once across the street to where Mrs. Pierce was, and one of the girls spoke to her, but he did not hear what she said, but he heard Mrs. Pierce, in reply to them, say, "Very well, I am going down to the farm in the evening, with the buggy, and I will take you down with me when I go."

Van Scoy also testified, that, about the middle of the afternoon of the day the little girls arrived at Leland, they were at his house playing with his little girl, and when asked by him what they were doing there, they said they had come from Somanauk, and were going home with Mrs. Pierce.

It further appears, when the buggy was ready in the evening, the defendant put the children in it, with Mrs. Pierce, who drove it, and was a good driver, and while proceeding to the farm, the horse took fright, and ran away. The little girls were thrown out, and the plaintiff's right arm was fractured above the elbow. The child was properly cared for at the farm, and surgical attendance provided by defendant, and when able to be moved, she was taken to Leland.

Several medical gentlemen pronounced the injury a very serious one, while Dr. Hinkley, a surgeon of thirty-two years' practice, does not seem to have a fixed opinion that the injury will be permanent,—it may, or it may not be. He thinks the

removal of the child to Leland, did it no injury, and it was removed on his advice. That the difficulty of the joint was caused by want of proper care after the removal.

There was other testimony not of sufficient importance to be commented upon. The above are the prominent facts touching the alleged assault and violence, and it would seem to have consisted in the fact of placing the plaintiff in the buggy and driving off with her.

The question whether this was done by defendant without authority, was fairly left to the jury, and they have found he had no authority for so doing. It is apparent the act was done without violence, and there is no evidence that the plaintiff objected to the proceeding. The most that can be alleged of the act is, that it was a technical trespass.

In the absence of all malice, which was expressly disclaimed by appellee's counsel on the argument of this cause, we are at a loss to perceive on what grounds the jury rendered this large verdict of $4,000. No outrage was committed by appellant by placing the appellee, apparently with her consent, in the buggy, and the accident which befell was of a nature difficult to be guarded against, and though a painful injury was caused by it, no ground is perceived for the recovery of vindictive damages, as these appear to be, or smart money. Full compensation for the pain and suffering, loss of time, expenses incurred for surgical or medical attendance, and compensation for the injury, if permanent, is all that should be allowed.

On the latter point the testimony is by no means satisfactory, that the fracture will amount to a permanent injury. The appellee is young, and will, in all probability outgrow it, and her arm become useful. She stated in her testimony before the jury, that she could then use it.

There must have been something outside of the record, which had unconsciously to the jury an effect upon them to render this verdict, for there does not appear to be any thing in the record which can sustain it.

Malice being absent, the right is narrowed down to the recovery of mere compensatory damages. This being the

extent, the judgment must be reversed and the cause remanded, that a new trial may be had.

Judgment reversed.

GEORGE HAMMER
v.
ASHBURY F. JOHNSON *et al.*

1. GRANTEE OF PARTY HOLDING EQUITABLE TITLE—*liability for purchase money on prior sale.* H., the owner of an undivided half of a mill, sold his interest to C., taking in part payment C.'s notes, and gave him a bond for a deed, to be made upon payment. C. assigned the bond to J., the owner of the other half, and soon after the mill was burned. On a bill filed by H. against J., to compel him to pay C.'s notes, *held*, it appearing, by the proof, that J., in purchasing from C., had never assumed the payment of the notes, and that their payment was no part of the consideration for the assignment, he could not be held liable therefor.

2. Nor can J. be compelled to account to H. for any portion of the insurance money received by him upon the destruction of the mill, the policy having been procured by J. to protect his own interest.

3. But, as to the boiler and other machinery saved from the fire, complainant held a lien thereon, the same as when it constituted a part of the mill, and, as to such property, J. having sold the same, he is bound to account to H. for one-half of the proceeds thereof.

4. And, such sale having been made upon credit, and without the consent of H., the risk of collection is upon J. alone, and he must account to H. the same as if it had been made for cash.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. AMOS L. MERRIMAN, Judge, presiding.

This was a bill in chancery, filed in the court below by the plaintiff in error against the defendant in error and others, to compel the defendant Johnson to pay certain notes made by one Chambers, and which had been received by plaintiff in part payment for the sale to Chambers of plaintiff's undivided half interest in a certain mill, the other half of which was owned by Johnson, who subsequently purchased Chambers' interest. The further facts in the case are given in the opinion.

Messrs. McCULLOCH & TAGGART, for the plaintiff in error.

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

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Hammer, being the owner of an undivided half of a mill, sold to one Chambers for $2,000, receiving $800 in money and the notes of Chambers for $1,200, and giving a bond for a deed to be made on payment. Chambers assigned the bond to Johnson, who had become the owner of the other undivided half. The mill was burned soon after the assignment, and this bill is filed to compel Johnson to pay the notes given by Chambers. The oath to the answer is not waived, and John son answers, denying that, in purchasing from Chambers, he agreed to pay his notes, or that their payment was any part of the consideration for the assignment. The assignment itself is a simple transfer of Chambers' interest in the bond, and makes no allusion to the unpaid notes. There is no proof to contradict, in this respect, the allegations of the answer. On this point, then, the case is within the principle of *Comstock* v. *Hill*, 37 Ill. 542, where it was held that an assignee, in a case of this character, incurs no personal liability, unless he expressly assumes the payment of the outstanding lien, or its amount is allowed in the purchase money, in which event the law would imply a promise.

Neither can Johnson be compelled to account to Hammer for any portion of the insurance money received by him, amounting to $1,500. It seems to have been received on a policy procured by himself to protect his own interest, and the amount can not have covered his own loss.

On both the foregoing points the Circuit Court ruled correctly, but there is one particular in which the complainant is entitled to relief. After the fire, he sold the boiler, and other incombustible machinery saved from the fire, to one Fickes, for $600. One undivided half of this property, though severed from the realty, was, while in the hands of Johnson, clearly subject to the complainant's lien, as it had been when a part

of the mill, and on its sale Johnson stands chargeable as a trustee for the proceeds. Equity will subject the proceeds acquired by his wrongful sale of the property to the same uses for which the property was held subject to a lien. *Gaty* v. *Casey*, 15 Ill. 189. Johnson in his answer explicitly admits the sale, not of his interest in the property, as suggested by counsel, but of the property itself, and claims the right to sell it by denying that Hammer had then or has now a lien upon it. Johnson received the notes of third persons in payment of the property, but he did this at his own risk. He had no right to make the sale without the consent of Hammer, but having wrongfully done so, and sold upon a credit, he must take the risk of collection upon himself, and account to Hammer as if the sale had been for cash. Hammer is entitled to a decree for $300, with interest from the day of sale.

Judgment reversed.

HENRY MILLS *et al.*
v.
JAMES MCCABE.

1. STATUTES — *concerning the act of congress relative to naturalization.* Under the act of congress of 1802, conferring jurisdiction upon certain courts for the purposes of naturalization, only courts of record for general, and not for special, purposes, were intended to be embraced within its provisions.

2. ELECTORS — *only qualified electors have a right of action for a rejection of their votes.* By the act of 1849, the right of action is given only when the vote of a qualified elector has been rejected.

3. SAME — *who will not be deemed a qualified elector.* "The Marine Court of the city of New York" is not a court of record within the meaning of the act of congress conferring jurisdiction upon courts of record to admit aliens to citizenship; and hence a person so admitted by an order of that court does not become a qualified elector, and cannot maintain an action, under the act of 1849, for a rejection of his vote.

WRIT OF ERROR to the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

The opinion states the case.

Mr. GEORGE C. CAMPBELL, for the plaintiffs in error.

Mr. OLIVER C. GRAY, for the defendant in error.

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

This was an action on the case brought by James McCabe, in the La Salle Circuit Court, against Henry Mills, Thomas Phillson, and Darius Fyffe, to recover damages for refusing his vote at a general election. Plaintiffs in error were judges of the election in the precinct where the vote was offered. It appears that defendant was a native of Ireland, but emigrated to this country, and claims to have been naturalized according to the laws of congress, previous to his offering to vote. Plaintiffs in error insist that he was not legally naturalized, inasmuch as the court before which his declaration of intention was made, and which administered the oath of allegiance, did not have jurisdiction for the purpose.

The only question which we propose to consider, is, whether that court was invested with legal authority to naturalize aliens under the acts of congress; if it had not, that ends the case. If it had, then the proceedings are sufficiently regular in other respects, to sustain the action and judgment of the court below.

The order admitting defendant in error to citizenship, was made and certified by the "Marine Court of the city of New York," which was created by the act of the general assembly of the State of New York. Congress has conferred a jurisdiction upon various courts, as well State as federal, for the purpose.

The act of 1802 provides that an alien may be admitted to citizenship by any one of the following named courts, upon proper case made. "The Supreme, Superior, District or Circuit Court, of some one of the States, or of the territorial districts of the United States, or a Circuit or District Court of the United States," and section three declares, "whereas

doubts have arisen whether certain courts of record in some of the States are included within the description of District or Circuit Courts, be it further enacted, that every court of record in any individual State, having common law jurisdiction, and a seal and clerk, or prothonotary, shall be considered as a District Court, within the meaning of this act."

These provisions seem to be clear and unambiguous, and the only question is, whether the "Marine Court" was embraced within the scope of their operation. That court had a clerk and a seal, and it had common law jurisdiction to the extent of $500, and whether it comes within the other requirements of being a court of record, depends upon the law by which it was created, and subsequent enactments which conferred and extended its jurisdiction.

In ascertaining the limits of its jurisdiction, we must be governed by the construction given to the act by the courts of New York. In the case of *Carter* v. *Dallimore*, 2 Sandf. 222, it was held, that while it was a court of record for some purposes, it was not authorized to give judgment on default without full proof of plaintiff's demand, in the manner required of justices of the peace. In the case of *Hughes* v. *Mulvey*, 1 Sandf. 95, the assistant justice's court, and the Marine Court, are referred to as courts of inferior jurisdiction, and not courts of record. In *Rice* v. *Platt*, 3 Denio, 81, the court held, that the Marine Court had no jurisdiction in a case of illegal arrest. In the case of *Cain* v. *Daley*, 3 E. D. Smith, 128, that court is classed with a justice of peace court. In *Feganiers* v. *Jackson*, 4 E. D. Smith, 483, the court says, the proceedings in the Marine Court on a trial are informal; the pleadings are oral; they have, in technical strictness, no judgment roll. Their judgment record is a justice's docket. There is, then, no bill of exceptions. And it was also held in another case, that the court, as to attachment suits, must be governed by the act prescribing proceedings in such cases before justices of the peace. The question, however, seems to have been settled by the Court of Appeals in New York, in the case of *Huff* v. *Knapp*, 1 Selden, 65, where it was held, that this Marine Court was not

a court of record, in the strict legal sense of the term. The court says, that it may be called a statutory court of record, having certain powers of such a court expressly given it by statute, and none others; and hence it had none of the incidental powers of a court of record. Having been decided by competent authority to be a court of record only to the extent that it was so declared by statute, and not to possess other powers incident to such a court, we are not authorized to hold it a court of record. A fair and reasonable construction of the act of congress requires us to hold that only a court of record for general, and not special, purposes, was intended to be embraced. The act has not declared, that a court of record, for some purposes only, shall be invested with such jurisdiction. Nor do we think such can be held to be the legislative intention.

The provision of the act of 1849, under which this proceeding is instituted, is contained in the 20th section. Sess. Laws, 75. It is this: "If any judge or judges of any election shall refuse to receive the vote of any qualified elector who shall take, or offer to take, the oath prescribed by this act, in such case every judge so refusing or neglecting to receive the vote or ballot, or opening or unfolding such ballot when the same shall be presented, shall be liable to be indicted, and on conviction shall be fined $500, and imprisoned not exceeding thirty days; and for every refusal or neglect to receive such vote, the party aggrieved may have an action on the case against the said judge or judges; the damages in such case shall not exceed the sum of $500."

It will be observed, that the right of action is given only when the vote of a qualified elector is rejected. When such an elector offers to take the oath, and they reject his vote, they can, under this provision, only become liable in case he was a qualified elector. This section has only authorized such elector to maintain an action.

As we have seen, defendant in error, although he had gone through the forms of admission to citizenship, did not become naturalized, and consequently was not a qualified elector. He,

therefore, was not entitled to vote, and no wrong was done him when his ballot was refused.

We deem it unnecessary to discuss the question in this case, whether the judges may reject the vote of a qualified elector, who has offered to take the oath, although there may be evidence to rebut the evidence of his right to vote. That question does not necessarily arise in this case.

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

Judgment reversed.

THE PEOPLE *ex rel.* HARTWELL FREEMAN *et al.* *v.* JAMES S. BARR, Clerk of Franklin County Circuit Court.

1. STATUTES — *concerning acts of* 1859, 1865 *and* 1867, *relative to the twenty-sixth judicial circuit — Franklin county not deprived of the judicial system.* The act of 1859, arranging Franklin county into the twenty-sixth judicial circuit, and that of 1865, fixing the terms of court therein, are not expressly repealed by the act of 1867. This last named act is to be construed as merely adding other counties to the twenty-sixth circuit, and not as depriving Franklin county of the benefits of the judicial system.

2. SAME — *repeal by implication — not favored.* If the acts of 1859 and 1865 are repealed by that of 1867, it is only so by implication, and such a repeal is not favored in the law. If statutes are seemingly repugnant, they should, if possible, be so construed that the latest one shall not operate as a repeal, by implication, of the former ones.

THIS was an application made to this court for a peremptory writ of mandamus, to be directed to the clerk of the Circuit Court of Franklin county to compel him to issue a summons, as set forth in the petition of the relators, and which he had refused to do. The facts in this case are fully stated in the opinion.

Mr. GEORGE W. WALL, for the relators.

Messrs. YOUNGBLOOD & BARR, for the respondent.

Mr. JUSTICE BREESE delivered the opinion of the Court:

By the act of 1845, the county of Franklin, with other counties therein named, composed the third judicial circuit, and the terms therein fixed for the second Mondays of March and August.

In 1849, the time of holding courts in that circuit was changed. The law of that year provided, that court should be held in Hamilton county on the fourth Mondays of March and August, and in the county of Franklin on the Mondays following.

In 1859, the legislature formed a new circuit called the twenty-sixth circuit, of which Franklin county was declared to be a part.

In 1865, an act was passed to change the time of holding court in the twenty-sixth circuit. The counties composing the circuit, at this date, were Franklin, Williamson, Johnson and Saline, and the time fixed for holding the courts therein were, in Franklin, on the second Monday of March and first Monday of August; in Williamson, on the fourth Monday of March and third Monday of August; for Johnson, on the second Monday thereafter, and in Saline on the first Monday thereafter.

In 1867, an act was passed to define the twenty-sixth judicial district of this State, and to fix the times of holding court therein, by which it is declared, that the counties of Johnson, Williamson, Saline, Gallatin and Hardin shall compose the twenty-sixth judicial circuit. The terms were fixed as follows: In Johnson, on the first Mondays of March and September; in Williamson, on the third Mondays of March and September; in Saline, on the second Mondays following; in Gallatin, on the second Mondays following, and in Hardin on the second Mondays following. Sess. Laws 1867, p. 62.

This act repeals no former act, nor does the arrangement of

the terms by it, conflict at all with the terms required to be held in Franklin county by the act of 1865.

James S. Barr, then being the clerk of the Circuit Court of Franklin county, was applied to as such clerk on the 6th day of April, 1867, by the relators for a summons in partition, to be returnable to the August Term of that court. This writ the clerk refused to issue, alleging as a reason for such refusal, that there was no August Term of said court; that by reason of the act of 1867, Franklin county was not within any circuit, and therefore there could be no August Term.

On this refusal an application is made to this court, for a peremptory mandamus, the clerk waiving an alternative writ. The facts are agreed upon, and are as above stated.

This court was once called upon to decide, if there was rightfully a coroner in this State, the present Constitution of 1847 omitting to create such an office. It was not denied, that the legislature might create such an office though the Constitution did not provide for it, but as the legislature had not so done in express terms, it was insisted, there had been no such officer since the adoption of this Constitution. This court held, as there was a recognition of such an officer in one or more acts of the legislature, it was equivalent to a legislative declaration, that such an office was in existence. *Wood* v. *Blanchard*, 19 Ill. 38. And in the case of *The People* v. *Thurber*, 13 id. 554, as to what officer was the successor of the clerk of the County Commissioners' Court under the old Constitution, which was abolished by the new, this court did not hesitate to hold, in view of the important duties that officer was required to perform, and which the continuance of the government required should be performed by some one, that the clerk of the new County Court did in all things succeed to the duties of clerk of the County Commissioners' Court.

Section 8 of article 5 of the Constitution declares, there shall be two or more terms of the Circuit Court held annually, in each county of this State, at such times as shall be provided by law; and said courts shall have jurisdiction in all cases at law and equity, and in all cases of appeals from inferior courts:

This provision of the Constitution is one of the very highest importance to the people, but it does not execute itself, and must be carried out by legislative action. This the legislature has done by the several acts passed, fixing the time of holding Circuit Courts in the several counties, and arranging them into circuits. Now the act of 1859, arranging Franklin county into the twenty-sixth judicial circuit, has never been repealed in express terms, nor has that county been formed into a circuit, or declared to be a circuit by itself. Nor has the act of 1865, fixing the time of holding court therein been repealed, and we see the times so fixed do not interfere in any manner with the times fixed for holding the courts in the other counties, as declared by the act of 1867. Courts can be held in all of them by the same judge, without any clashing.

This requirement of the Constitution, it cannot be presumed the legislature intended to disregard, by any legislation on this subject which has been brought to our notice. If the act of 1867 is to be so regarded, it would be void, for the behests of the Constitution are above all law.

It is then only by implication, under the language of the act of 1867 that the act of 1859, arranging Franklin county into the twenty-sixth circuit, and that of 1865, fixing the terms of the court therein, are repealed. Such a repeal is not favored in the law, and there is no essential repugnancy in these several acts; they can all stand consistently together, and the legislature be relieved of any suspicion of a design to disobey a vital command of the Constitution. If statutes are seemingly repugnant, it is the duty of courts so to construe them that the latter shall not repeal the former by implication.

We, therefore, hold — as Franklin county was made part of the twenty-sixth judicial circuit by the act of 1859, and as no other act has been subsequently passed, arranging that county to any other circuit, or making of itself singly and alone a circuit, and no express repeal of that act, and no repeal of the act of 1865 fixing the time of holding court in that county, and as the terms as there fixed do not interfere with the terms fixed by the act of 1867 — that this last named act is to be con-

strued as adding the counties of Gallatin and Hardin to the twenty-sixth circuit, and not as designed to deprive Franklin county of the benefits of the judicial system conferred by the Constitution and made operative and effectual by the act of 1859.

This avoids a seeming disregard of the Constitution, and carries out the will of the legislature, as expressed in the previous acts we have cited; and we are gratified that we are enabled to come to this conclusion, for to hold that one of the oldest counties in the State was without the judicial pale would involve its people, and others having commercial or other intercourse with it, in annoyances and troubles and calamities appalling to consider. No crime committed there could be punished, no debt over one hundred dollars could be collected, and its whole community, the good and the bad, would be deprived of that justice in the due administration of which much of its happiness and success depend.

A peremptory mandamus must be awarded.

Mandamus awarded.

JULIUS ROSENTHAL, Administrator, etc.,
v.
THOMAS T. RENICK *et al.*

1. EXECUTORS AND ADMINISTRATORS—*payment of debts—limitation of—circumstances control.* In determining the question, whether a creditor has waived his lien upon the property of an intestate, by failing to pursue his remedy within a reasonable time, in the absence of a legislative rule, each case must be left to depend largely upon its own circumstances.

2. SAME—*lapse of seven years—when a bar to such liens.* And in cases where the delay of the creditors is *unexplained*, and even where the title is still in the *heirs*, the period of seven years from the death of the intestate may be properly adopted, by analogies of the law, as a bar to such liens.

3. SAME—*a shorter limitation.* And in many cases a much shorter limitation may be applied, to protect innocent purchasers against the secret lien. The facts of each case must decide the limitation to be applied.

4. SAME—*lapse of seven years—when not a bar.* Where a person died in Ohio, having devised all of his real estate in Ohio, Indiana and Illinois, to R., first to pay all of his debts, and then to convey it to his son H., and subse-

quently such trustee and devisee died, the devisee H. leaving a will, and administrators with the will annexed were appointed in each of the States of Ohio and Illinois,—*held,* that the lien of a creditor upon the property of the testator was not barred by his failure to pursue his remedy within seven years after the death of the testator, it appearing that the property against which the lien was sought to be enforced, and of which the devisee H. died seized, had never been aliened by his devisee, nor any improvements made thereon *by him,* and that the estate was *still unsettled* in Ohio.

5. JUDGMENTS AND DECREES—*foreign judgments.* Where a judgment rendered by confession in the Court of Common Pleas, in the State of Ohio, was revived by *scire facias* in the same court, upon the following return of the officer upon the writ of *scire facias:* "June 3, 1853, served personally by copy. John Boyer, Sheriff,"—this court will presume such return to have been sufficient under the laws of that State to have authorized the order reviving such judgment.

6. SAME—*allowed as a claim against an estate by probate court.* A judgment rendered in the State of Ohio against the executor of an estate was allowed as a claim against the estate of the deceased in the County Court of Cook county. *Held,* that such allowance was only *prima facie* evidence of the justice of the demand against the estate.

7. SAME—*judgment against an administrator in one State no evidence of the indebtedness against the administrator of the same decedent in another.* And in such case, the claim having been founded upon a judgment to be paid in the State of Ohio, in due course of administration, its allowance by the County Court of Cook county was improper. A judgment against an administrator in our State, is no evidence of indebtedness against a different administrator of the same decedent in another State, for the purpose of affecting assets received by the latter under his trust.

8. ADMINISTRATION OF ESTATES—*rights of citizens of other States.* A citizen of another State, in which administration has been granted upon an estate, may come to this State and cause administration to be taken out here, a claim to be allowed, and real estate sold for its payment; and, in such case, it is not necessary to show that the personal estate in the other State has been exhausted.

APPEAL from the County Court of Cook county; the Hon. JAMES B. BRADWELL, Judge, presiding.

The opinion states the case.

Messrs. SCAMMON, MCCAGG and FULLER, for the appellant.

Messrs. BONNEY & GRIGGS and J. E. FAY, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application in the County Court of Cook county by Rosenthal, as administrator of Andrew Huston, deceased, for leave to sell real estate for the payment of debts.

Andrew Huston died in Pickaway county, Ohio, in the month of March, 1854. He devised all his real estate in Ohio, Indiana and Illinois, or elsewhere, to Jonathan Renick, to be disposed of by him for the payment of his debts, so far as might be necessary, and directed that the residue, after the payment of his debts, should go to his son, Renick Huston. Jonathan Renick took out letters testamentary in Ohio, in March, 1854, and died in September, 1862, when Thomas T. Renick was appointed in Ohio administrator *de bonis non*, with the will annexed, of said Andrew Huston.

The devisee, Renick Huston, died in February, 1864, leaving a will, and letters testamentary upon his estate were also issued to said Thomas T. Renick, who, with the devisees of said Renick Huston, is a defendant in this proceeding.

On the 15th of May, 1861, Julius Rosenthal, public administrator of Cook county, in this State, was appointed administrator of the estate of Andrew Huston, without reference to the will, and two claims were allowed against the estate — one in favor of Thomas Huston, for $6,346.09, and the other in favor of William Cassell, for $2,905.07. These claims were allowed in 1862. A petition was filed in the County Court of Cook county, for leave to sell land in payment of these debts, and on the 13th of September, 1862, the record of that court shows an order revoking the letters of administration, on the ground that Andrew Huston left a will, to which no reference had been had in granting the letters. On the 22d of January, 1863, Rosenthal was re-appointed administrator with the will annexed, the executor named in the will having departed this life. On the 26th of March, 1863, the claims of Cassell and Thomas Huston were again allowed, with the addition of the accrued interest. Another petition for the sale of real estate was filed on the 19th of September, 1863, which was amended in February, 1865, in order to make parties the devisees of Renick Huston, deceased. The petition was dismissed by the County Court, on the ground that the lien of the creditors had been lost by lapse of time.

An elaborate opinion of the learned judge who heard this

case in the County Court, has been embodied by counsel for appellees in their argument, and we concur in very much that is said by him upon this point, but we differ from him in the application of the law to the facts of the present case. If the real estate in Illinois, of which Andrew Huston died seized had been aliened by his devisee for a valuable consideration before the filing of this petition, or even if money had been expended by the devisee himself in improving such real estate, we should have no hesitation in saying, that the lapse of more than seven years between the death of Andrew Huston and the filing of this petition, would be a sufficient reason for denying its prayer. In many cases a much shorter limitation might be properly applied to protect innocent purchasers against this secret lien, and even where the title is still in the heirs, the period of seven years may be properly adopted in analogy to our statutes of limitation relating to the lien of judgments, and, under certain circumstances, to the action of ejectment, if the delay of the creditors in causing the application to be made, is unexplained. *McCoy* v. *Morrow*, 18 Ill. 519.

But where the legislature has not thought proper to fix a definite and inflexible period of limitation, it does not become the courts to do so. While it may be said, generally, that this secret lien is entitled to no special favor, and courts should be intolerant of laches, because the lien is secret, yet, in the absence of a legislative rule, every case must be left to depend largely upon its own circumstances. As said by the Supreme Court of New Jersey in *Sidell* v. *Mc Vickar*, 6 Halst. 56, "Reflection and experience both teach the extreme difficulty of prescribing any fixed rule which would in general operate safely and justly. The lesson is more impressively taught by the very wide conclusions to which enlightened courts have been led. The time, reasonable according to the situation of one estate, would in another be very unreasonable."

Now, in the case before us, it is not claimed, that the lands have ever been sold, or that the devisee of Andrew Huston has ever expended any money in improvements, in the belief that the lands were his, which he would lose by subjecting them to

the payment of the debts. It appears, also, that the estate is still unsettled in Ohio, and creditors may have been deterred from resorting to these lands, by the hope of receiving payment from the Ohio administrator. It is not sought to impeach the good faith of these proceedings. This is clearly what it appears to be upon its face, an honest attempt to secure payment of debts from the property of the man who owed them, and not a scheme for securing the title of valuable real estate, by seeking and finding some evidence of a debt long since forgotten, against some person long since dead, whose estate has been settled in the place of his domicile, and bringing the evidence of such indebtedness here, with the view of wresting a title from the heirs of the deceased person or their grantees. Cases of this sort sometimes arise, and are entitled at the hands of the courts only to the strictest law.

The delay, then, in the present case is explained, without imputing laches, by the fact that the estate is still unsettled in Ohio. Neither Renick Huston, the devisee of Andrew, could have complained of hardship in his life-time, nor can his devisees, the present defendants; since, so far as appears, they have expended no money on this real estate. It is only sought to apply it as natural justice would require, there being no countervailing equities in the way. Not only that, but these defendants claim under the will of Andrew Huston, and that will expressly directed his real estate in Illinois to be sold for payment of his debts, and that Renick Huston should take only after the payment of his debts. This, it is true, is not a proceeding to enforce the trusts of that will, nor has the County Court the power for such a purpose; but we may well recur to this provision of the will as showing, in reference to the claims of the defendants, that Andrew Huston intended his devisees should derive nothing from his bounty, until his creditors had received their dues; and, to accomplish this, he devised his property to a trustee, first to pay his debts, and then to convey to his ulterior devisee. Under these circumstances, we think this proceeding is not barred by the lapse of time, so far as appears on the present record.

We must now consider the nature of the two claims allowed. The claim in favor of Cassell was founded on a judgment rendered by confession in the Court of Common Pleas of Pickaway county, Ohio, on the 1st of June, 1847, and revived by *scire facias* in the same court on the 28th of February, 1854. It is objected that the service of the *sci. fa.* was defective. The record shows the following return of the officer: "June 3, 1853, served personally by copy. John Boyer, Sheriff." On this return the Court of Common Pleas entered an order reviving the judgment, and we must presume the return to have been sufficient under the laws of that State. This claim was properly allowed, and real estate should be sold for its payment.

The claim in favor of Thomas Huston was founded on a judgment rendered in 1860, in the Court of Common Pleas in Pickaway county, Ohio, against the executor of Andrew Huston. This claim has been allowed in the County Court of Cook county, but that makes it only *prima facie* evidence against the heirs, in a proceeding of this character, as decided by this court in *Stone* v. *Wood*, 16 Ill. 177; *Hopkins* v. *McCann*, 19 id. 113, and *Moline Co.* v. *Webster*, 26 id. 234. As this claim was founded solely on a judgment rendered in Ohio, against the executor in that State, and to be paid there, in the language of the judgment, in due course of administration, it was improperly allowed by the County Court of Cook county. A judgment against an administrator in one State is no evidence of indebtedness against another administrator of the same decedent in another State, for the purpose of affecting assets received by the latter under his administration. The administrators are not regarded as in privity with each other. Story's Conflict of Laws, § 522.

So far, then, as this claim of Thomas Huston was concerned, the application for leave to sell was properly denied.

It is suggested by counsel for the appellees that a citizen of another State in which administration has been granted, cannot come here and cause administration to be taken out, a claim to be allowed and real estate sold for its payment. But this has always been the practice, so far as our experience and

observation go, and we see no objection to it. There is nothing in our statute indicating an intention to confine this right to citizens of this State.

Neither do we deem it necessary to show that the personal property in the State of Ohio is exhausted. The Illinois administrator has nothing to do with the assets in that State.

We have disposed of all the questions in this record which we deem it necessary to notice, and reverse the order dismissing the bill, and remand the case for further proceedings in accordance with this opinion.

Judgment reversed

HENRY T. BLOW *et al.*

v.

JARED GAGE *et al.*

1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*power to make, and give preferences.* A debtor in failing circumstances may make an assignment for the benefit of his creditors, and in so doing, he may make a preference in favor of a portion of his creditors.

2. SAME—*must be in good faith.* But to be valid, it must be done in good faith; for, if intended to delay creditors, or otherwise for fraudulent purposes, or if the preference be a secret trust, it is void.

3. SAME—*will be rigidly scrutinized.* Transactions of this character are required to be fairly and honestly made, and, to that end, they will be rigidly scrutinized.

4 CHANCERY PRACTICE—*proof requisite to overcome a sworn answer.* Where an answer to a bill in chancery is required to be made under oath, and is responsive to the allegations of the bill, it must be received as true, unless disproved by the evidence of two witnesses, or that of one and corroborating evidence amounting to the evidence of another, such answer being evidence of a higher grade than that of a single witness.

5. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*of particular words in the deed.* It is no objection to a deed of assignment, that it contains this language: "deducting and retaining all such costs, charges, *damages*, expenses and disbursements, as shall be sustained, incurred, or reasonably due, for or in relation to the execution of the trusts." The use of the word "damages" therein does not vest in the trustee power to squander the assets, by the charge of fictitious damages.

Syllabus.

6. SAME — *reasonable costs and charges attending the execution of the trust allowed — whether provided for in the deed or not.* The law allows all reasonable charges, costs, expenses and disbursements, to be paid out of the fund, but they are always subject to be reviewed by a court of equity; and such disbursements will be allowed, whether provided for in the deed or not.

7. SAME — *damages awarded against a trustee — when will be allowed.* Where a trustee, in an effort to execute his trust justly, renders himself liable to damages, which are awarded against him, he will be allowed to retain the amount thereof out of the fund.

8. SAME — *reservation of the portion of the fund.* Where the schedule of unpreferred creditors contained this item, "Jacob Baker, house account, $11.93," and it appeared that one of the persons executing the deed was of the same name, this court will not presume that they are one and the same person, in the absence of all proof of the character of the debt, or of who such person is.

9. SAME — *employment of the debtor — when will not be regarded as a badge of fraud.* Where the trustee employed the debtor to assist him in the settlement of the affairs of the firm, the management of the trust fund remaining strictly under the control of the trustee, such employment will not be considered as a badge of fraud, unconnected with other facts tending to prove fraud.

10. SAME — *of a debt due to a former partner.* The fact that a debtor, making an assignment for the benefit of his creditors, includes in the list of preferred creditors a debt fairly and honestly incurred by him, in buying out a former partner, and for money loaned to him by such retiring partner after his withdrawal, cannot be regarded as a fraud upon the creditors.

11. SAME — *insolvency — what facts not sufficient proof of — to charge a retiring partner with a fraudulent design in selling out his interest.* It is no evidence that a firm is insolvent, because, if forced to wind up its business at a particular time, it would be unable to pay all of its liabilities. And it is no fraud upon the creditors, for one of its members to sell out to the other partners at such a time his interest in the partnership, and to be so there must be proof of such fraudulent design.

12. SAME — *of purchases made shortly before an assignment, arriving afterward, go to the general fund.* Purchases made by a firm some time before an assignment, arriving subsequently, the title thereto vests in the assignees, the seller having failed to exercise the right of stoppage *in transitu.*

13. SAME — *notice of failure need not be given.* There is no rule of law that requires a debtor to give notice of his failure.

14. SAME — *purchases before assignment — what will not be regarded as having been fraudulently made.* Purchases made by a party, on credit, at a time when he knew he could not pay his debts, will not, for that reason alone, be regarded as fraudulent.

15. SAME — *purchases made in contemplation of an assignment — fraudulent.*

But the rule is otherwise as to purchases made in contemplation of an assignment.

16. SAME—*fraud must be proved.* The fraudulent design of a debtor in making an assignment must be proved, and cannot be established by mere suspicion; but can only be sustained upon satisfactory proof of the fact.

WRIT OF ERROR to the Superior Court of Chicago.

The opinion states the case.

Messrs. STEELE & HERBERT, for the plaintiffs in error.

Messrs. GOODWIN, LARNED & GOODWIN, for the defendants in error.

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

It appears from the record in this case, that, for about three years previous to the 1st of February, 1859, Baker, Phillips, Stoutenburgh and Innis were partners in a wholesale drug store in Chicago, under the name of Baker, Innis & Co. That the capital stock put in was about $18,000, and was contributed equally by the partners except Stoutenburgh, who was to contribute services. In carrying on the business, the firm, from time to time, borrowed money to the amount of $40,000 to $50,000. These loans were effected by the indorsement of friends in New York, and were renewed in the same manner at their maturity.

On the 1st of February, 1859, Innis sold out his interest in the firm of Baker, Innis & Co. to the other members of the firm. They agreed to give him $6,000 for his interest, good will, etc., in the firm. They continued the business under the style of Baker, Phillips & Co. A notice of the dissolution of the former partnership, and of the continuance of the business by the new firm, was published. At the time he sold out, having drawn less from the firm than the other members, to equalize his account with theirs, they gave him $1,254.83. They afterward obtained from him $5,480 for the purpose of paying debts of the new firm.

On the 12th of November, 1859, the firm made a general assignment to Gage and Wilkinson for the benefit of creditors, they having either paid or renewed all of the debts of the old firm. The debts arising for money borrowed on the accommodation paper of their friends in the east had been renewed, as they matured, in the name of the new firm. By the assignment, these debts for money loaned on the indorsement of eastern friends, and the debt to Innis for money obtained from him, and the sum they owed on the settlement of their accounts, were made a first and preferred class; the other debts of the firm were placed in a second class, to be paid out of the remainder after paying the first class, or, if not sufficient, then to be paid *pro rata*. The assignees entered into possession, and carried on the business, so far as selling the stock was concerned, in the usual manner of selling for cash. After thus disposing of the assets for about one year, the assignees sold the remainder of the stock to Ward for the sum of $30,000, delivered to him the possession, and he continued Baker, Phillips and Stoutenburgh as clerks in the store, as they had been under the assignees.

Complainants sued the firm and obtained judgments, but were unable to obtain satisfaction of executions issued thereon. They thereupon filed their bill, alleging that the firm was insolvent when Innis sold out to his partners; that they were aware of the fact, and adopted that course for the purpose of defrauding their creditors, and to enable Innis to avoid liability for their debts; that the accommodation indorsers in the east knew the condition of the firm, and were parties to the fraud; that the subsequent assignment, the preference made to creditors, the sale of the assigned property to Ward, and the preference to the first class creditors, were all intended to carry out the fraudulent agreement; that Innis, by reason of the fraud, is still liable for the payment of the debts of the old firm; that the whole transaction originated in a corrupt agreement between Innis and them for the benefit of the parties, and is a fraud on the new creditors. The bill requires the anwers to be under oath. The answers were so made and

filed. Defendants deny all manner of fraud in the entire transaction, or in any one of its parts, but insist that it was in every thing made in perfect good faith. After hearing the evidence on a trial in the court below, a decree was rendered dismissing the bill at costs of complainants. To reverse which this writ of error is prosecuted.

That a debtor may make a general assignment for the benefit of creditors, no one can deny. And it is equally true, that, in doing so, the law permits him to make a preference in favor of a portion of his creditors. But to be valid and binding, it must be done in good faith. If the assignment be intended by the debtor to hinder and delay his creditors, or otherwise for fraudulent purposes, or if the preference be on a secret trust, then the instrument must fail, and may be declared void. Such transactions, like all others, are vitiated by fraud. To become binding, fairness and honesty of purpose are indispensable; and such transactions are subjected to the most rigid scrutiny. The interest of commerce requires that the law shall be so administered, that fair and just dealing shall be secured.

The case under consideration is one involving a considerable amount, and has been fully and ably discussed, and the questions involved have been forcibly presented on both sides. The theory of plaintiffs in error, is, that the entire transaction, in its conception, as well as its execution, was intended to defraud the creditors of the firm of Baker, Phillips & Co. This is the gravamen of the bill. It calls for the answers under oath, and they were so given. According to the plainest rules of chancery practice, such answers, so far as responsive to the bill, become evidence on the trial, — and not only so, but evidence of a higher grade than that of a single witness. It requires the evidence of two witnesses, or that of one and corroborating evidence equal to the evidence of another, to overcome or contradict such an answer. Plaintiffs in error then, by calling for discovery on oath, made the answers of the defendants evidence of that high character. In this case the answers deny all fraud, or intention to commit any, in clear and explicit terms. They declare the transaction to have been fair and

honest in all of its parts. In the face of such answers, then, plaintiffs in error can only rely for a recovery on clear and satisfactory evidence.

If such proof was adduced, we should find it in the testimony of witnesses, or in badges of fraud inhering to the transaction itself, or in both. We have discovered no evidence in this record that the defendants ever declared such a purpose, or any thing which they said from which it could be inferred. If fraud has been established, it is by the transaction itself, viewed in the light of surrounding circumstances.

When the instrument itself is examined, it contains no provision prohibited by law, or which can be held to render it fraudulent. It, in the usual form, assigns the property of the firm to the assignees, declares the preferences, and is executed in the usual mode. It is true the deed contains, in reference to the trustees, this language: "deducting and retaining all such costs, charges, damages, expenses and disbursements as shall be sustained, incurred, or reasonably due for, or in relation to the execution of the trusts." The principal force of the objection is, that the word "damages" leaves the trustees with too much power to squander the assets, by the payment of fictitious damages. We do not perceive that the objection is well taken. The charges, costs, expenses and disbursements attending the execution of the trust, are not specifically enumerated. The law allows such charges upon the fund, but requires them to be reasonable. They are always subject to be reviewed by a court of equity; and although the deed had not contained such a provision, the law would have authorized the retention of all such reasonable charges.

It is a proposition too plain to admit of doubt, that if the trustees, in an honest effort to execute the trust, were to render themselves liable to damages, and they should be awarded against them on a trial, they would be allowed to retain the amount of such damages. The trustees would have no more discretion in this matter than they would in retaining costs and expenses. In either case they could be compelled to account if the fund was thus improperly perverted. This but

expressed what the law implied. *Campbell* v. *Woodworth*, 24 N. Y. 304. This case is unlike the case of *Heacock* v. *Durand* (42 Ill. 230), where it was held, that the deed was void because it allowed counsel fees to be retained by an attorney who was himself the trustee.

It is again insisted that the assignment is rendered void because the second schedule of debts directed to be paid contained this item: "Jacob Baker, house account, $11.93." The record contains no evidence which explains the character of this debt or who Jacob Baker is. It is, however, insisted, that, as one of the persons executing the deed of trust is of the same name, we must therefore infer that they are one and the same person, and that this item was inserted for the purpose of reserving a portion of the fund to one of the debtors. Where we see that this schedule embraced debts to the amount of over $71,000, we can hardly suppose that so insignificant an item would have been deliberately inserted with such a purpose. But we are not authorized to judicially know that the person named in the schedule is the same person who executed the deed of trust. Our observation teaches us that it not unfrequently occurs that two persons bear the same name. If so small an item, intended as a reservation, proved to have been intentionally made in favor of one of the debtors, could be held to avoid an assignment of such magnitude, there is no proof in this record that this was to one of the debtors. Had the person who made the schedule been called as a witness, he could no doubt have stated whether it was the account of Jacob Baker, the grantor, or another person, and how and why the entry was made. But he was not called.

When examined, do the circumstances of the case prove a fraudulent intent? Are there such badges of fraud as should invalidate the deed? We see that when the deed was made the trustees entered into full and complete possession of the trust property, and proceeded to carry out the trust reposed in them. This was in conformity with the usual course of business, and is what is required. It is true, they employed the grantors to aid and assist in settling the debts, the sale of

the drugs and the settlement of the business of the firm. We think, that the evidence shows, that, after the sale of the property, the management of the trust fund was strictly under the control of the trustees,—that the debtors acted under their directions. This was not a badge of fraud, unconnected with other circumstances tending to prove fraud.

It is insisted, that the fact that the debt to Innis for the amount they agreed to pay him to render their accounts equal, which was preferred, as well as the sum they owed him for borrowed money, and the debt due him for his interest in the firm, being placed in the second class of debts, evinces a fraudulent intent. We do not see why the firm should not be permitted to provide for paying a former partner who had withdrawn from the firm any sum they fairly owed him. It cannot be because he had once been their partner. We are aware of no rule which prevents such persons from transacting ordinary business with each other. Nor can it be that an indebtedness fairly and honestly incurred in buying out a partner cannot be paid or secured without being regarded a fraud on creditors.

If it is true that the other partners had drawn from the firm more than Innis, we do not see that it was unjust or fraudulent, on the withdrawal of Innis from the firm, for the other partners to agree to pay him an amount to make him equal. There can be no pretense, that they did not have the right to borrow of him the $5,480 several months after he had ceased to be a partner, or that, when they did so, they could not become legally bound for its payment. Nor do we discover that it was a badge of fraud to embrace it in the schedule of preferred creditors. It seems that he put into the firm $6,000 as capital stock when they first went into business; and that would seem to be the sum they, when he withdrew, agreed to pay him at their convenience. This cannot be held to be a badge of fraud. Such transactions as these are of frequent occurrence, and are in the usual course of business, and never of themselves, even in the minds of the most suspicious, excite a doubt of their fairness.

It is, however, said, that the firm was insolvent at the time when Innis withdrew, and that all of the partners knew the fact. That the firm might not then have been able, had it been forced into liquidation, to pay all of its liabilities, may be true. And that the same may be said of a large number of business houses of high standing, and which eventually overcame their inability to pay, and cease to exist with large fortunes, there can be no doubt. Such a state of things is inevitable from the very nature of the credit system. If it is a fraud on creditors for a member of a firm to sell out to his partners, because the house would be unable to pay all of its debts if forced to wind up its affairs, it is believed that a large number of partnerships could not be dissolved by a member selling out to his partner. We do not regard such a transaction as fraudulent, and to be held so there should be proof that such was the design. The fraudulent intent is denied in this case, and it is not so clear that they knew the firm would fail, as to render it probable that it was designed for fraudulent purposes. On the contrary, it was no more than reasonable to believe that the parties supposed their firm was in a reasonably safe and healthy condition, and that they could soon recover so as to be easy in their circumstances.

Their indebtedness was a little more than their assets, which, after the disastrous year they had just passed, was not surprising; and, as the partners deny that any fraud was intended, this fact does not overcome the denial. Again, if the design was to perpetrate fraud in the manner charged, we are at a loss to understand why it was that Innis loaned the firm $5,480 after all of the indebtedness of the former firm had been paid or renewed, and he entirely released therefrom, and this, too, but a short time before the failure occurred. If the object of the parties in making the sale was to get him released, we are unable to comprehend why he should, after the end had been accomplished, voluntarily advance such a sum, so short a time before the next step was taken by which it is insisted the preference was to be given to a portion of the creditors.

It is urged, that, as the firm had ordered goods that had not been received, their appropriation to the general fund was a badge of fraud. It seems these articles had been ordered some time before, and had not been received. After the assignment was made, the assignees took these, as well as all other property, into possession for the benefit of the creditors. Upon their arrival, the legal title vested in the assignees, the seller having failed to exercise the right of stoppage *in transitu.* We are aware of no rule of law that required the firm to give notice of their failure. It has never been considered fraudulent for a business house to purchase on credit simply for the reason that they knew that they were unable at the time to pay their debts. If they were to make such purchases in contemplation of making an assignment, it would no doubt be otherwise.

When they were notified that their eastern friends would no longer indorse for them, and that they must protect their paper at maturity, one of the partners immediately went east for the purpose of making other arrangements to sustain their credit, but in this he failed. From the time they received this notice, the book-keeper testifies that no more purchases were made. This would seem to negative the idea that they had previously contemplated an assignment, or that they designed to make purchases with a view to the assignment.

In this case, the evidence is so voluminous, that we cannot discuss it in detail, but must content ourselves by referring to a few of the most prominent portions of the proof. But, after a careful examination of the entire record, we are compelled to say that the plaintiffs in error have failed to prove that the assignment was made in fraud of their rights, or was fraudulent in law or in fact. The transaction bears on its face no evidence of bad faith; and, if there was a secret intent to hinder or delay creditors, it is denied under oath, and the evidence fails to disclose the fact. Fraud must be proved, and cannot be established by mere suspicion. And while the law abhors fraud and crime, at the same time it is unwilling to impute either on slight and trivial evidence, thereby wrong-

fully destroying the character of men worthy of confidence and respect. Such imputations are grave in their character, and should not be lightly made, and should only be sustained on satisfactory evidence.

The decree in the court below must be affirmed.

Decree affirmed.

DANIEL F PEASE
v.
CHARLES ANDERSON.

OFFICER—*how far process a protection.* When an officer, by virtue of an attachment, seizes property claimed by a third person under a sale from the defendant in the attachment suit, and judgment is recovered in the attachment suit, such officer, when sued for the property so seized, may show, that the sale of the property levied on was in fraud of creditors, and that, as to that property, he represented creditors.

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

This was an action of trespass, originally commenced before a justice of the peace, by the appellee, against the appellant, and one Daniel Corey, for levying upon certain property, under an attachment, in favor of one Brundage, against Charles Bowman, as the property of said Bowman, which said property appellee claimed as having been purchased by him from Bowman, prior to the commencement of the attachment suit. On the trial before the justice, the appellee obtained a judgment, and an appeal was taken to the Circuit Court of De Kalb county, when a trial was had before the court and a jury, and a verdict rendered in favor of the appellee, for eighty-five dollars, upon which judgment was entered, to reverse which the case is brought to this court by appeal.

Mr. R. L. DEVINE, and Mr. L. LOWELL, for the appellant.

Mr. C. J. METZNER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

There is but one point presented by this record deemed of sufficient importance to be noticed at length, and that is the fourth instruction given for the plaintiff.

That instruction is as follows: "The defendant can only attack the sale in question as fraudulent, by showing that he represented creditors, and that the affidavits and attachments in this case, of themselves, do not prove such creditors. Neither does the justice's docket prove the same, judgments in attachment, where there is no personal service, being no evidence of debt."

We are of the opinion that the judgment in the attachment suit, and the execution thereon, authorized the constable to show that the sale of the property levied on was in fraud of creditors; as to that property, he represented creditors. *Cook* v. *Miller*, 11 Ill. 611; *Schlussel* v. *Willet*, 34 Barb. 615.

The instruction was erroneous, and for this error the judgment must be reversed, and the cause remanded.

Judgment reversed.

JOSEPH G. STOLP *et al.*

v.

CHARLES HOYT.

1. CHANCERY — *riparian rights — when will not interfere until after the right and its infringement — established at law.* Where three persons, in possession respectively of certain lands, viz., A of those lying upon the east bank of a river, B of those lying upon the west bank, and C of an island in the center, made their respective entries for the same at the government land office on the same day, and which lands had been separately surveyed and purchased by them as distinct tracts, — *held*, in a suit in chancery brought by A against the others to settle their respective rights to the use of the water bounding these grants, that a court of equity could not acquire jurisdiction in such case, to settle the legal rights of the respective parties to the water-course, until after the right and its infringement had been established in a court of law.

2. FORMER DECISIONS. The case of *Bliss et al.* v. *Kennedy et al.*, 43 Ill. 67, cited in support of this doctrine.

Opinion of the Court.

3. WATER-COURSE—*riparian proprietors—rights of, sufficiently certain to be determinable at law.* That the rights of the respective parties in the water are sufficiently certain to be easily determined by a court of law for any infringement thereof by either.

4. SAME—*boundaries.* That, the mainland and the island having been separately surveyed and purchased by these parties respectively as distinct tracts, the grantees of the mainland cannot claim, that the island purchased at the same time by C was not reserved but included in the grant to them.

5. SAME. That, the grant to each being separate and distinct, neither can claim beyond the calls of his entry and patent. That C acquired the same riparian rights as A and B, two *fila aquæ* being established, one on each side of the island.

6. SAME. In a grant of land lying on a stream not navigable, if there be a clear reservation of the islands, either expressly or by implication, they do not pass to the grantee, and the *filum aquæ* which bounds the grant is the center thread between the mainland and the island.

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

The opinion states the case.

Messrs. DICKEY, WHEATON & CANFIELD, E. A. STORRS and R. G. MONTONY, for the appellants.

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

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, brought by Hoyt against Stolp, Gill and others, to settle the rights of the respective parties to the use of certain water power in Fox river. Hoyt owned on the west bank, Gill on the east, and Stolp an island in the middle of the river, containing about ten acres, on the head of which rested the dam. The court, on the final hearing, made a decree determining the respective shares of Hoyt, Stolp and Gill in the water, and appointing commissioners to make partition in accordance with the decree, and enjoined the parties from using the water except as specified in the decree. Stolp and Gill appealed.

In Stolp's amended answer to the bill, objection is taken to the jurisdiction, and the same objection has been urged in this

court. We are obliged to hold the objection well taken. In the case of *Bliss et al.* v. *Kennedy et al.*, 43 Ill. 67, we held that chancery would not interpose by injunction in cases of this character, until after the right and its infringement had been established in a court of law.

It is, however, urged, by the counsel for appellee, that there was a tenancy in common in this water, and that chancery could take jurisdiction for the purposes of partition, and it is also insisted that the rights of the several parties are so far undetermined and uncertain that the complainant can have no adequate remedy at law for an infringement of his rights in the water. This argument makes it necessary to state our conclusions upon some of the questions made by counsel in regard to the title of some of the parties.

It appears, that, prior to the year 1835, J. and S. McCarty had what was called a "settler's claim" to this quarter section and the water-power, and had built a mill-dam and made other improvements. It does not, however, appear in the record, nor is it claimed in the argument, that they had what would have been recognized under the laws of congress as a right of pre-emption. In the fall of 1834 the McCartys sold to one Lake their claim to that part of the quarter lying on the west bank of the river, together with half of the dam and water-power, and Lake went into possession. In November, 1835, the McCartys sold to Frederick Stolp a portion of the island and of the water-power, and Joseph G. Stolp, the appellant, went into possession, as claimed by him, under this sale. On the 8th of June, 1842, up to which time the land belonged to the United States, Lake entered at the government land-office the fraction of the quarter lying on the west bank; and on the same day Stolp entered the island, by the description of "the island in the S. W. quarter of section 22, township 38 north, range 8 east of 3d P. M.," and Samuel McCarty entered the fraction of the quarter lying on the east bank. In August, 1842, Hoyt, the complainant below, purchased Lake's title. Gill claims on the east bank, by virtue of a series of conveyances from McCarty, the deed from the latter bearing

date January 31, 1843, and having been recorded February 3, 1843. On the 1st of February, 1843, Samuel McCarty made a conveyance to the appellant Joseph G. Stolp, which the latter claims to have been executed in pursuance of the sale made to Frederick Stolp in 1835, already mentioned, but this conveyance to Joseph G. Stolp was not recorded until after the record of the first deed in the chain of conveyances from McCarty down to Gill. Stolp now claims both riparian rights as owner of the island on each side of the same, and also, as against Gill, so much of the water as was conveyed to him by McCarty's deed, insisting that his deed relates to the sale of 1835, and that his possession was notice to Gill. Hoyt, the complainant, insists, that, by virtue of his ownership of the west bank, he owns the water to the middle of the river, without regard to the island, and denies all riparian rights to Stolp growing out of the ownership of the island.

The McCartys, in selling to Lake the west bank and half of the water-power, in 1834, executed, so far as appears, no written instrument. Hoyt, then, claiming under Lake, cannot claim that any rights inured to him in the water-power, under McCarty's subsequent entry of the east bank. Since the title passed from the United States, there has been no tenancy in common between Hoyt and the McCartys. The rights of Hoyt spring solely from his ownership of the west bank of the river, and, if he is entitled to go only to the middle thread between the west bank and the island, then his claim is easy of ascertainment in a court of law, and there can be none of that difficulty in prosecuting an action for damages which counsel allege as a ground of jurisdiction. We think it clear that his title goes only to the center thread between his shore and the island.

It is urged by appellee's counsel, that a grant of lands on a stream not navigable includes all islands, or parts of islands, between the shore and the center thread of the stream, belonging to the grantor, unless reserved from the operation of the grant. This is true, but the converse of the proposition is equally true, — that, where there is a clear reservation of the

islands, either expressly or by necessary implication, they do not pass to the grantee, and the *filum aquæ* which bounds the grant is the center thread between the shore and the island. In such cases two *fila aquæ* are established — one on each side of the island. *Hopkins Academy* v. *Dickinson*, 9 Cush. 544; *People* v. *Canal Appraisers*, 13 Wend. 355; Washburne on Real Property, 677; Angell on W. C. 14. There would be no reason in the contrary rule. There is no more ground for holding the owner of the shore owns the water to the island, than there is that the owner of the island owns the water to the shore.

The question is, then, was there a reservation of the island by the general government at the time Lake entered the fraction of the quarter lying on the west bank? It must be remembered that Lake, Stolp and McCarty were all in possession of the west bank, the island, and the east bank, respectively, and they all made their respective entries at the government land-office on the same day. The fraction on each bank, and the island, had been separately surveyed, and the government sold and the purchasers bought them as distinct and independent tracts. It is impossible to suppose that either Lake or McCarty believed, or had any reason to believe, that in buying the shore fractions, they were in fact buying to the center thread of the river passing through the island, and that the island would be divided between them, when they knew that the island was an independent survey which Stolp was buying, and for which he was receiving a certificate of purchase at the same time they were making their own entries. As the government sold the island to Stolp at the same time it sold the main-land to Lake and McCarty, it is idle to say it did not reserve the island from the sale of the main-land. The reservation would hardly have been stronger if it had been written on the face of the certificates issued to Lake and McCarty.

But the counsel for appellee insist, that the survey of this quarter section into two fractions and an island, and its sale in this manner, were not authorized by the acts of congress in regard to government lands, and they quote the case of *Brown's*

Lessee v. *Clement*, 3 Howard, 660, as analogous to the case at bar. But it is not in point. In that case, one of the parties claimed under an entry and patent for the entire south-west quarter. The section was fractional, and had been surveyed and platted into two divisions of unequal size, an eastern and a western. The court held this survey unauthorized, and that the patent, calling for the entire S. W. quarter, entitled the patentee to claim the one hundred and sixty acres which would have been within that quarter had the survey been properly made. But in the case before us neither Lake nor McCarty entered or received a patent for the entire quarter. On the contrary, each entered a specific fraction of the quarter, while Stolp entered the island, and neither can claim beyond the calls of his entry and patent. There is no more reason for saying, that Lake by his patent took the island, than that he took the east shore, and there would be no more reason for giving him the island than there would be for giving it to McCarty, under the calls of their respective patents.

It is suggested that Stolp's entry, so far as concerns riparian rights, must be considered as having been made under an agreement with Lake and McCarty that the use of the water should be in accordance with the rights derived by contract from McCarty under his settler's claim. But there is not the slightest proof of such an agreement, and we are not at liberty to invent it and make it the basis of a decree. Possibly such may have been the fact, and it may have been, on the other hand, that the sales by McCarty, made while the title was yet in the government, were understood by the parties to be merely a transfer of his naked possessory right, to be operative only while the title remained in the government. But we cannot proceed upon shadowy hypotheses devised in favor of one party or the other. We must accept the facts as we find them in the record, and on these facts we must hold that Stolp, by virtue of his entry and patent, acquired the same riparian rights as Lake and McCarty, and is entitled to go to the middle thread of the water on each side of the island.

In this view of the case, the jurisdiction of the court fails,

for the original bill does not aver, nor do we understand the evidence as showing, that Hoyt has been disturbed in the enjoyment of one-half of the water flowing between his fraction and the island. The same is true of the cross-bill of Gill. It does not aver, nor does the evidence show, that Stolp has used more water flowing on the east side of the island than he was entitled to use under his riparian rights, as we have here defined them. As to the question between Gill and Stolp, whether the latter can claim, in addition to his riparian rights, a portion of the water pertaining to McCarty's patent, under McCarty's deed of February, 1843, against the deed from McCarty under which Gill claims, it would not now be proper to express an opinion. If Stolp is using more water than his riparian rights would give him, and Gill shall bring an action against him for diverting water properly belonging to Gill, that question will arise, but we will not decide it in advance and hypothetically.

The decree of the Circuit Court is reversed and the cause remanded, with directions that the original and cross-bill be dismissed without prejudice to future proceedings. The costs in this court will be taxed, one-half against Hoyt and one-half against Gill. The costs in the Circuit Court arising under the original bill will be taxed against Hoyt, those under the cross-bill against Gill.

Decree reversed.

GEORGE HALTY
v.
LUDWIG MARKEL.

1. BAILMENT — *agistment — reasonable care and diligence required.* An agistor of stock for hire is bound to exercise reasonable care and diligence, by himself and his servants, for the safety of the property committed to his charge; and whether this has been done, is a question of fact for the jury to determine, in view of all the testimony before them.

Opinion of the Court.

2. SAME — *agistors of stock bound to employ careful servants — when liable for their acts.* An agistor of stock is bound to employ careful, skillful and trustworthy servants, and is liable for all injuries done by them, in the course of their employment, through negligence or carlessness; but is not liable for any malicious or willful act committed by them without his knowledge or consent.

3. INSTRUCTIONS — *need not be repeated.* This court has repeatedly held, that it is not necessary to repeat instructions to a jury. The court, having once directed the jury upon the law, may properly refuse to announce the same principles in other instructions, though couched in different language.

APPEAL from the Circuit Court of Bureau county; the Hon. G. S. ELDRIDGE, Judge, presiding.

The opinion states the case.

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

Messrs. STIPP & GIBBONS, for the appellee.

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

This was an action originally commenced by appellee before a justice of the peace of Bureau county, against appellant, for the value of a colt killed while on the premises and in the possession of appellant. A trial was had before the justice of the peace, resulting in a judgment in favor of appellee, from which an appeal was prosecuted to the Circuit Court of Bureau county. A trial was afterward had in that court, resulting in a verdict in the same way. A motion for a new trial was entered and overruled, and a judgment rendered on the verdict. The case is brought to this court by appeal, and it is urged in favor of a reversal that the verdict is not sustained by the evidence, and that the court gave the jury improper instructions.

It appears that appellant agreed to pasture a number of colts for appellee; that at the time the agreement was made appellant said he would build a fence around the pasture, and when it was done he would let appellee know. After getting the fence partly done he told Jacob Markel that he could put

the colts in the pasture, and he would finish the fence that afternoon. Jacob Markel, appellee, and hired men put the colts in the pasture, but the fence was not completed, as agreed. One of appellee's colts was injured and died while on appellant's premises. The evidence seems to concur that the colt was killed by jumping the fence, and at a point where it was sufficient to turn any but breachy stock. It also appears that this and other colts and some calves had got out of the pasture intc appellant's wheat field, and that his hired men and son were engaged in putting them back into the pasture when the injury occurred.

It is insisted that the colt was killed by the negligent manner in which it was put back into the pasture, and that appellant is rendered liable by reason of such negligence. There was evidence that the son of appellant was dogging the colt at the time. On the other hand, his hired men testify that the son was driving the calves, and some distance from the colt, and that it was not dogged; that they were turning the colts from the wheat field into the pasture; had opened the fence so the colts could pass through; that all had gone through but this one, which jumped the fence. They say they did nothing to frighten the colt. In this conflict of evidence, it was for the jury to reconcile it if they could, and if that could not be done, they were required to consider all the circumstances relating to the witnesses, and give such weight to it as they believed it was entitled to receive; to reject such as they believed to be unworthy of belief, and find their verdict on the balance.

Under this contract of bailment, appellant was bound to exercise reasonable care and diligence for the safety of the colt. Story, in his treatise on bailment, section 443, says, it has been decided that agistors of cattle are within the general rule. That they do not insure the safety of the cattle agisted, but they are merely responsible for ordinary negligence. That it will be such negligence if an agistor or his servants leaves open the gates of his fields, and the cattle, in consequence of such neglect, stray away, and are stolen; and he will be

responsible for the loss. This, then, imposed upon appellant the duty of exercising ordinary care, by himself and his servants. If he has failed in this, he is liable, but if not, then the loss must fall upon appellee. And this was a question for the jury to determine in view of all the testimony before them.

The same author says, section 402, that the master is not universally liable for the misdeeds of his servants; that we must, therefore, distinguish between the acts of the servant done in his service, or in obedience, and those which are not; for in the former cases, only, is the master responsible. That the master is not responsible for any willful or malicious injury done by his servant, without his knowledge or consent; but only for injuries done by the servant in the master's service, in the course of his employment. The master is bound to employ skillful, careful and trustworthy servants, as he must be held liable for their careless and negligent acts. It was, therefore, a question for the jury to determine, whether the persons performing the act were appellant's servants, engaged in the prosecution of his business; and whether the act was negligently or carelessly performed by them, or whether it was willful or malicious. And, having determined these questions, they were then required to find their verdict according to these rules.

Were the jury, then, properly instructed as to the law of the case? An agistor for hire is clearly bound to exercise ordinary care for the safety of stock committed to his care; and, when he undertakes to pasture such stock, unless it is otherwise understood by the parties, he should furnish reasonably good pasture. Failing to either exercise ordinary care in maintaining reasonably good fences to keep the stock in, or to furnish such pasturage as is necessary to keep stock, would be negligence, and would render him liable for the immediate damages occasioned by stock escaping by reason of such negligence. This is what is announced by appellee's first instruction. Nor is any objection perceived to the second instruction. Nor do we see that the third and fourth instructions contravene the principles which we have seen should govern the case.

A careful examination of the instructions asked by appellant does not disclose the fact that they were improperly modified before they were given. When modified, they harmonized with those given for appellee. The fifth instruction asked by appellant and refused by the court asserted, that, if appellant undertook to pasture the colt for him, and promised appellee that he would put the fence around the pasture in proper repair to keep the colt within; and appellee relied upon such promise, and was induced by such promise to put his colt in the pasture; and that the want of such a repaired fence was the immediate, and not the remote, cause of the accident to the colt,—then appellant would be liable. We are unable to see, that this instruction announces any rule or principle not contained in the instructions already given. And this court has repeatedly held, that the court below is not required to repeat instructions to the jury,—that, having announced a rule to them, it need not be repeated, although stated in different language. Although this instruction may contain correct legal propositions, still they had already been announced in instructions given, and it was not error to refuse it. The judgment of the court below must be affirmed.

Judgment affirmed.

THE BOARD OF SUPERVISORS OF BUREAU COUNTY

v.

THE CHICAGO, BURLINGTON & QUINCY R. R. COMPANY.

1. APPEALS—*lie from decisions made by the board of supervisors of county* The act of 1861, allowing an appeal to be taken by a railroad company from the determinations of the board of supervisors of a county to the Circuit Court, is constitutional and valid.

2. STATUTES—*will not be held unconstitutional except in the clearest cases.* This court has repeatedly declared, that it will not pronounce a statute unconstitutional, except in a case where the violation is plain and palpable.

3. TAXATION—*must be uniform.* The rule of uniformity of taxation prescribed in the Constitution requires that one person shall not be compelled to

pay a greater proportion of the taxes, according to the value of his property, than another.

4. So, where the property belonging to individuals in a county has been assessed at less than its actual value, the constitutional rule of uniformity forbids that the property of a railroad company in such county should be assessed upon any greater per cent of its value than that of individuals.

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

The facts in this case are fully presented in the opinion.

Messrs. LELAND, BLANCHARD & HERON, for the appellant.

Mr. GEORGE C. CAMPBELL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This cause was argued and submitted at April Term, 1866, and carefully considered with a desire to reach a conclusion which should be entirely satisfactory. After much reflection, it was thought advisable to direct a reargument of the cause, as the questions presented were of great magnitude and of great public importance. Accordingly, the case has been re-argued at this term, with consummate ability, affording us much aid in coming to the conclusions which we now an nounce.

The power of the legislature to impose taxes is expressly granted by the Constitution, and is found in the following provisions of that instrument. They are just, wise and simple. Section 2, article 9, requires the general assembly to provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. Section 5 of the same article provides, that the corporate authorities of counties, townships, school districts. cities. towns and villages

may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

In the exercise of this grant of powers, several laws have been passed by the general assembly, and among them the act of February 12, 1853, relating to the assessment of property for taxation in counties adopting township organization.

The 10th section of this act provides, that "each separate parcel of property shall be valued at its true value in money, excluding the value of crops growing thereon; but the price for which such real property would sell at a forced sale, shall not be taken as a criterion of such value; and personal property of every description shall be valued at the usual selling price of similar property at the time of listing and in the county where the same may then be; and if there be no usual selling price known to the person whose duty it shall be to fix a value thereon, then at such price as it is believed could be obtained therefor in money at such time and place." Scates' Comp. 1046, 1050.

The fourth section provides, that every owner of real property shall list it in the town or district in which the property belongs, and personal property shall be listed in the town or district wherein the owner resides. Section 6 provides the mode by which this listing is effected.

It is apparent these provisions have special reference to the ordinary kinds of property which the people generally have in possession and own; therefore, by the act of February 14, 1855, a discrimination is made in regard to the property of railroad companies. They are required, by section 4, of that act, to set forth in their schedules, or lists of taxable property, a description of all the real property owned or occupied by the company in each county, town and city through which their railroad may run, and the actual value of each lot or parcel of land, including the improvements thereon (except the track or superstructure of the road), must be annexed to the description of each lot or parcel of land. This list must set forth the number

of acres taken for right of way, stations, or other purposes, from each tract of land through which the road may run, describing the land as near as practicable in accordance with the United States surveys, giving the width of the strip or parcel of land, and its length through each tract; also, the whole number of acres and the aggregate value thereof in such county, town and city. All this is denominated real property, and such list must set forth the length of the main track and the length of all side tracks and turn-outs in each county, etc., through which the road runs, with the actual value of the same, and the value of the improvements at each of the several stations, where such stations are not a part of the city or town lots. This track and these stations are denominated "fixed and stationary personal property."

This list must also contain an inventory of the rolling stock belonging to the company, with the value thereof. This rolling stock is denominated personal property. This list must also contain a statement of the value of all other personal property owned by the company, and also must state the length of the whole of the main track within the State and the total value of the rolling stock, which rolling stock is taxed in the several counties, towns and cities *pro rata*, in the proportion the length of the main track in such county, town or city bears to the whole length of the road; all other property must be listed and taxed in the county, town or city where the same is located or used. This section then proceeds to define the description of all lands owned by any railroad company for right of way or station purposes other than those which are a part of a laid off town, city or village, under which it shall be entered by the assessor in his books. Scates' Comp. 1166.

The second section provides, that this list or schedule of taxable property belonging to a railroad company shall be made to the county clerk, instead of the assessor, and the clerk is required to lay the same before the board of supervisors when they meet to equalize the assessment of property.

If a majority of this board are satisfied that the schedule is correct, they are required to assess the property according to

it; but if they believe such schedule does not contain a full and fair statement of the property of the company subject to taxation in such county, made out and valued in accordance with the requirements of the law, the board is authorized to assess, or cause it to be assessed, in accordance with the rules prescribed for assessing such property. Scates' Comp. 1105.

Bureau county, in which these proceedings originated, it is admitted, is under township organization, and the above provisions of the law are applicable to them.

The appellees, in the attempted performance of the duty enjoined on them by these statutes, presented their list, or schedule of their taxable property, for 1863, owned by them in Bureau county, to the clerk of the County Court, in all respects, as alleged by them, in strict compliance with the statute; which the clerk laid before the board of supervisors when they met to equalize the assessments in that county. This schedule presented an aggregate valuation of $\$282{,}383\frac{27}{100}$, of their property owned in Bureau county, which, by the action of the board was increased to $\$395{,}336\frac{57}{100}$, being forty per cent above the valuation by the company.

Availing of the act of 1861, by which an appeal is allowed to the Circuit Court from the action of the board of supervisors, the company took an appeal to the Circuit Court of Bureau county, and, by change of venue, the cause was transferred to La Salle county, in the Circuit Court of which county, at the March Term, 1866, such proceedings were had as resulted in a deduction by that court of the per cent thus imposed by the board of supervisors, leaving the schedule of the company as originally presented to the county clerk intact.

To reverse this judgment, the county of Bureau bring the case here by appeal, and assign various errors, which we have fully considered.

The first question they make is, that the Circuit Court had no jurisdiction of the appeal,—that it was a case not provided for by the fundamental law, and we are referred to that clause of the Constitution conferring judicial power, in support of the position. Section 1 of article 5 declares, that the

judicial power of the State shall be vested in one Supreme Court, in Circuit Courts, in County Courts and in justices of the peace. *Provided*, that inferior local courts of civil and criminal jurisdiction may be established by the general assembly in the cities of this State, but such courts should have a uniform organization and jurisdiction in such cities. By section 8 of the same article, it is provided, that there shall be two or more terms of the Circuit Court held annually in each county of this State, at such times as shall be provided by law; and said courts shall have jurisdiction in all cases at law and equity, and in all cases of appeal from all inferior courts.

It is argued with great force and ability, that, inasmuch as the board of supervisors is in no sense a court of any description, an appeal cannot lie to the Circuit Court from any of its determinations, and, consequently, the act of 1861, allowing an appeal by a railroad company from their determinations, is unconstitutional and void. Much ingenious, forcible and persuasive argument has been used by appellants here in support of this view, but we are not convinced by it. Even if we had a doubt of the power of the legislature to make this enactment, we should be constrained, under repeated rulings of this court, to solve the doubt in favor of the legislature; for this court has declared, that it is only in a very clear case, where the violation of the Constitution is plain and palpable, that we will so pronounce. *Lucas* v. *Harris*, 20 Ill. 164; *The People ex rel.* v. *The Auditor*, 30 id. 434; *City of Chicago* v. *Larned*, 34 id. 203.

In considering the legislation of this State of a character analogous to this act of 1861, we are by no means convinced of the want of power in the legislature to allow this appeal. It may be the board of supervisors of a county is not a court in the legal acceptation of that term, but it has power conferred upon it, by the wanton and unjust exercise of which the most vital interests of parties before it may be rendered totally valueless. Perilous indeed would be their condition, if those great interests were at the mercy of irresponsible men, bent, it may be, on inflicting injury for which they could not

atone. It is going a great way to say, that any act of the legislature — a co-ordinate department of the government, and whose speciality is the enactment of laws — that any one of their enactments has no foundation in the Constitution,— an instrument which the law makers are sworn to support, and which we must not suppose they have violated, in the absence of the clearest proof. Hence, courts have always approached this subject with great delicacy, and have ever manifested a disposition to sustain the law, in the absence of an entire conviction of its unconstitutionality. This much of respect is certainly due to that department of the government, and this court has always most cheerfully extended it, and ever will.

To insist that a board of supervisors is not a court, does not decide the question, as we think. In our legislation, several acts may be found, giving an appeal to the Circuit Court in cases confessedly not originating in the exercise of judicial power by a court. As for example, in the case of the trial of the right of property by a sheriff's jury. The case of *Rowe* v. *Bowen*, 28 Ill. 118, was such a case, in which we held, that an appeal lies in many cases not growing out of judicial proceed ings, as upon assessments of damages by commissioners for roads, or for city improvements. So, also, in the case of the establishment of a road by commissioners, as was held in the case of *The County of Peoria* v. *Harvey*, 18 id. 364. So, where the statute gives an appeal from an assessment of damages for a right of way. *Joliet & Chicago R. R. Co.* v. *Barrows*, 24 id. 562; the case of the *Ohio and Mississippi R. R. Co.* v. *The County of Lawrence*, 27 Ill. 71, occurring before 1861, very distinctly intimates that legislative action was necessary to uphold the appeal, and if that existed, the right to appeal was free from doubt. The act of 1861 gives an appeal in express terms In view of this legislation, and these judicial decisions, it is too late to urge a want of jurisdiction in the Circuit Court to try the appeal from the board of supervisors, and we must hold, that the jurisdiction was complete under the act of 1861, and that statute is not in conflict with any provision of the Constitution, considered in the light of long continued analo-

gous legislation under it. In counties not adopting township organization, individual tax payers had an appeal from the county assessor to the County Court, and from that court, through the auditor of public accounts, to the Supreme Court. Scates' Comp. 1040. Railroad companies are entitled to as much favor in this regard as individuals, and we have no difficulty in deciding the Circuit Court had full jurisdiction of the appeal.

Having disposed of this preliminary question, the other points arising in the case may be grouped into the consideration of the instructions given for appellees, and which is the most important error assigned.

For the appellees, the court instructed the jury, if the company valued their property in their schedule or return, so that it bore a just relation to other property in the county, then the board of supervisors had no power to increase the valuation, and they should find for the company; and, further, if the jury believed that the addition of forty per cent to the aggregate valuation returned by the company so increased the valuation that it bore an undue proportion of the taxes of the county, then such increase was unwarranted by law, and the jury would be authorized to reduce the assessment, so that it would bear a proper proportion to such taxes, but they could not reduce it below the valuation fixed upon it by the company. Appellants asked instructions directly opposite to those given for appellees, which were refused by the court.

The instructions so given announce principles so congenial to justice, and so consonant with the principles of equity, and so reasonable, as to challenge the approbation of all right-minded men, and they ought to be sustained if they are in accordance with the law under which the proceedings were had. This, then, becomes the main point of inquiry.

It is insisted by appellees, that their property, by this addition of forty per cent on its valuation, as returned by them to the county clerk, placed on it by the board of supervisors, has the effect to cause them to pay a greater proportion of the revenue than is demanded of individuals listing their property

for taxation in the same county. If this be so, no just mind, with the Constitution of the State before him, could sanction the proceeding. The great central and dominant idea in that instrument is, uniformity of taxation; and no power exists, or should exist, in any corporate authority to go counter to this command of the fundamental law. A mode has been furnished by law by which this uniformity shall be attained; and that is, that property shall be assessed at its actual value, and the rate of taxation placed upon it shall be the same regardless of persons or ownership. Persons are elected to ascertain this value, and the rate is prescribed.

It sufficiently appears, that the schedule returned by the appellees to the clerk of the County Court, fixed the value of the property owned by them in Bureau county on the same, or on a more liberal basis, than the several assessors in the various towns fixed upon the property of individuals in the same county, though in neither case was the property valued at any thing near its actual cash value. For instance, while the valuation of the property of individuals ranged from one-fifth to one-third of its cash value, that of the appellees ranged from one-third to one-half of its actual value.

The requirements of the law, that each separate parcel of property shall be valued at its true value in money, though simple as a proposition, is not always easy to obey; nor is that requiring personal property to be valued at the usual selling price of similar property at the time of listing. So many elements enter into the price of an article, even one in common use, that it is difficult to put a selling price upon it. Upon railroad property it is still more difficult, as their personal property has no market value. Their property is *sui generis*, not affected by the principles of supply and demand, and is, for the most part, unsalable except in emergencies, when competing lines may need rolling stock or other portions of their equipments. It cannot be affirmed of a railroad in running condition, that its properties are marketable. What they cost is no evidence of their real value; nor do we know of any means an assessor or a board of supervisors may have at command by

which to determine precisely the true value of their most valuable property. Their lands can be valued with the same, but with no greater facility than similar property of individuals; but the value of their track, and superstructure, and rolling stock depends so much on contingencies that it seems almost impossible to fix its real value. But, assuming the values to be as fixed by the witnesses examined on this point, the return made by appellees shows that the valuation they fixed upon it, was from one-third to one-half of its appraised value. But we do not intend to go into the *minutiæ*, but to announce simply the principles we recognize as legal and just, which should govern the whole subject. The question is before us in all its length and breadth: Can a railroad company, by any action of the corporate authorities of a county, be required to pay more than its fair share of taxes as compared with those paid by individuals? Does the power exist anywhere to destroy the cardinal principle of uniformity of taxation so forcibly and prominently insisted upon by the Constitution? This is a great question, affecting, not only railroad corporations, but every property owner and tax payer in the State.

It seems to us there is something so monstrous in the proposition as to be indefensible by fair argument.

Regarding uniformity as the vital principle, the dominant idea of the Constitution, where can the power reside to produce its opposite? Where is the power lodged, in view of this principle, to compel A to pay, on his land or personal property, of no more value than the same kind of property belonging to B, forty per cent more taxes then are assessed against B? We affirm such a power nowhere exists, and if it did it would be so revolting in its exercise to the lowest sense of justice with which our species is imbued as to justify any and every lawful expedient for relief against it.

The framers of our Constitution and our law makers, to their credit be it said, have kept steadily in view the principles of equality and justice, in adopting a system of taxation which commends itself to the favor and approbation of all well organized minds.

It is no argument to urge, that the fault is with the assessors in the case of individuals, and with railroad companies in making out their schedules for the county clerk. If the assessors violate their duty, are railroad companies to be the sufferers? If they neglect to act fully up to all the requirements of the law, is that any reason why A should pay forty per cent more taxes, in proportion to value, than B?

The rule adopted by the assessors in this State has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. Even so late as the last special session of the legislature, that body, by clear implication, acknowledged the custom and yielded to its influence, by the provisions of the act to tax the shares in national banks. They therein impliedly declare that such shares are to be taxed the same as other property. A share of bank stock, under that bill, is not required to pay more State or local taxes than a piece of land, or a house, of equal value; and the plain inference is, if such property be assessed on only one-third of its actual value, bank stock shall be assessed on the same per cent of its actual value. Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher tax on a similar article of the same actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice.

It is an admitted fact on both sides to this controversy, that the property of no one owner in the county of Bureau has been taxed on its real value, and that the per cent added by the board of supervisors to the valuation of the property of appellees imposes on them a greater proportionate burden than the law requires them to bear. We are of this opinion, and therefore consider the action of the board unfounded in justice, and in direct opposition to the Constitution. The great and attractive feature of uniformity has been disregarded by the board, and appellees victimized. It may be very desirable, that the greatest share of the public burdens shall be borne by these

corporations, but until there be a radical change in our fundamental law it cannot be done. They stand on the platform of equality before the law, and no greater burden for the support of government can be imposed upon them than can be placed on the individual tax payer.

Entertaining these views, we must affirm the judgment of the La Salle Circuit Court. The action of the board of supervisors of Bureau county was *ultra vires*, and cannot be sanctioned by this court.

Judgment affirmed.

WALKER, Ch. J. I concur in holding, that an appeal lies, under the Constitution and law, in this class of cases; but dissent from the rule announced in the opinion of the majority of the court, for ascertaining the value of the property in controversy for assessment for taxation.

THE CHICAGO & NORTH WESTERN RAILWAY COMPANY
v.
THE BOARD OF SUPERVISORS OF BOONE COUNTY.

1. TAXATION—*must be uniform.* One portion of the tax payers of a county, owning taxable property, shall not be required to pay more taxes in proportion to its value, no matter how that may be ascertained, than another portion in the same county.

2. So if the assessors, regardless of the strict injunctions of the law, shall place a value upon property far below its real cash value, and such a practice goes on unchallenged, and is recognized by the authorities having special charge of the revenue of the State, that misconduct must also contain within itself the great and cardinal principle of uniformity.

3. SAME—*corporations stand on the same footing with individuals.* If the law is not strictly observed in the case of individuals, and their property is not assessed at its actual value, the property of a corporation, situate in the same county, should not be assessed at a greater proportional value than that of individuals, even though the enhanced assessment is not on the actual cash value of the property of such corporation.

4. SAME—*the rule does not apply as between counties.* But one county does not furnish a rule for another, in regard to the proportion of the value of property which shall be taken as the basis for assessment.

Syllabus.

5. So that, on the trial of an appeal in the Circuit Court of one county, from the decision of the board of supervisors increasing the valuation upon property beyond that fixed in the schedule returned by the owner, it is not competent to give in evidence a schedule returned by the same owner, of property of the same character, situate in another county, and which placed a higher value upon it.

6. SAME—*of the rule by which to ascertain the value of property.* The cost of an article is no evidence of its value on any certain day; and upon such a trial, the proof should be confined to its value at the time of the assessment, and the court should not permit evidence to be given of the first cost of the property.

7. SAME—*admissibility of evidence.* Where the trial is in relation to the proper valuation to be put upon the property of a railroad company by the supervisors for purposes of taxation, a report, not under oath, made by the president of the company to the stock and bondholders, having reference, among other things, to the value of the property of the company, is not admissible in evidence.

8. The voluminous character of such a report, in this case, was such, that the bearing it had upon the issue before the court would have to be ascertained, if at all, by a careful analysis and dissection, to which a jury would scarcely be able to subject it. Besides, if it contained any statements bearing on the issue, they could be proved by witnesses under oath.

9. And upon the trial of such an issue it is improper to admit evidence of an advance in the rate of freights upon the railroad. That has nothing to do with the value of the property to be taxed.

10. EVIDENCE—*admissions.* The voluntary admissions of a party, no matter when or how made, if made with knowledge of the circumstances, are proper to be given in evidence.

11. So upon the trial of the question as to the proper valuation to be put upon the property of a railroad company for purposes of taxation, it is competent to give in evidence, in behalf of the party adverse to the company, the deposition of the general superintendent of the road, which had been taken in another case and used by the company, adopting and acting on the statements therein as facts.

APPEAL from the Circuit Court of Boone county.

Messrs. SCAMMON, MCCAGG & FULLER, and Mr. GEO. C. CAMPBELL, for the appellants.

Mr. EMERY A. STORRS, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This case, in its main features, does not differ from the case of *The Supervisors of Bureau County* v. *The Chicago, Burlington and Quincy Railroad Company*, *ante*, p. 229.

That case upholds the principle of uniformity of taxation, as the central and dominant object of the Constitution in the assessment of taxes, and requires that principle to be fully carried out, as far as practicable, in respect to all property, without regard to ownership. While it is not expected that entire correctness can be reached in imposing taxes, still an approximation, at least, to equality and uniformity, can and must be attained. We do not deem it necessary to add any thing to what was said in that case on this point. As in the Bureau county case, so in this, neither the property of individuals, nor of the railroad company, was assessed at its actual value, but far below it, varying from one-fourth to one-third of such value, and in very few cases, if any, exceeding one-third of its actual value. The supervisors, when sitting as a board to equalize valuations, had before them the several assessments of the assessors of the different towns in the county, which, upon their face, showed the valuation; and it was uniform as to those tax payers, and, in that view, wholly unobjectionable, however reprehensible and violatory of the law it may have been on the part of these assessors. That afforded no justification to the board, if they did so, to withdraw the property of appellants from the protection of this constitutional principle of uniformity, and, by the addition of twenty per cent on their rolling stock, and of fifty per cent on their fixed and stationary personal property, compel them to pay, thereby, more taxes on the valuation of their property than the individual citizen paid on his. Justice, and the observance of the constitutional principle of uniformity, would seem to require the same addition, or even, comparatively, a greater one, on the value of the property of the individuals.

It cannot be, that one portion of the tax payers in a county, owning taxable property, shall be required to pay more taxes in proportion to its value, no matter how that may be ascertained, than another portion in the same county. If the asses-

sors, regardless of the strict injunction of the law, shall place a value upon property far below its real cash value, and such a practice goes on unchallenged, and is recognized by the authorities having special charge of the revenue of the State, that misconduct must also contain within itself the great and cardinal principle of uniformity. No warrant is given, if the law is not strictly observed in the case of individuals, and their property is not assessed at its actual value, that the property of a corporation situate in the same county, shall be assessed at greater proportional value than that of individuals, even though the enhanced assessment is not on the actual cash value of the property of such corporation. The same rule which is applied to individuals, justice and the Constitution demand shall be applied to corporations. To demand of appellants that they should schedule their property at its cash value, while individuals may schedule their property at one-third, or less, of such value, would be to demand of the former three times the amount of taxes demanded of the latter.

As we said in the Bureau county case, such a proposition is so monstrous as to be indefensible by fair argument. Such discrimination is condemned, not only by the Constitution, but by the indignant, yet no less just, judgment of an honest people. On the fact, however, we express no opinion, as the case will go to another jury.

We now come to the points of difference between the Bureau county case and this. In that, the judgment of the Circuit Court was in favor of the railroad company, holding that their schedule was correct, and in compliance with the statute and the practice under it which had obtained for such a long series of years, unchallenged and unquestioned.

And here we might say, more explicitly than was said in that case, that a long, uniform and unchallenged practice under a law, is strong evidence of the real meaning of the law. To the hoary maxim, *contemporanea expositio est optima et fortissima in lege*, is accorded full force in all courts, and we have ever rendered it due respect.

In this case, the additional per cent imposed by the board

of supervisors of Boone county was declared legal by the Circuit Court, and a judgment was rendered against the railroad company for the same.

This appeal is brought to reverse this judgment, on the grounds we have discussed, and on the further ground, that improper evidence was admitted on behalf of appellees to the injury of appellants.

It appears from the record, that on the trial of the appeal from the board of supervisors, the court, against the objections of appellants, permitted appellees to show to the jury the return made by appellants to the county clerk of McHenry county for 1865, of their fixed and stationary personal property in that county, their track running through a portion of that county. By this schedule, it appeared appellants had returned the valuation of their track therein at $3,000 per mile, and the argument was, inasmuch as the track in Boone is in as good repair, and capable of doing the same proportionate amount of business, as that part of it running through McHenry county, therefore, the value must be the same, and it should be assessed accordingly. This, in our judgment, does not follow.

So far as the return in McHenry county is concerned, *non constat*, but that it was proper and necessary to place that valuation upon it, in order to put it on the basis established by the assessors of that county for assessing the property of individuals therein.

What may have been just in McHenry county may not have been just, at the time the return was made by appellants, in Boone county. So that they returned their property as high as individuals in Boone county, they complied with the law as enforced against the tax payers of Boone, and the same of McHenry county. Neither county furnishes a rule for the other. So that the return of the valuation in McHenry was wholly irrelevant to the question then before the court. The appellants were taxed, it is to be presumed, in McHenry county, on the same basis of valuation individuals in that county were taxed, and this may have been vastly different

from that adopted by the assessors in Boone. In this connection, the second instruction for appellees was wrong.

It is also complained by appellants, that improper evidence of the value of their rolling stock, and fixed and stationary personal property, was admitted, to their prejudice.

This evidence consisted of a deposition made by George L. Dunlap, the general superintendent of this road, in a case pending in the Circuit Court of the United States, to which these appellants were a party. The statements in that deposition had been used by appellant in that case as facts; they had adopted them, and acted on them as facts; they had admitted them to be true, and they are not at liberty now, in this case, to repudiate them. The voluntary admissions of a party, no matter when or how made, if made with knowledge of the circumstances, have always been admitted in evidence, as this court said in *Robbins* v. *Butler*, 24 Ill. 427.

On this point appellants also complained, that certain mortgages executed by the president of the company to S. I. Tilden, the one bearing date January 1, 1863, and the other dated September 1, 1864, were admitted in evidence to their prejudice.

These mortgages, we understand, were what are known as equipment mortgages, and were delivered by the appellants to secure the bonds of the company which had been executed for the rolling stock. It would seem, an extensive line of road was equipped on credit, the bonds having a long time to run, and were issued some time prior to 1865, and furnished no evidence of the value of this stock in 1866. What property cost three years ago affords no evidence of its value to-day, and least of all when the equipment of a railroad is concerned. It is well known, and these mortgages prove it, that their equipment is purchased on long time, bonds are issued therefor, and mortgages executed to secure their payment at maturity. What a railroad company may be induced to promise for such equipment affords no evidence whatever of its actual cash value two or three years thereafter. And so with most descriptions of personal property, that have not in themselves elements of

improvement and appreciation. These engines had been in use some years, and, though repaired by the outlay of large sums of money, were, notwithstanding, depreciated, the actual annual depreciation being, as some of the witnesses stated, about fourteen per cent. Though repaired constantly, and serviceable, they were not so valuable as new ones, and, in speaking of such property, nothing would tend more to mislead a jury than evidence of what it cost. The cost of an article is no evidence of its value on any certain day. Nor does the necessity of the case require they should be admitted, for it is well understood, any maker of such machines is entirely competent to speak knowingly of their cash value at the time they were listed by the company for taxation. In the case of an individual who may have purchased a carriage which has been in use three years before he is called on to list it for taxation, the injustice of holding him to its cost will be apparent; or, if the carriage has been unlawfully taken, and converted to the use of another, it is very certain the owner, on trial of his action for damages therefor, would be confined to proof of its value when thus unlawfully taken and converted, and no court would permit evidence to be given of its first cost, by reason of the tendency of such evidence to mislead the jury.

In this connection, the appellees' third and fourth instructions were erroneous.

Whatever may have been the original cost of the rolling stock, the question for the jury to determine was, not that, but was it assessed at a valuation disproportionate to that of other tax payers; and directing their attention, by these instructions, to a fact not properly before them, was calculated to mislead them from the great question presented in the controversy, viz., was the principle of uniformity observed by the board of supervisors?

As regards the report of the president, made in October, 1865, by order of the board of directors, after the consolidation of these several different roads, it must be observed that the report was made to the stock and bond holders of the company, and perhaps, in some degree, for effect. It was not

on oath, and embraced the transactions of one of the greatest enterprises of modern times; it is very voluminous, and the bearing it had upon the issue before the court had to be ascertained, if at all, by a careful analysis and dissection, to which the jury would scarcely be able to subject it. Besides, the statements contained in it, affecting the question before the court, could be proved by witnesses under oath. We are of opinion, such a document was not legitimate evidence, and its introduction was well calculated to mislead the jury and confuse them. The case of the *Ch. B. & Q. R. R. Co.* v. *Coleman*, 18 Ill. 297, does not conflict with the views we have here expressed. The question in that case was as to the admissibility of the acts and statements of the president of the company, whereby to charge the company on a contract for carrying the iron for the road, and his authority to make the contract.

We concur in all that is there said on this question. The admissions of the president were germane to the case before the jury, and strictly applicable to it. They were made in respect to the transaction which was the subject matter of the suit, and clearly admissible, as the authorities cited fully show. This report of Ogden was not in relation to the matter then on trial before the jury, but was a general statement of the affairs of the company for the past years, and with no special statement of the real value of any of the articles of property contained in his report. It abounds with statements of the cost of their equipment, and is open to the same objection we have sustained to the evidence sought to be furnished by the mortgages.

The appellants also complain, that injustice has been done them by the court admitting testimony going to prove an advance in the rate of freights on their road since 1865. This inquiry was foreign to the question before the jury, and should not have been allowed. It had nothing to do with the value of the property to be taxed. It is true, this court said, in the case of *The State* v. *The Ill. Cent. R. R. Co.*, 27 Ill. 68, in discussing the questions presented in that case, which were very different from those in this case, that company being

taxed, by its charter as a corporation, in seeking to ascertain its value for taxation purposes, "the inquiry should be, what is the property worth to be used for the purposes for which it is constructed?" Were the appellants taxed on their income, the inquiry would be quite proper.

This testimony could have answered no other purpose than to excite the prejudice of the jury.

We approve the instructions given on the question of uniformity, but are of opinion that the second instruction asked by appellants and refused, should have been given. It states in clear and most explicit terms the great principle which underlies the case, that is, uniformity. The matter of this instruction is not fully contained in those given.

For these errors appearing in the record, the judgment of the Circuit Court must be reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY
v.
THE BOARD OF SUPERVISORS OF LEE COUNTY.

TAXES—*roadway of a railroad company must be valued as real estate, including improvements.* The improvements made upon the real estate belonging to a railroad company, occupied and fitted for use as a roadway, must be taken into account, in fixing its value for the purposes of taxation.

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

The facts in this case sufficiently appear in the opinion.

Messrs. SCAMMON, MCCAGG & FULLER, and Mr. GEORGE P. GOODWIN, for appellants.

Mr. JAMES K. EDSALL, for appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an appeal from the Circuit Court of Lee county, by the Chicago and North Western Railway company, from a judgment rendered by that court in favor of the board of supervisors of Lee county.

The case differs from the case of *The Board of Supervisors of Bureau County* v. *The Chicago, Burlington and Quincy Railroad Company*, *ante*, p. 229, and the case of *The Chicago and North Western Railway Company* v. *The Board of Supervisors of Boone County*, *ante*, p. 240. The difference is presented by the first point argued by appellants, and that is, that, under the revenue law of 1855, the real estate or "land" of a railroad company can be valued only as land, without regard to the cost of fitting it for use as a railroad, or of preparing it for receiving the track and superstructure. That it can only be valued as land by superficial measure, like other lands in that place and neighborhood.

The statute declares that the real property owned or occupied by a railroad company in each county, town and city through which it may run, and the actual value of each lot or parcel of land, including the improvements thereon, except the track or superstructure of the road, shall be annexed to the description of such lot or parcel of land. Such list must set forth the number of acres taken for right of way, stations, or other purposes, from each tract of land through which the road may run, etc., giving the width of the strip or parcel of land, and its length through each tract, also the whole number of acres and the aggregate value thereof in the county, town and city; all this property is denominated "real property."

The counsel for appellants insist, that the land occupied as the right of way, and fitted for use as such, by grading, filling, culverts and bridges, should be assessed as land only, without regard to the work upon it.

We cannot concur in this view. The legislature have declared that this strip of land shall be particularly described in the schedule, and, with the improvements upon it, shall be taxed at its value. There can be no doubt on this point.

An objection is made by appellants to the form of the verdict, they insisting that it cannot be executed.

So far as appellants are affected by it, there can be no doubt but a proper mode will be adopted, by which the county authorities will dispose of the money when appellants pay it. This is all, we think, which concerns them. The mode or manner in which the authorities may distribute it among the several towns concerns the county alone.

The cross errors, for reasons we have given in the cases referred to, decided by this court at the present term, are not well assigned.

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

Judgment affirmed.

DAVID NICHOLS
v.
WILLIAM MERCER.

1. TRIAL — *instructions — must be based on the evidence.* M. sold to N. eighteen hogs, and, while driving them to the town of Arlington, three of them died from heat, and, upon N.'s refusal to pay for the dead hogs, M. brought suit to recover; and, the question being, whether by the contract of sale the hogs were to be driven at the risk of M. or of N., — *held*, that the court properly refused an instruction based upon the theory that plaintiff contracted to deliver them at a place other than at Arlington, and directing the jury, that, if such was the fact, and plaintiff could by reasonable care have made the delivery at such other place, and failed to do so, defendant was not liable; there being evidence tending to show, that, whatever may have been the original contract as to the place of delivery, it was subsequently agreed that the delivery should be at Arlington.

2. CONSTRUCTION OF CONTRACTS. In giving a construction to a contract, the question is, What was the bargain, by a fair and reasonable construction of the words and acts of the parties, and not what was the secret intent or understanding of either of them.

3. SAME — *instructions — containing slight inaccuracies — not erroneous.* An instruction, containing verbal inaccuracies, such as the use of the word

"plaintiff," in one instance, when the word "defendant" was intended, and the omission of the word "if" in another place, are not errors calculated to mislead a jury.

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

The facts in this case are sufficiently stated in the opinion.

Messrs. ECKELS & KYLE, for the appellant.

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

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Mercer sold Nichols eighteen fat hogs in the month of June, and three of them died from the heat while being driven from the farm of Mercer to the town of Arlington. The controversy in this case is, whether, by the terms of the contract of sale, the hogs were to be driven at the risk of Nichols or of Mercer. The jury gave Mercer a verdict for the value of the three hogs, and Nichols appealed.

It is urged that the fifth and eighth instructions asked by the defendant were improperly refused. The fifth instruction is based upon the theory that the plaintiff contracted to deliver the hogs at the house of one Norris, instead of Arlington, and it tells the jury, if such was the contract, and if the plaintiff could by reasonable care have delivered them at Norris's house, and failed to do so, he cannot recover. This instruction was properly refused, because there was evidence showing, or tending to show, that, whatever may have been the original contract as to the place of delivery, it was afterward agreed that the hogs should be delivered at Arlington. This instruction could not properly have been given without a modification having reference to this evidence.

It is also urged that there was error in refusing the sixth instruction, which was as follows:

"If the jury believe from the evidence, that, at the time of the making of the contract by the plaintiff and the defendant's

agent, the plaintiff understood that, by the terms of the contract, the defendant was to take the risk of moving said hogs, and that the defendant's agent understood that the defendant was not to take such risk, and that there was such misunderstanding, then, on that point there was no contract, and the defendant would not be bound to bear such loss."

We think this instruction might have easily misled the jury, and was, therefore, properly refused. The proper object of inquiry on the part of the jury was, not so much the manner in which the purchaser of the hogs may have understood the contract in his own mind, but rather what was the language used in making the purchase, and whether the plaintiff had the right to consider, from that language, that he was selling at the defendant's risk, and to act upon that belief. The question was, what was the bargain, by a fair and reasonable construction of the words and acts of the parties, and not what was the secret intent or understanding of either of them. Although the instruction may express a correct legal proposition as it would be construed by lawyers, yet it is an instruction which a court may properly refuse, because liable to be misunderstood by a jury, and to lead them astray. They had already been told that the liability of the defendant depended upon whether, by the terms of the contract, the hogs were to be driven at his risk, and this instruction the jury would understand.

As to the instructions for the plaintiff, it is only necessary to say, that, while there are in them some verbal inaccuracies, such as the use of the word "plaintiff" in one instance where the word "defendant" was intended, and the omission of the word "if" in another place, yet these errors are not of a character which could have misled the jury or have worked injury to the defendant.

We think the case was fairly left to the jury by the court, and the evidence is so conflicting that the interference of the court, on the ground that the verdict is against the evidence would be clearly improper.

Judgment affirmed.

Syllabus.

PERCY W. BONNER *et al.*

v.

GEORGIE H. PETERSON.

1. DOWER — *decree in chancery for, when reversed — cannot be set up as a bar to — under what circumstances.* In February, 1857, P. filed her bill for dower, in which suit a money decree was rendered for $3,455.44, in lieu of dower in the lands; and in December, 1858, she assigned the decree to S. In June, 1855, the city of Chicago condemned a portion of the lands in which dower was claimed for public improvements, and assessed the damages thereon, but refused to pay them, whereupon suit was brought by the heirs against the city, and judgment recovered for $12,162.65, which in December, 1861, was satisfied by the payment of $11,500, in city bonds, and the balance in money. In January, 1863, upon a bill of review brought by the heirs, the decree allowing dower in gross was set aside, and thereupon P. filed her second petition, and the court decreed dower in the lands unappropriated by the city, and also in the bonds, at the sum of $1,277.73, and $426.72 as interest on the same. S., the assignee of the first decree, was not made a party to the bill of review, nor to this second petition filed by P. *Held,* that, the decree rendered in the former suit having been set aside, it constituted no bar to the proceedings under the second petition filed by P. for the same purpose.

2. SAME — *assignment of decree — no bar.* Nor can the heirs of the estate set up the assignment of the decree to S., as a bar to the widow's dower, after having reversed such decree.

3. SAME — *rights of assignee — cannot be urged by the heirs as an excuse for not assigning dower.* Nor can the heirs urge the rights of S., under the assignment of the former decree, as an excuse for refusing to assign the widow her dower.

4. SAME — *what must be shown — to bar the widow's dower — on the ground that it was purchased by another.* Until the heirs can show, either an assignment of dower to P., or a release by her, they cannot set up, as a bar to her dower, what another may have paid her for such right.

5. DECREE — *valid until reversed — and may be assigned while in force.* The decree entered in the first suit, however erroneous, was valid and binding until reversed, and while in force was subject to an equitable assignment.

6. PARTIES — *in chancery — all parties whose rights may be affected should be made parties.* In chancery all the parties in interest, and whose rights may be affected, ought to be made parties to the bill; and the fact, that S. was not a party to the bill of review, nor to this second proceeding for dower, being a necessary party, his right to contest the validity of the decree rendered in the suit by the heirs upon the bill of review still subsists.

Syllabus.

7. DOWER—*a person having dower in lands condemned for public uses—the right exists in the money paid therefor.* Where lands are condemned for public improvements, the assessment of the damages therefor, unless the contrary appears, satisfies all the title to the property, including the fee simple and all lesser estates; and P., having dower in the land appropriated by the city to public use, must in equity be held to have dower in the proceeds paid in satisfaction of the judgment against it, as damages for such appropriation.

8. SAME—*how the widow may be endowed—and of a decree allowing dower in gross.* And, in such case, the heir being an infant, the court may, if deemed for the interest of the heir, order the fund to be invested in other real estate, and endow the widow with one-third thereof for life, and have it allotted to her, the same as if the husband had been seized of it in his life-time; or endow her of the legal interest on one-third of the proceeds for life, to be paid annually, in such case, providing ample security of the principal and the payment of the interest punctually, and payment of the principal to the heir, at the death of the dowress; and the decree may be made a specific lien on the remaining real estate, to render this annual payment, less the taxes. But, in the absence of legislative authority, it is a matter of doubt, whether a decree for a gross sum can be rendered without the consent of all parties. If so, it should not be done, unless there are no means of securing to her the payment of an annual sum equal to one-third of the rents and profits of the fund in which she is dowable.

9. SAME—*when widow entitled to.* The widow is entitled to her dower immediately upon the death of her husband.

10. SAME—*guardian or minor cannot assign dower.* A guardian or minor cannot assign the widow her dower in the lands of her husband, so as to bind the minor on arriving at age; and cannot, therefore, be in default in not making such assignment, if demanded.

11. SAME—*effect of refusal to assign dower—by a party capable to act.* Where a party capable to act refuses to assign the widow her dower, upon demand so to do, he is in default, and the widow is entitled to damages from the date of such demand and refusal.

12. SAME—*commencement of suit for dower—a legal demand therefor.* The commencement of a suit for dower is a legal demand therefor, and when commenced against a minor heir, it is such a demand as contemplated by law, and from that time the widow will be entitled to damages for withholding dower.

13. SAME—*when two suits are brought—the first proceeding having been illegal—damages must date from the time of instituting the last suit.* In this case, two suits having been brought by P., and the decree in the first having been set aside as erroneous, the widow is only entitled to damages from the time the last proceedings were instituted.

14. SAME—*measure of damages for failure to assign dower.* In such case, the measure of damages is usually the net profits, or income, of one-third of the estate in which the widow has dower.

15. SAME—*net profits—how ascertained.* To ascertain the net profits, the necessary repairs of the premises from which the fund is derived, as well as the taxes, and necessary insurance on the same, should be deducted from the gross receipts of the rents and profits.

16. SAME—*measure of damages in a particular case—for a failure to assign.* For the delay in assigning the dower in this case, the heirs should be required to account for one-third of the net proceeds of the rents and profits derived from the real estate in which P. is endowable received from the commencement of the second suit by her, also for one-third of the interest received on the fund derived from the city which remains after paying the debts of the estate, and the expenses incurred in the suit against the city, and the taxes paid on the money or bonds, if any, yielding such interest.

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

The opinion states the case.

Mr. J. S. PAGE, for the appellants.

Mr. C. A. GREGORY, for the appellee.

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

This was a bill in chancery, filed by Georgie H. Peterson, and Jeremiah B. Peterson, her husband, in the Circuit Court of Cook county, against John Jones, Percy W. Bonner, Lefa M. Platt, Auretia M. Bayle, F. L. Daniels and Charles A. Gregory. The bill alleges, that Georgie H. intermarried with J. D. Bonner, in October, 1855, and that he died some two months thereafter, leaving her as his widow, and three children by a former wife, of whom Percy W. Bonner is the sole survivor. Previous to his last marriage Bonner had mortgaged his real estate to one Spencer, to secure $3,000, and in trust. That Georgie H., having previously filed her bill for dower, on the 14th of February, 1857, a decree was rendered, assigning to her dower in her late husband's real estate, and it was assigned at the gross sum of $3,455.94, which was decreed to be paid, and the assessment was made without taking into account the mortgage.

That she and her husband, on the first of December, 1858, and while the decree was in force, except $300, which had been paid, sold and assigned all of her dower rights to one Smith, for $2,000, and other considerations expressed in the assignment. That in January, 1863, the decree for dower was set aside by the same court in which it had been rendered, for the reason, among others, that it was for too large a sum, by reason of the mortgage.

That in October, 1855, the city of Chicago instituted proceedings, and in June, 1856, passed an ordinance condemning a portion of the land in which she had dower, for the extension of La Salle street, and awarded as damages therefor the sum of $10,125. The city refused to pay the amount. That Bonner's heirs sued the city in 1859, to recover the same, in their own names; that, on a second trial in this court, to which the case was brought for review, they recovered a final judgment against the city for $12,162.65. In December, 1861, that judgment was satisfied by the city paying to Gregory, one of the attorneys, $11,500 in city bonds, and the balance in money. That, at the commencement of this suit, three of the bonds still remained in the hands of Gregory, the remainder having been applied to the removal of the mortgage and for other purposes.

The court below, on the hearing, decreed dower in the remaining strip unappropriated by the city, and appointed commissioners to allot it; also in the bonds, and assessed the same at the sum of $1,277.73, and the sum of $426.72 interest on the same. The case is brought to this court by appeal, and a reversal is asked on several grounds.

It is insisted, that the decree allowing dower, in gross, in lieu of one-third part of the lands of the husband, and which was set aside on a bill of review, is a bar to this proceeding. Had it remained in force this would no doubt be true. But how a decree that has been reversed can be set up, and be relied upon by the party procuring its reversal, as a bar, or for any other purpose, we are entirely unable to comprehend. That it is a nullity as to the heir, and is binding upon the widow, we are entirely unable to understand. If binding for

any purpose, it must be so in all respects, and upon both parties. Nor do we see, that the case is altered by the fact, that she and her husband may have sold and transferred the benefit of the decree while it was in force and unreversed The heirs of Bonner can have no right to set up that sale as a bar to the widow's dower after having reversed the decree. Nor can appellants urge Smith's rights as an excuse for refusing to assign dower to whoever is entitled to receive it. As the case stood when appellee brought her suit, the heirs had neither assigned dower to appellee, nor obtained her release. Until the heir shall show that he has done one or the other he cannot set up what others may have paid her, for her right of dower, as a bar. It might possibly be a ground for refusing to compel an assignment of her dower until Smith, her assignee, was brought before the court as a party.

If the decree was valid, however erroneous, it was binding until reversed. And not only so, but it could be equitably assigned while it was in force. And it is alleged, and appears to be conceded by all parties, that Smith had purchased the decree before it was reversed, and yet we do not see that he was made a party to the bill of review, nor to this proceeding. It nowhere appears that an opportunity has been afforded him to be heard as to his rights in this question. Before dower is assigned, it is but proper that he should be permitted to be heard, and should be bound by any decree that should be rendered on a hearing. Not being a party to the bill of review or to this proceeding, he would still have the right to contest the validity of the decree setting aside the decree allowing dower on the first petition, and, as in proceedings in chancery, all parties who have or may have an interest in the subject-matter of the litigation should be before the court. We think Smith was a necessary party to this proceeding.

It is next insisted, that the widow is not entitled to dower in the money received from the city on the condemnation of a portion of lot four. It is not disputed that she was entitled to dower in the lot, but it is insisted, that she should have urged her claim against the city for the appropriation of her life

estate for the use of the public. When property is so taken and condemned, it must be presumed, that the commissioners condemned the entire property and title thus appropriated, unless their report shows the contrary. And the assessment of the damages, unless it otherwise appears, must be held to be in satisfaction of all the title to the property, including the fee simple, and all lesser estates. This being so, those holding different estates in the property must be left to divide the money paid as a compensation for the land thus appropriated to public use, according to their several interests or estates.

Petitioner, having dower in the land, must in equity be held to have dower in the money paid as a compensation for its appropriation to the public. By its condemnation and appropriation, the heir did not thereby have the fund thus produced released from the burden of the widow's dower. It took the place of the land, and became liable to precisely the same burdens as it was under while it was land. And, inasmuch as it is not subject to allotment like the land, the fund is under the control of the court. The chancellor, in case the heir is an infant, as in this case, may, if he deems it for the interest of the heir, order it to be invested in other real estate, and endow the widow with one-third thereof during her natural life, and have it allotted to her precisely as if the husband had been seized of it in his life-time.

Or the court may, no doubt, if deemed for the best interest of the heir, endow her of the legal interest on one-third of the proceeds during her natural life, to be paid to her annually. In such a case the court would, of course, provide for the ample security of the principal, and the payment of the interest regularly to the widow during her life, and for the payment of the principal to the heir at the death of the dowress. And to render the annual payment of a sum equal to the legal interest on the one-third of the fund in which she has dower, after deducting taxes on the same, the court may no doubt make the decree a specific lien on the remaining real estate. In this manner the widow would be secured in the annual receipt of the sum, equal to interest on one-third of the entire fund, less the taxes

on that third, during her natural life, and at her death the heir would come into the possession of the fund free from burden; or, if made a charge on his real estate, it would then be freed from the burden.

Independent of legislative authority, it may be a matter of doubt whether a court of equity may, without the consent of all parties, decree a gross sum to a widow as dower. But, if it were conceded that the chancellor has such power, it should not be resorted to unless there was no means of securing the widow in the payment of an annual sum equal to one-third of the rents and profits of the fund in which she is entitled to dower. Until the last session of the general assembly, the statute did not authorize the allowance of a gross sum in lieu of dower, nor have we been referred to any English or Irish case which has so held. And it is believed, that, where cases are found in this country, it is under legislative enactment. We can imagine nothing more uncertain than the present value of a widow's life estate in real estate or in a fund. It is true that life tables might be resorted to, but they, at least, can afford but a mere expectancy of the continuance of that particular life. They are doubtless correct in the aggregate, but cannot be when applied to individual cases. The chances would be immensely against the expectancy coinciding with the result with an individual. The chances would be so largely against it, that it might be safely asserted that the life of an individual would not terminate at the time indicated by the tables. If then the power exists, it should not be exercised until all other more certain modes have failed.

It is likewise insisted, that there was no sufficient demand for an assignment of dower in this case to authorize the allowance of damages to the widow. The 17th section of the dower act declares, that the heir or other person having the next estate of freehold or inheritance, shall lay off and assign the widow her dower in the lands of her husband as soon as practicable after the death of the husband. The 26th section declares, that she shall be entitled to reasonable damages, to be

allowed her from the time of her demand and a refusal to assign her reasonable dower. The widow is entitled to her dower immediately upon the death of her husband. Yet it is believed that the guardian, under our statute, or at the common law, has no power to assign dower. Nor can a minor make such an assignment as would be binding on him, on arriving at age.

If, then, the minor heir is powerless to make a binding assignment of the widow's dower, we are at a loss to perceive how such a minor can be in default in not making an assignment when it is demanded. If the heir is of age, then the demand is on a person who can act, and failing to comply with the demand, he is then in default, and the widow is entitled to damages from that date. But the guardian, having no power at the common law or under the statute, to make the assignment, and the minor being equally powerless, an ordinary demand would be useless, as it could not be complied with, and the law never requires a useless or impossible act. It has, however, been uniformly held, that the commencement of a suit for dower is a legal demand for dower. It then follows that when a suit is commenced against the minor heir to have her dower allotted to her, this is such a demand as the statute contemplates. And from that time the widow will be entitled to damages for withholding her dower.

As there were two suits brought in this case for dower by the widow, and at each time the heir was a minor, the question is presented as to which should be held to constitute the demand. In the first the heirs interposed no defense, and the widow obtained her decree, but it was afterward impeached and reversed on a bill of review for error. Can such a proceeding be regarded as a legal demand of dower? It appears to have been erroneous and illegal, and it would seem that such a proceeding should not be held to be a demand of dower. As the minor heir cannot make a binding assignment of dower, he should not be held to a demand by a proceeding which is not more binding than his own act would be. To operate as a demand, the legal proceeding should be legal and binding. It

then follows that the heir in this case is only liable to damages from the time when this suit was instituted.

The measure of such damages is usually the net profits, or income of one-third of the estate in which the widow has dower. To ascertain the net profits, the necessary repairs of the premises from which the fund is derived, as well as the taxes on the same, should be deducted from the gross receipts of rents and profits. The same would be true of necessary insurance on the property. It then follows that the heir in this case should be required to account for one-third of the net proceeds of the rents and profits derived from the real estate in which the widow is entitled to dower, received from the commencement of this suit in the court below; also for one-third of the interest received on the fund derived from the city, which remains after paying the debts of the estate, and the expenses incurred in its recovery from the city, after deducting taxes paid on the money or bonds, if any, yielding such interest. This is the true measure of damages in this case, for the delay in assigning the dower.

The court below acted properly in deducting from the money received from the city, the expenses incurred in prosecuting the suits against the city for its recovery, also the money paid to discharge the mortgage on the lot, and in allowing appellee dower in the remainder. The decree should, however, have required the payment to her, annually, of a sum equal to the interest on the third of the fund, after deducting taxes on that third, during her natural life. And this yearly sum should have been charged on the remainder of the real estate of her deceased husband, as a security for its faithful payment, and such charge to cease upon her death.

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

Decree reversed.

PHILANDER CHASE
v.
GILES C. DANA.

1. AGENCY — *an attorney in fact — must act strictly within the scope of his authority.* The rule is an established one, that an attorney in fact can only act within the strict letter of his authority, for the purposes and in the manner prescribed, a departure from which will not be sanctioned.

2. JUDGMENT NOTE — *what deemed unauthorized action upon under power delegated.* Where, under a warrant of attorney, to enter the appearance of the maker of a note bearing date April 24, 1846, and confess a judgment thereon, the appearance was entered and a judgment taken upon a note bearing date April 24, 1856, — *held,* that the action was unauthorized, and the judgment entered therein a nullity, and binding upon no person, either in a direct or collateral proceeding.

3. JUDGMENTS — *of a sale under a void judgment — no title divested.* And in such case lands sold under an execution issued upon the judgment divests no title; the judgment being unauthorized, the sale is void.

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

The opinion states the case.

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

Mr. M. A. FULLER, for the defendant in error.

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

This was an action of ejectment brought by plaintiff in error, at the November Term, 1865, of the Stark Circuit Court, against defendant in error, for the recovery of the W. ½ S. E. qr. and the N. E. ¼ of the S. E. qr. of sec. 31, township 12 north, in range 7 east. The cause was tried by the court without the intervention of a jury, by consent, and resulted in a judgment in favor of defendant. Plaintiff proved possession of the premises, under claim of title by deed, from 1852 till 1863, when he was evicted by the tenants of defendant. There

is no dispute that plaintiff previously owned the premises, but it is insisted that his title was transferred to defendant, by a sale under an execution, and a judgment confessed under a warrant of attorney, executed by plaintiff, in favor of defendant. The power of attorney, the note, the judgment order, the execution and sheriff's deed, were all read in evidence on the trial.

It is, however, contended, that the confession of the judgment was not authorized by the power of attorney; and that, for want of such authority, the judgment, and all subsequent proceedings under it, were void, and conferred no title to the land. It appears that the note was dated on the 24th of April, 1856. The power of attorney bears date on the 4th day of June, 1858, and authorizes T. J. Henderson, or any other attorney, to confess a judgment against the maker, for the amount of a note which is therein described as similar to the note upon which judgment was confessed, except it is described as bearing date on the 24th day of April, 1846, and is described as a note dearing six per cent; while the note upon which the judgment was rendered is for the payment of the principal sum, with interest, without specifying the rate; the condition in the note is otherwise properly set forth in the power of attorney.

As a general rule, well recognized and firmly established, an attorney in fact is held to a strict compliance with the authority conferred. When he acts, it must, to be sustained, be within the scope of his authority. It must be for the purposes prescribed, and in the mode required. A departure from the authority conferred, or for purposes not authorized, will not be sustained, and because there is a want of power. In this case, the authority was to enter the appearance of the maker of a note, bearing one date, and to confess a judgment on that note, while the appearance was entered, and judgment entered on a note dated two years afterward. This was manifestly not within the power delegated; and, if there was no power to enter the appearance and confess the judgment, it is a nullity, and binds no one, either in a direct or collateral proceeding, but may be attacked at all times, and in all courts; because the

court must, in some mode, have jurisdiction of the defendant, or it cannot act. Nor is it an answer to say, that the power of attorney authorized the entry of appearance for one purpose, and that it was merely error to render a judgment for another and different purpose. The authority was special, and limited to entering an appearance to, and the confession of a judgment on, one particular instrument; and an appearance could not be entered to, or a judgment confessed on, a different instrument.

No one would contend, that the attorney in this case could have confessed judgment in an action of ejectment, slander or on an account, because they are not within the scope of the authority conferred; and yet in terms the authority to confess this judgment is as fully excluded as in either of the other cases. Nor is it an answer to say, that the date was by mistake misrecited in the warrant of attorney. We know of no rule of construction which would authorize us to draw such an inference. It, so far as we can see, is the contract of the parties, fairly drawn and embodying their intention. The judgment being unauthorized, no title could be divested by a sale under it. The defendant therefore failed to show title, and the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Joseph McPherson, impleaded, etc., *et al.*, *v.* Rufus C. Hall.

1. Tender—*what insufficient as a tender—grain receipts.* In an action to recover damages for failure to receive and pay for a quantity of oats, sold by the plaintiff to defendant, proof of the attendance of the plaintiff at the time and place agreed upon for their delivery, but in the absence of the purchaser, for the purpose of tendering warehouse receipts for the oats, is not a sufficient tender, without the further proof, that such receipts were genuine, and that the grain was not subject to charges.

2. Same—*made to the purchaser personally—otherwise.* But a tender of the receipts to the defendant in person would have been good, if without objec-

tion, as the failure to object would impliedly admit, that the receipts honestly represented the property. But this inference cannot be drawn, in the absence of the purchaser.

3. Instruction — *to be reviewed — must be excepted to.* Where instructions asked by a party have been refused, unless excepted to, this court will no review them.

Appeal from the Superior Court of Chicago.

Messrs. Scates, Bates & Towslee, for the appellant.

Mr. F. S. Howe, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

This was an action brought to recover damages for failure to receive and pay for a quantity of oats sold by plaintiff to defendants. On the trial the court below gave for the plaintiff the following instruction:

"If the jury believe, from the evidence, that the defendants, through their agent, Stiles, on or about the 25th day of February, A. D. 1865, purchased of the plaintiff, through his agent, Parks, five thousand bushels of number one oats at 61½ cents per bushel, to be delivered at the office of defendant on any day during the month of March, following; and the defendants failed during the entire month of March to demand and call for said oats, and that on the 31st day of March, the plaintiff, by himself or his agent, went to the office of the agent, Stiles, with warehouse receipts for 5,000 bushels of oats, and then and there, either tendered, or was willing to tender, receipts for that amount, and that said agent, Stiles, was not there, and that plaintiff was only prevented from making such tender by reason of such absence, then the plaintiff is entitled to recover."

This instruction was erroneous. We decided at the April Term, 1866, in the case of *McPherson* v. *Gale* (40 Ill. 368), that the mere attendance of the plaintiff at the office of the defendants, in the absence of the latter, for the purpose of tendering warehouse receipts, was not a sufficient tender, without proof that the

warehouse receipts were genuine, and that the articles for which they called were not subject to charges. Unless the receipts which the plaintiff was ready to deliver really represented the quantity of grain they called for, and would have produced that grain without charge when transferred to the defendants, then the tender, even as a symbolical tender, was not good. A tender of the receipts to the defendants in person, would undoubtedly have been good, if not objected to by them, as the failure to object would be an implied admission that the receipts honestly represented the property. But, in the absence of the defendants, no such inference can be justly drawn. In regard to the warehouse charges, it may be remarked, that, if they are shown by the evidence to have existed, yet if they were so small that it would have been for the manifest interest of the plaintiff to pay them, the jury would be justified in presuming, if he had found the defendants or their agent at their office, he would have offered to pay them, or deduct them from the contract price of the oats.

It is suggested, that, even if the instruction was defective, no actual harm has accrued therefrom to the defendants, as it was proven that the warehouse receipts were genuine, and the oats actually in store. It is true, there was evidence on these points, but none on the question as to whether the oats were subject to charges. They may have been subject to charges which it would not have been for the interest of the plaintiff to pay in order to complete the transaction.

The instructions asked by the defendants and refused are not properly before us, as no exception was taken to them.

Judgment reversed.

JOHN A. MERRICK, impleaded, etc.,

v.

WILLIAM WAGNER, for the use of JAMES YOUNG.

AGENCY—*powers of agent—to sign a replevin bond.* M. executed to H. a power of attorney under seal, authorizing him to settle his business and collect all claims due to him in the State of Illinois; which instrument conferred

upon him extensive powers in relation thereto, giving him authority to generally do all and every act and acts, thing and things, service and services, in the law whatsoever needful and necessary to be done, in the settlement of such business, and the collection of the claims. *Held*, that a replevin bond, executed by H., as M.'s attorney, under this instrument, was within the scope of his authority and binding upon M.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. E. A. STORRS and E. B. SHERMAN, for the appellant.

Messrs. SCATES, BATES & TOWSLEE, for the appellee.

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

This was an action of debt, brought by appellee against appellant in the Superior Court of Chicago, on a replevin bond, which appears to have been executed by Hughes as Merrick's attorney. The evidence showed the replevying of the property by Merrick, a trial subsequently had, and a recovery by defendant in the replevin suit, and a judgment of *retorno habendo*, and that the property was of the value of $550. A verdict was found in this case for the plaintiff for the debt mentioned in the replevin bond, and six hundred and forty dollars damages. A motion for a new trial was entered and overruled, and a judgment rendered on the verdict, to reverse which, this appeal is prosecuted.

The only question is, whether, under the power of attorney executed by Merrick to Hughes, the latter had power to execute the replevin bond sued on in this case. This is the power of attorney under which the bond was executed:

"Know all men by these presents: That I, John A. Merrick, of Chicago, Cook county, and State of Illinois, have constituted, made and appointed, and by these presents do constitute, make and appoint, my trusty friend, Thomas Hughes, of the city of Chicago, county of Cook, and State of Illinois, to be my true and lawful attorney, for me and in my stead,

and in my name, and to my use, to ask, demand, sue for, levy, recover and receive all such sum and sums of money, debts, rents, goods, wares, dues, accounts and other demands whatsoever, which are or shall be due, owing, payable and belonging to me, or detained from me in any manner of ways whatsoever, by any person or persons whatsoever, their heirs, executors and administrators, or any of them, giving and granting unto my said attorney, by these presents, my free and whole power, and strength, and authority to prosecute and do all business belonging to me in the State of Illinois, in my name and for my benefit and behoof, and in and about such premises, to have, to sue and take all lawful means and ways in my name for the prosecution of my business, and for the receiving of any and all sums now due and owing, or which may hereafter be due and owing, to me in said State of Illinois, and upon the receipt of any such debts, dues or sums of money, aforesaid, acquittances, or other sufficient discharges, for me, and in my name, to make, seal and deliver, and, generally, all, every other act and acts, thing and things, device and devices, in the law whatsoever, needful and necessary to be done in and about the premises, that is, in and about my said business generally, in the State of Illinois, for me and in my name, to do, execute and perform as largely and amply to all intents and purposes, as I might or could do if personally present, and attorneys, one or more, under him, for the purpose aforesaid, to make and constitute, and again, at pleasure, to revoke, ratifying, allowing and holding for, firm and effectual, all and whatsoever, my said attorney shall lawfully do in and about the said premises heretofore named, by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal, this 7th day of March, 1864.

"JOHN A. MERRICK. [SEAL.]

"In presence of

"WM. B. SNOWHOOK."

We see that this instrument confers upon the attorney large powers in reference to the settlement of the business of appellant, and the collection of his claims. Appellant Merrick

authorized his attorney to generally do all and every other act and acts, thing and things, device and devices, not already specified, in the law whatsoever, "needful and necessary to be done, in and about the business generally in the State of Illi nois," for him and in his name. When it is remembered that the business referred to was to sue for and collect money in Illinois, there can be no doubt that this general power was amply sufficient to authorize the execution of this bond. It is as full and complete as if it had specified the execution of this bond. That act was deemed necessary to the collection of money, or the recovery of Merrick's property. If Merrick held a mortgage on this property, or had a prior lien to secure any sum of money due or owing to him, the execution of the power of attorney related to its collection, and its execution was within the scope of the authority. It seems to have been within the scope of his authority, and was therefore binding on his principal. The judgment of the court below must be affirmed.

Judgment affirmed.

J. YOUNG SCAMMON *et al.*

v.

THE CITY OF CHICAGO.

1. TAXES — *of the power of the board of assessors of the city of Chicago to fix the valuation of property.* Under the second section of the revised charter of 1863, of the city of Chicago, the board of assessors at the joint meeting therein provided for, raised the valuation of the property in the south division of the city, forty per cent above the value which had been fixed by the assessor for that division; the board considering the property *en masse*, and without determining the value of separate parcels. *Held*, that this action of the board was authorized; it being clearly within its power to adopt the valuation of property in any one of the divisions as a standard, and either raise or fall, on the valuation fixed by the respective assessors in the other divisions, in order to equalize the several assessments.

2. SAME — *notice not required to be given to property owners of such action.* And in such case, it is no objection, that notice was not given to the property

owners of such addition of forty per cent, as the law requires no notice of such subsequent action to be given.

3. PENALTIES — *for a delay in payment of taxes — void.* The provision contained in section 11, of this charter, providing for a penalty of five per cent, to be imposed for delay in the payment of taxes after a certain day, is void, being in conflict with that provision of the Constitution requiring uniformity of taxation.

APPEAL from the Superior Court of Chicago.

The facts in this case are fully stated in the opinion.

Messrs. HOYNE, FORSYTH & HORTON, and Messrs. BARKER & TULEY and Mr. D. L. SHOREY, for the appellants.

Mr. S. A. IRVIN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This record is brought here by appeal from the Superior Court of Chicago. It shows a proceeding before that court, at its February Term, 1867, by the collector of the city of Chicago, to obtain judgment against the several lots and parcels of land owned by appellants, on which the municipal taxes remained due and unpaid for the previous year, as appeared upon the general tax warrant in the hands of that officer.

Notwithstanding the multitude of objections, diverse in their character, urged upon that court, a judgment was rendered against the appellants, severally, for the amount of delinquent taxes due from them respectively, the court, through its chief justice, delivering an elaborate opinion in favor thereof, which the counsel for the city has adopted as the basis of his argument, and which is now before us.

That court entered into a close and critical examination of the local law deemed to be applicable to the case, and we have gained much valuable information from an examination of that opinion, and with which, in the main, we fully concur.

Without particularizing the several objections raised, it will be sufficient if we direct our attention to that one which is considered by all the parties as the principal objection, and gives character to the case, and to understand it in its full extent it will be necessary to examine with some particularity — for it is a question of chartered power — some of the provisions of the charter, which the appellee contends affords full warrant for all that has been done.

The objection is, that raising the valuation of the property in the south division of the city, by the board of assessors, when in joint meeting, after the valuation had been fixed and return made thereof by the assessor specially appointed for that division, was *ultra vires*, and consequently void.

It will not be denied by this court, having so often considered and decided the point, that municipal, and other authorities, claiming powers under legislative grant, can exercise such powers only as have been expressly granted, or such as are necessary to carry into effect the granted powers, and this by no strained or forced construction. The point of the objection is, that the assessors of the three divisions, when assembled in counsel, took into their consideration the whole of the real estate in the south division *en masse*, and without determining the value of the separate parcels, undertook by a majority vote to direct, and did direct, the city clerk, to add forty per cent to the value of this real estate, and to extend the tax at that rate on his books, against the same, — all which was done.

Premising that the taxing power is one of the most necessary powers that can be conferred on the legislature, and by that body on subordinate organizations, it must at the same time be remembered it must be executed with reasonable strictness. Taxes, in some form, must be levied in every State, county and city, and their levy must be enforced upon property if not paid in money.

The power to assess the property of the city of Chicago for purposes of taxation, has been conferred by its charter on certain persons denominated a board of assessors. Rev. Charter of 1863. They are municipal officers, and are required to take

and subscribe the oath of office prescribed by the Constitution of the State. This board consists of three persons, who must be freeholders in the city, and one of them taken from each of the three divisions of the city. The appointment is made annually, by nomination of the mayor of the city, with the advice and consent of the common council. This board of assessors are required to perform all the duties in regard to the assessment of property for taxation, for the purpose of levying such taxes as may be imposed by the common council, and in the performance of their duties they have the same powers as are bestowed upon county or town assessors, and are subject to the same liabilities. Private Acts of 1865.

In the charter concerning assessments, it is provided by the first section, that the assessors, immediately after their appointment, shall examine and determine the valuation of the taxable real and personal estate in their respective divisions.

By the term "divisions," as here used, and elsewhere in the charter, we understand those natural divisions produced by the Chicago river and its north and south branches, so called; the territory south of the main stream, and east of the south branch, being known as the south division; that north of the same, and east of the north branch, as the north division; and the remaining territory, lying, as it does, west, both of the north and south branch, as the west division.

To aid these assessors, the city clerk is required to furnish each of them with schedules or lists of all the taxable real estate in the several divisions, on which they are required to enter, opposite the land or lot, their valuation. These are made, in each division, by the division assessor, he examining and determining for himself, in the first instance, the value of the taxable property in his division. When these assessments are completed, which must be by the first Monday of August in each year, unless further time is granted by the common council, they are to be filed in the office of the city clerk, and a day is fixed by the assessors on which they will meet and hear objections to the assessments, of which notice is to be given by the city clerk, by six days' publication in the corpora-

tion newspaper. The object of this notice is plain. It is simply to enable any individual dissatisfied with the value placed on his property by the division assessor, to procure the judgment of the three assessors, sitting as a board, on the question. It is, in effect, giving to a property owner an appeal from the judgment of one assessor to three assessors constituting a board of assessors, and *pro hac vice*, a *quasi* court of appeal.

The powers and duties of these assessors, when thus assembled, are defined by the second section, and on the construction to be placed on this, hinges this controversy.

That section is as follows: "The said assessors shall meet at the time and place designated, to revise and correct their assessments. They shall hear and consider all objections which may be made, and shall have power to supply omissions in their assessments, and for the purpose of equalizing the same, to alter, add to, take from, and otherwise correct and revise the same."

It is said, by one of the counsel for appellants, that the city reads this section as if the legislature had said, or used the words—"And also alter, add to, or change and determine the valuation of all taxable real estate in the respective divisions, as returned and appraised by the respective assessors of said divisions." Counsel insists, such is not the proper reading; that the assessors, individually, charged with the performance of a specific duty within his particular division, cannot, when meeting together, overthrow or supersede the work of each other, by ordering different appraisal lists to be made up without notice to the tax payers, and substitute an entire change of all the valuations, producing, thereby, entirely new and different results.

This leads directly to the consideration of the question, what powers are conferred by this second section, and what duties imposed?

At the time and place appointed to hear objections, the assessment of each division assessor is subjected to the scrutiny of all the assessors. They are to revise each one of the assessments, with a view to their correction; and this without any motion for such purpose, and independent of any objection

made to them, and in the absence of objections. This power to revise, as defined by lexicographers, is the power to review, re-examine, and look through their pages and columns, in order, if need be, that proper corrections be made. To correct an assessment, means the same as to rectify it,— to amend it, by bringing it to a line of right and justice, from which the division assessors may have departed. The Constitution of this State, by section 5 of article 9, provides that the corporate authorities of counties, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. As all the divisions of the city are under the same jurisdiction, it is necessary the valuations within them should be uniform; hence, the necessity of subjecting the assessment of each assessor to the judgment of all of them, in order, if this principle of uniformity has not been observed, that the faulty assessment may be rectified,— may be brought to this line. The section then proceeds to declare, in an independent sentence, not connected with the first subject, that "they shall hear and consider all objections which may be made,"— that is, such objections as may be made by those who appear for such purpose, and they may be of various kinds, but all must be of a character affecting the property owner making the objection; and they may supply omissions in their assessment,— that is to say, on examination of each assessment list, should it be discovered that a lot has been omitted in either division, or a valuation neglected to be placed against a lot, this omission can be supplied. By force of these several provisions, ample power is given this board, when thus met, to ascertain if each piece of property in the several divisions has been appraised in proportion to its value.

But the section, in plain and unmistakable language, confers other powers; and they are given to carry out the principle of uniformity, which is the one great principle to be observed in assessing property for taxation. For this purpose, for the purpose of equalizing the assessments,— that is, the assessment of

each division, so that they may show on their face uniformity of valuation,— this board can alter one or all of the assessment lists,— can add to or take from one or from all, or otherwise correct and revise the assessments. Language stronger than this, by which to grant power to this board for the purposes indicated, could not be used. Under this grant, this board could, as they did, assume the assessment of the north and west divisions as a proper basis, to which they could make that of the south division conform, either by adding to the valuation of each piece of property sufficient to bring it up to the standard established, or by adding a per cent on the whole valuation by which to effect the same object. So might they have assumed the valuation of the assessor of the south division as the true basis, and brought down that of the north and west divisions to that standard. The power being given, how it shall be executed must be with the donees of the power.

It is in proof, the valuation in the south division is, on an average, forty per cent less than that of the north or west division, and that of the north and west is not more than one-third of the actual value of the property situate within them. How unreasonable, then, is the complaint now made, that, with this forty per cent added, in order to equalization, appellants are assessed on property at one-third of its value only.

We can have no doubt, when these several assessments were before this board, and on examination they found that two of them were about right, and the third too low, the board had full power to equalize them, by making any one of the assessments the standard, and bringing the others up to it, or down to it, as the case might be. Establishing the standard, the clerk was directed to add forty per cent on the valuation of all property in the south division.

Instead of reassessing each piece of property separately, which none deny they could do, even without additional notice, they add forty per cent, which is proved to be requisite, to bring it up to the valuation in the other divisions. The mode thus adopted may not have been the wisest, and has, perhaps, produced individual hardship in one or more cases; but this does

not affect the question of power, nor furnish any ground for staying the collection of the entire tax list. Nor does the record furnish any evidence, that the property of these appellants has been assessed above its actual value, or higher than similar property in the other divisions. As a question of power, we are satisfied it is bestowed, in the fullest extent, by the second section, and has been exercised properly by the assessors sitting as a board of equalization.

The objection, that the property owners had no notice of this addition of forty per cent, is answered by the fact, that the charter requires but one notice to be given of the meeting, to hear objections and revise and correct the assessments, and to act as a board of equalization. Such a notice was given by the city clerk. But of what avail would be a more special notice? The property owners could not defeat this exercise of power by the board, and notice would have availed nothing. But it is a sufficient answer, that the law required no additional notice. The case cited from 13 California, goes further than we are disposed to go, in a case where the notice required by the statute has been given.

The case of *Bennet* v. *The City of Buffalo*, 17 N. Y. 383, is cited by appellants, in support of this objection of want of notice. That was an action of trespass for taking personal property, by a collector of city taxes, for a special improvement. It was contended by the plaintiff's counsel, that the common council, under the power to correct the description of the land imperfectly described, could not insert in the new assessment roll a different name from the one contained in the former roll, as the owner of the land and the party to be personally assessed; and that, having done so, in this instance, the proceeding was illegal and inoperative upon the plaintiff. It was held, that the original roll could not be collected by a levy on the personal property of a party not named, and that the statute did not, in terms, confer authority to insert a new name. If the power should be implied, the party would be cut off from those modes of correction, and that advantage of notice, which the statutes give to parties named in original

assessment rolls. Four of the judges non-concurred in this opinion, and we do not think it has any very powerful bearing upon this case, as here all the notice required by law was given, and no mistake is alleged.

The reason for the decision in 3 Ind. 452, cited on the first point, and which we omitted to notice in the proper place, is found in the statute of that State.

The State board of equalization had power only to equalize the appraisement of lands in the State, between the several congressional districts, and they proceeded to equalize the appraisement between the several counties in one of those districts. This power, it was held, was not given to that board.

There is, however, one objection, which must reverse the judgment in this case, for the purpose of correcting that particular error. It is in awarding a penalty of five per cent against a tax payer, who may be delinquent for a single day, in the payment of his taxes. We do not think the legislature has any power whatever to impose this penalty for this delay, for the plainest of all reasons, that the taxes would not be uniform. One man would pay, on the same valuation, on December 31, 1866, one hundred dollars, but he who paid on January 1, 1867, would be required to pay one hundred and five dollars. The basis of this additional tax, is not in the valuation of the property, but is a penalty, arbitrarily imposed, for delay in payment of the tax. The city counsel has shown no authority for the imposition of any penalty. The law provides the land shall be sold, if the taxes assessed against it are not paid in the time required. This is as far as the legislature can rightfully go, under a Constitution recognizing uniformity of taxation.

The other objections seem to come under the curative power of sections 15 and 30 of the charter. If they do not, they are not of sufficient importance to require a critical examination, the main points being fully discussed and decided.

For the error in imposing a penalty of five per cent, in addition to the taxes assessed, and rendering judgment therefor, the judgment, on that account, must be reversed, in that particular only. The cause is remanded to the Superior Court, with

instructions to render judgment on the warrant, omitting therefrom the five per cent.

At the September Term, 1867, a rehearing was granted in this case, on the petition of the appellants, in order that the court might further consider the question of the legality of imposing the penalty for non-payment of the taxes assessed. Thereupon, the following additional opinion of the court was announced:

PER CURIAM: On this application for a rehearing we are referred to the case of *Bristol* v. *The City of Chicago*, 22 Ill. 587, as controlling the question of imposing five per cent on the amount of taxes not paid on or before the 1st day of January in each year. In that case, the law authorized the collection of ten per cent on the amount of the special assessment, in case the owner of the land failed to pay it before the collector filed the delinquent list, on an application for an order of sale, as additional costs. That the legislature may provide for the recovery of reasonable costs, either by a percentage on the amount of the recovery, or by fixing specific sums in a bill of items, there can be no doubt. In that case the law was sustained, as it gave that per cent as additional costs, which was manifestly designed to cover the expense of making and advertising the delinquent list, together with other expenses and outlays incurred by the application.

The per cent imposed in that case was upon a special assessment levied for the improvement of a wharf in the city. In such cases, after the levy has been made, labor is performed and expenses incurred by the city in completing the improvement, on the faith of the collection of the assessment to meet the outlay; and it is therefore but reasonable, that the person failing or refusing to pay his assessment, should contribute to the payment of interest which may have accumulated, by delay in paying for labor and materials procured by the city for the construction of the improvement. One of the objects in giving costs is to cover expenses incurred in prosecuting a suit for the recovery of the demand. Hence it is reasonable, that the

delinquent tax payer should in some mode be required to meet the expense incurred in prosecuting a suit for the recovery of the amount, which remains delinquent, and the same is equally true of unpaid special assessments.

That the legislature may authorize the courts to impose and render a judgment for such a penalty, we have no doubt; but we do not believe that such a power can be conferred upon a mere ministerial officer, without any opportunity to be heard by the tax payer. It will be observed, that in Bristol's case the law did not authorize the collector to impose the additional per cent, until he filed his report on the application for the order of sale of the property, and it was then adjudicated upon by the court; while, in this case, the officer was authorized to impose it long before the term of the court at which he is required to file his report of the delinquent list, which is at the term at which he applies for judgment. Had the ordinance in this case only provided for the imposition of this five per cent at the time of passing the order for the sale of the lands, thus affording the tax payer an opportunity until that time to pay his tax, and to be heard in the court whether he was liable to the forfeiture, this case would then have come within the principle of Bristol's.

The facts in this case afford an illustration of the hardship that is liable to occur from accident, or otherwise, by imposing a penalty at a previous time. It appears that there was a mistake of a large amount in the case of the chamber of commerce, and before it could be corrected the first of January had arrived, and the penalty claimed and attempted to be imposed, without any fault on their part. To impose such a penalty, under these circumstances, would be, to say the least, a hardship and a wrong. If, however, the penalty should not be imposed until after the collector's report is filed on the application for the judgment, then all have a fair opportunity to pay their tax, and be heard against a forfeiture. We are aware of no case where a forfeiture may be imposed and enforced, except by a judgment of a court of competent jurisdiction. If the collector may impose this per cent, he can enforce it by distress

and sale of property, without the tax payer having been legally adjudged to have incurred a penalty. When a per cent is imposed for taking an appeal for delay, or for failing to pay a note due to the school fund, the penalty is imposed by the judgment of the court, and not by the creditor, or a ministerial officer. It is believed to be a general rule, without an exception, that forfeitures cannot be enforced, except through the judgment of a court of competent jurisdiction, and this is true whether it be called costs, damages, or a penalty. A judgment must be first had before satisfaction can be enforced.

We do not, therefore, regard Bristol's case as governing this, as it is materially different both in the facts and principles involved. With these additional reasons we adhere to the original opinion filed in the case.

Judgment affirmed.

CHARLES W. CLAYTON
v.
THE CITY OF CHICAGO.

1. TAXES — *concerning sufficiency of specification in a particular ordinance — of the object of the tax imposed.* Under section 4, chapter 9, of the revised charter of 1863, of the city of Chicago, which requires the object of the tax to be specified, an ordinance was passed imposing a tax of one mill on the dollar for permanent improvements. *Held*, that this was a sufficient specification of the purpose of the tax.

2. SAME — *mere informality in procedure — will not vitiate tax levied.* An ordinance levying taxes, and passed before the tax lists were completed by the clerk and signed by the assessors, does not vitiate the tax thereby imposed, every thing having been done that was necessary to authorize the levy. It is such an informality in the procedure as the charter expressly provides shall not vitiate the tax.

3. NOTICE BY TAX COLLECTOR — *in what proceeding its sufficiency may be questioned.* The charter of the city of Chicago requires that the collector, when he receives a warrant for the collection of taxes, shall give notice, that, after the expiration of sixty days, he will levy on the personal property of all persons who have failed to pay. On an application for judgment against the land assessed, whether the collector did or did not give notice that he would levy on personal property in default of payment, is wholly immaterial; so, in such proceeding, the sufficiency of the collector's notice in that regard cannot be questioned.

4. FORMER DECISION. The case of *Scammon* v. *The City of Chicago, ante*, p. 269, is decisive of the other questions presented in this case.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. E. A. RUCKER and J. S. PAGE, for the appellant.

Mr. S. A. IRVIN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application in the Superior Court of Chicago for judgment against certain real estate for the non-payment of taxes. The main question presented by the record is the addition by the assessors of forty per cent to the valuation of property in the south division. We have decided at the present term, in the case of *Scammon* v. *The City of Chicago*, *ante*, p. 269, that this addition was legal, and it is only necessary here to refer to the opinion already filed in that case.

The appellant also takes some further exceptions to the judgment.

The ordinance imposing this tax levied "one mill on the dollar for permanent improvements."

It is objected that this is not a sufficient specification of the purpose of the tax under section 4, chapter 9, of the charter, which requires the object of the levy to be specified. The ordinance levying the tax provides for the levy of four and one-half mills to defray contingent expenses, — one mill for permanent improvements, three mills for public expenses, and various other rates for different purposes which are specified in the ordinance. We are of opinion that the levy of one mill for "permanent improvements," was a sufficient specification. It would be obviously impossible to specify by ordinance at the beginning of the fiscal year, in a large and rapidly growing city, every permanent improvement that might be required in the course of the next twelve months. Bridges, streets, sidewalks, market houses, and other improvements of like character, might become necessary where no such necessity could have been foreseen; and it was the evident intent of the legislature to grant power, in the 8th clause of the 1st section

of chapter 8, to levy a tax under the general head of permanent improvements.

The charter requires that the collector, when he receives a warrant for the collection of taxes, shall make publication of such fact, and give notice that, after the expiration of sixty days, he will levy on the personal property of all persons who have failed to pay. It is objected that the notice in the present case did not state that the collector would make a levy on personal property in case of failure to pay. The notice was, that "in default of payment, the taxes will be collected at the cost and expense of persons liable for the payment thereof." If the question before us were in regard to the validity of a levy made by the collector upon personal property, it would be necessary to decide whether the foregoing notice was a sufficient compliance with the statute. But it is an application for judgment against the land, and whether the collector did or did not give notice that he would levy on personal property in default of payment, is wholly immaterial. If he had given such notice, he would have been under no obligation to make such levy before applying for judgment. The material portion of this notice, so far as regards the present proceeding, was, that the warrant was in his hands, and that persons interested could make payment. In these respects the notice was unobjectionable. No objection is taken to the subsequent notice of the intended application for judgment against the lands, which seems to have been all that the law required.

It is also objected, that the ordinance levying the taxes was passed before the tax lists were completed by the clerk and signed by the assessors. As is remarked in the printed opinion of the judge who tried this case in the Superior Court, it is true the lists had not been mechanically completed and signed, but, nevertheless, all had been done that was necessary, in order to enable the common council to impose the tax. The assessors had revised and corrected their lists, and decided to add the forty per cent to the valuation of the south division, and had made an order directing the clerk to make the addition. Nothing remained to be done but a clerical act, the mere copy-

ing of the rolls into a book, to be signed by the assessors, and adding the forty per cent. The total valuation could as well be determined from the rolls as from a copy made from them, as it only was necessary to add the forty per cent in the manner directed by the assessors. This objection goes simply to the form of precedure, and not to the substance, and the charter expressly provides, that no such informality shall vitiate the tax.

There are several other objections taken to this judgment, but they are so utterly unimportant, that counsel cannot have placed any reliance upon them, and we do not deem it necessary to recapitulate them.

There is, however, one fatal error — the addition of the five per cent penalty. This we have decided in the case of *Scammon* v. *The City of Chicago*, already referred to, and our reasons for so ruling are given in that opinion.

Judgment reversed.

JOHN KENNEDY, Jr.,

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. MISTAKE — *occurring in a record, how may be corrected.* When in the record of a criminal case, a clerical error is made, the court has the power to permit such mistake to be corrected, upon a proper application by the people.

2. INSTRUCTIONS — *in a criminal proceeding — unnecessary that each one should state the law of a reasonable doubt.* In a criminal proceeding it is not necessary that each instruction given to the jury should inform them, that before they could convict, they must believe the accused to be guilty beyond a reasonable doubt.

3. EVIDENCE — *going to the credit of a witness.* In a proceeding upon an indictment for an assault with intent to commit a rape, the prisoner, in his rebutting testimony, showed, that the prosecuting witness had stated, before the trial, to others, that it was a person other than the accused who had made the assault upon her, and had described such person to them, and that the description then given was different from that given on the trial by her, which evidence the court excluded by remarking in the presence of the jury, after reciting it, "that it amounted to nothing." *Held,* that the remarks of the court, in assuming to determine the weight of the evidence, were erroneous, being calculated to exclude from the consideration of the jury testimony which was proper, and should have been admitted.

WRIT OF ERROR to the Circuit Court of Ogle county; the Hon. WILLIAM W. HEATON, Judge, presiding.

This was a proceeding upon an indictment found against the plaintiff in error, for an assault upon Nancy McManus, with intent to commit a rape. The cause was tried at the November Term, 1866, of the Ogle county Circuit Court, and the defendant found guilty; whereupon motions for a new trial, and in arrest of judgment, were severally made and overruled, and afterward, on application to this court, a writ of error was ordered to issue, and made a supersedeas, so far as to stay the execution of the sentence of five years' imprisonment in the penitentiary. Various errors were assigned, all of which are fully noticed in the opinion.

Messrs. DUTCHER & MIX, and Messrs. LELAND & BLANCHARD, for the plaintiff in error.

Mr. DAVID MCCARTNEY, for the people.

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

It is insisted, that the record in this case fails to show that the indictment was returned by the grand jury into open court. The record, however, recites, that they did so report a bill for the crime of rape, properly indorsed and signed a true bill by the foreman. The case was docketed and numbered, and it appears that the case was tried, the verdict returned, and the judgment rendered in a case of the same title and number. The indictment copied into the record is for an assault with intent to commit a rape, and was properly indorsed and signed by the foreman. We might no doubt from these facts infer, that this was the only indictment presented against the accused, and that it was a clerical error of the clerk in entitling the cause when the presentment was made. But in the view we take of this case, we deem it unnecessary to pass on this point. If such a mistake was made, the court below has the power to

permit the record to be amended upon a proper application by the people.

It is also insisted, that the instructions given on behalf of the prosecution are erroneous. It is true, that a portion of these instructions fail to inform the jury that they must believe the accused to be guilty beyond a reasonable doubt before they could convict. A portion of these instructions do so inform the jury, and in so clear a manner, that they could not have been misled, and the same instruction is repeated in several of those given for plaintiff in error. It is not necessary that each instruction shall contain such an announcement. Some of the instructions given select particular portions of the evidence, and inform the jury that such facts tend to prove the issue are proper to be considered by the jury. Evidence is only admitted because it tends to prove the issue, and when admitted it is all for the consideration of the jury. This being so, it is not a practice that should be encouraged to give such instructions. It gives, in the estimation of the jury, in many cases, undue weight to such facts. And while, as a general rule, we would not feel warranted in reversing for that reason, still the better practice is, that they should not be given.

The accused, in his rebutting evidence, introduced Burch, and on his cross-examination he stated, that on the night the assault was made, and immediately after it occurred, he saw the prosecuting witness, and that she then stated that it was Jillson's hired man who made the assault, and that he wore a white hat at the time. To this answer the prosecution objected, and the evidence was excluded. This was erroneous, as the accused had the right to prove that she had given different and contradictory accounts of the transaction. This was proper evidence to test her recollection, to test her disposition to state the facts fairly, and to enable the jury to ascertain the value of her evidence.

It appears from the record, that the court below, on the trial and in the hearing of the jury, stated, that, "whatever Mrs McManus may have said to Burch and Vanston that night, or to Jillson in the morning after, as to its being Jillson's hired man

that assaulted her, and that it was a thick set, dark complexioned man, with a white hat on, amounted to nothing, when the proof shows that as soon as she saw him, she said he was not the man." An exception was taken to this statement. The court, in this, assumed the province of the jury in determining the weight of the evidence. It was for the jury, and not the court, to say whether these statements, if made, amounted to any thing. And such remarks, made by the court in the hearing of the jury, are well calculated to exclude from their consideration such evidence. These remarks amounted to an exclusion of this evidence from the jury, while it was proper for their consideration. If they believed that she had made different statements of the facts, it was for the jury to determine whether they impaired the weight of her testimony. We are of the opinion, that the court erred in making these remarks in the hearing of the jury. The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

CHARLES W. DEAN
v.
JOSEPH GECMAN.

1. PLEADING AT LAW—*filing new pleas—after demurrer sustained—waiver of first pleas.* The practice is well settled, that where a defendant, after his pleas have been adjudged bad on demurrer for substance, takes leave to amend, and files as an amended plea a new and different plea, he thereby waives his first pleas and cannot assign for error the decision of the court sustaining the demurrer.

2. PRACTICE—*finding upon the issue of nul tiel record—when presumed correct.* The finding of a court upon the issue of *nul tiel record* will be presumed correct in the absence of a bill of exceptions.

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

The opinion states the case.

Messrs. STORRS & JOHNSTON, for the plaintiff in error.

Mr. W. K. MCALLISTER, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of debt on a judgment brought in the Circuit Court of Cook county by Charles W. Dean against Joseph Gecman.

To the action the defendant filed, first, the plea of *nil debet*, and second, a special plea, averring that the judgment was obtained on an award made by the committee of arbitration of the board of trade of Chicago, setting out in full the act of incorporation of the board, and then averring that the award was not in compliance with the act and was null and void, as not being in conformity with the submission, setting out the article of submission. A third plea was filed attacking the constitutionality of the act of incorporation on grounds set forth in the plea.

The plaintiff demurred severally to each of these pleas, and the court sustained the demurrer, whereupon the defendant asked and obtained leave to amend, which he did by filing the plea of *nul tiel record*, on which the issue was made up, and found for the plaintiff, on which judgment was rendered.

To reverse this judgment, the record is brought here by writ of error, and many errors assigned, which we have carefully examined, as also the argument submitted by the counsel for the plaintiff in error.

The argument is made to bear on the special pleas, but, as they were adjudged bad on demurrer, not for any formal defect, but for substance, and leave given to amend, which was done by filing a new and different plea, it is impossible, under the repeated rulings of this court, that the quality of those pleas, or the facts averred in them, can be now considered. The only question is, was the issue on the plea of *nul tiel record* properly found, which, in the absence of a bill of exceptions, we must presume was correctlh found. *Wann* v. *McGoon*, 2 Scam. 74; *Crisman* v. *Matthews*, 1 id. 148. As the record stands, the

questions discussed by plaintiff's counsel do not arise on it, and are not presented by it. The judgment on which this action was brought was described in the declaration as a judgment rendered by the Circuit Court of Cook county at a certain term thereof, and under the issue made, such a judgment was produced in proof, as we must presume, in the absence of a bill of exceptions; and, being produced, it sustained the issue on behalf of the plaintiff, and nothing remained to the court but to give judgment for him. The record of the judgment imported absolute verity, against which nothing could be alleged save fraud.

We have been referred to the case of *Hamlin* v. *Reynolds et al.*, 22 Ill. 207, as having a direct bearing on this question of pleading. In that case there were three pleas, one the general issue, and the other two special pleas, to which the court had sustained a demurrer. No leave was taken to amend, nor was there any new plea filed, consequently the decision of the court upon the demurrer remained an open question, to be considered on error. The cases are entirely different.

Hard as this case may be upon the plaintiff in error, it is not in our power, having regard to long established principles, to relieve him, and we must affirm the judgment.

Judgment affirmed.

TIMOTHY D. MAHONY
v.
MICHAEL D. DAVIS *et al.*

1. PRACTICE—*jurisdiction to send process out of county.* Under the act of 1861, amendatory of our practice act, a sole defendant cannot be sued out of the county where he resides, or may be found, unless the contract upon which the suit is brought, was *actually made* in the county where suit is brought, and the plaintiff resides in that county.

2. SAME. And when a party living in La Salle county gave in that county an order to the traveling agent of a merchant residing in Cook county, for the

purchase of certain goods, upon which they were sent to him, such contract cannot be sued upon in Cook county, and process sent to, and served upon, the defendant in La Salle county.

3. SAME. Such contract cannot be said to have been *"actually made"* in Cook county; as the sense in which those words are used in the act, evidently has reference to the actual presence of the parties, and not to a constructive presence, in the form of an offer by letter, or verbally transmitted.

4. SAME — *in cases tried by the court — motion for a new trial is not necessary.* In cases tried by the court, it is not necessary that a motion for a new trial should be made, in order that the evidence in the case may be reviewed in this court.

5. SAME — *motion confined to cases tried before a jury.* It is only to cases when a trial is had by a jury, that the practice of moving for a new trial is confined.

WRIT OF ERROR to the Superior Court of Chicago.

This was an action in assumpsit, brought in the court below, by the defendants in error against the plaintiff in error, to recover for a quantity of cheese, alleged to have been sold to him under a contract made with them in Cook county. The defendant resided in La Salle county, and was sued in Cook county, and process sent to, and served upon him in La Salle county. The question, therefore, of the jurisdiction of the court below over the defendant, is the sole question presented.

Messrs. LELAND & BLANCHARD, for the plaintiff in error.

Messrs. WAITE & CLARKE, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only question presented by this record is, whether a person living in La Salle county, and giving an order in that county to a traveling agent of a Chicago merchant, upon which goods are sent to such person in La Salle county, renders himself liable to be sued in Cook county, and have process sent and served in La Salle. Prior to the act of 1861, it was lawful to bring suit in the county of the plaintiff, and send process to any other county in the State, provided the cause of action accrued in the county of the plaintiff. It was also

lawful to bring suits in the county where a contract had been specifically made payable.

By the act of 1861, the law was so amended that a sole defendant cannot be sued out of the county where he resides or may be found, unless the contract upon which the suit is brought has been actually made in the county where the suit is brought, and the plaintiff resides in that county. The old law was somewhat uncertain in its language, as it spoke of a contract "accruing." This term was construed, in *Phelps* v. *McGee*, 18 Ill. 158, in application to contracts, to be synonymous with "made" or "executed," and to refer to the place where the contract was made. This construction was followed in *Aird* v. *Haynie*, 36 Ill. 176, where the suit was brought in Alexander county, the summons served in Marion county, and the defendant pleaded that the cause of action accrued in Marion and not in Alexander. The plaintiff insisted, that, as he, as assignee, was suing the assignor of a note, the cause of action "accrued" to him in Alexander county, where he lived when the assignor became liable, and that, therefore, the proof did not support the plea. But we held, the averment in the plea, that the cause of action accrued in Marion county, was equivalent to an averment that the contract was made in Marion county, and that the plea was supported by proof that the note was made and indorsed in Marion county.

The construction which the court found it necessary to give to the term "accrued," in this act, in reference to contracts, the legislature emphatically adopted in the act of 1861, by substituting the words "actually made," and in order to still further limit the right to send a summons to a foreign county, they provided that sole defendants should not be sued beyond the county where they reside or may be found, except in that particular case.

To allow this suit to be maintained would contravene the clear policy of the legislature. This contract was not "actually made" in Chicago, in the sense in which those words are used in the act of 1861. It is true, as contended by the counsel for defendants in error, that there was no concurrence of minds (ad-

mitting that the traveling agent was authorized only to receive orders and not to sell), until the plaintiff accepted the defendant's order in Chicago. The contract was then first completed. But nevertheless it was not "made" in Chicago, in the legislative sense. The offer was as essential to the contract as the acceptance, and the offer was made in La Salle county. The time when the minds of the parties met was the moment of acceptance, but where was the place — that is, where were the parties at that moment of time. One of them was in Cook county, and the other was in La Salle. Now, the legislature, in amending the law, and in using the words "actually made," evidently had reference to the actual presence of the parties, and not to some constructive presence in the shape of an offer sent by letter, or by a verbal message. This defendant was not present in Cook county at any time, in regard to this contract, and therefore did not fall under the jurisdiction of its courts.

That the law must receive this construction, will be perfectly manifest, if we consider the results of the opposite interpretation. Chicago is the great commercial center of the State. A very large proportion of the merchandise consumed in this State is ordered from Chicago, either by letter or through traveling agents of Chicago houses. If it should be held that every order thus sent is to be considered a contract made in Chicago, although the party sending it was never there, and if, upon such an order, such party is liable to be sued in the Chicago courts, the effect would be to throng those courts with defendants brought from all portions of this vast State, at such a sacrifice of time and money that they would often submit to the payment of an unjust demand rather than litigate it at such a distance from their business and their homes. The legislature intended to tolerate nothing of this kind, and to give such a construction to the law, would be not only most unjust to traders in the country, but injurious to the business of Chicago itself, by inducing purchasers in some parts of the State to send their orders to some city beyond our State limits.

It is objected that we cannot review the evidence in this case, because there was no motion for a new trial. There is

an early decision of the court to that effect, but the late practice of the court has been to confine that decision to cases where the trial was by a jury. In the present instance it was by the court, and, the judge having once passed upon the evidence, it was not necessary to go through the form of submiting it to him again by moving for a new trial. *Metcalf* v. *Fouts*, 27 Ill. 113.

Judgment reversed.

THE ILLINOIS CENTRAL RAILROAD COMPANY
v.
GUSTAVE DEMARS

1. MEASURE OF DAMAGES. In an action against a railroad company for a failure to furnish passenger cars, as agreed upon, for an excursion, at a stipulated price, the measure of recovery would be the amount the plaintiff would have received as passage money, if the train had gone as proposed, less the amount agreed to be paid for the use of the cars.

2. CONTRACTS — *need not be performed in installments.* Where the contract on the part of the company, in such case, was to furnish six cars, upon certain notice to be given, and there was a request for only four cars, a failure to furnish the smaller number was no breach of the contract. The company had a right to perform the contract as an entirety, or could not be required to perform it at all.

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

The facts sufficiently appear in the opinion of the court.

Mr. GEO. C. CAMPBELL and Mr. H. LORING, for the appellant.

Mr. THOS. P. BONFIELD, for the appellee.

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

This was an action of assumpsit, brought by appellee, in the Kankakee Circuit Court against appellant, to recover for a breach of contract to furnish six passenger cars upon three days' notice. On the trial below, appellee introduced in evi-

dence a letter written by W. P. Johnson, as general passenger agent, in which he says that appellee's communication to Mr. Hughitt, general superintendent, had been placed in his hands for reply. He says they will charter appellee six cars to Chicago, and to return, for fifty-six dollars each; that he can have them at any time by giving the station agent three days' notice, and requesting him to give notice. This was dated the 28th day of August, 1856.

Appellee proved, that on the 22d of September following, he gave notice to the station agent that he wanted four cars on the following Tuesday morning. The agent telegraphed to Johnson on the day appellee gave notice that he wanted the cars. The station agent received no reply, nor were the cars furnished. The station agent testified, that he had no authority to make a contract for cars with appellee, nor did he make any; that Hughitt was the agent for letting the cars. Appellee proved that he sold two hundred and forty-three tickets, at one dollar and fifty cents each, for the excursion, on the 25th of September, and that the money was refunded.

The jury found a verdict in favor of appellee for $376. A motion for a new trial was entered, and overruled, and judgment rendered by the court on the verdict, to reverse which this appeal is prosecuted.

It is urged that the court below erred in allowing appellee to introduce evidence of the number of persons at the depot on the morning of the 25th of September, the time he had given notice that his excursion would be made. This was error, unless it had appeared that these persons intended to go on the cars chartered by appellee, and were not of those who had purchased tickets. Had that appeared, then the jury would have been authorized to take into consideration the amount he would have thus received over and above that received on the sale of tickets. The object of this evidence was to ascertain the loss he had sustained by not obtaining the cars. It could, therefore, have made no difference what number of persons were there, unless they had intended to go on appellee's excursion train on that day.

The measure of damages would be the amount of money appellee lost by the breach of contract, and to ascertain the amount he had received by the sale of tickets and the sum he would have received from others had the train gone as proposed, and any other loss sustained, and from the gross sum deduct the cost of the cars, and the difference would have been the damage sustained. This evidence was therefore improper and should have been excluded.

It is likewise urged, that the evidence did not warrant the verdict, as the damages were excessive. We have seen that appellee sold two hundred and forty-three tickets, which, at one dollar and fifty cents each, makes the aggregate sum of $364.50. The amount he would have been required to pay for four cars would have amounted to $224, which, taken from the amount received for tickets, would have left $140.50, which might have been increased by proving expense for advertising and the payment of agents to sell tickets. But in no view we can take of the evidence could such expense have reached the amount of the verdict. If twenty-five or thirty dollars were allowed for advertising, the sale of tickets and other incidental expenses, still the verdict would be more than $100 too large. The jury evidently overlooked the fact, that the cost of the cars would have to be deducted from the receipts, on the sale of tickets. The remainder would, under the evidence in this record, have been the measure for the recovery. For this error the court below should have set aside the verdict and granted a new trial.

The evidence no doubt varied from the contract described in the first count. It averred a contract to furnish six cars on three days' notice, while the proof showed a request to furnish but four. When the company agreed to furnish a certain number of cars, they were guilty of no breach of contract in failing to furnish a larger or smaller number. Their contract was not to furnish four cars, but six. A demand to furnish but four was not a request to perform the contract they had made, but it was for a different thing. They could not be in default by refusing to perform their contract in parts. They had con-

tracted to furnish a specific number to be furnished all at the same time, and appellee had no right to compel them to furnish the cars in installments. They had a right to perform their contract as an entirety, and to require it to be performed otherwise would be to make for the parties a new contract. Until he demanded the six cars he claims to have contracted for, and the company had refused to furnish them, there was no breach of contract authorizing a recovery. The evidence does not tend to prove such a demand, and the judgment was therefore unauthorized, and must be reversed, and the cause remanded.

Judgment reversed.

THE CITY OF CHICAGO

v.

MARY ANN GALLAGHER, Administratrix, etc.

1. NEGLIGENCE—*what constitutes—corporations making improvements must render them safe to the public.* In an action brought by G. against the city of Chicago, for the loss of her husband's life, caused by falling into a slip, it appearing by the proof that the slip was crossed by a bridge much narrower than the street, and that there was no protection in the course from the sidewalk to the bridge to prevent persons proceeding in that direction from falling into it, if they continued in a direct line from the walk to the slip,—*held,* that the omission to erect proper barriers to protect persons from walking or falling into it, was negligence for which the city was liable for all damages resulting therefrom.

2. SAME. The city having permitted the excavation to be made, it was its duty to have made it secure, and fully protected persons in passing from walking or falling into it under any circumstances.

3. SAME—*when improvement made is not within corporate limits—duty to protect it the same.* And even it had been a natural channel, or one made before the limits of the city were extended so as to embrace it, the duty to have rendered it safe to the public would have been the same.

4. EVIDENCE—*of noxious condition of water—admissible.* And in such case, proof of the noxious condition of the water is admissible to show that by reason of its condition the danger to the life of a person falling into it would thereby be enhanced.

5. NEGLIGENCE — *when degree of — increased.* And the failure to properly protect such a place, establishes a greater degree of negligence than if the water had been free from such pollution.

APPEAL from the Superior Court of Chicago.

The facts in this case are fully stated in the opinion.

Mr. S. A. IRVIN, for the appellant.

Messrs. HOYNE, HORTON & HOYNE, for the appellee.

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

This was an action brought by Mary Ann Gallagher, as administratrix of Michael Gallagher, against the city of Chicago, under the statute, for the loss of the life of her husband by the negligence of the city, in failing to secure the crossing at Ogden's slip, at one of the street crossings in the city. The case was twice tried in the court below, the jury on each trial finding the issues for appellee. On the first trial the damages were assessed at $1,000, but a new trial was granted by consent. On the second trial the jury assessed the damages at $2,000. A motion for a new trial was entered and subsequently overruled, and judgment rendered on the verdict, to reverse which, the case is brought to this court by appeal, and numerous errors assigned.

It is insisted, that the evidence fails to show, that the city was guilty of any negligence contributing to the death of appellee's intestate. On the other side it is contended, that the evidence proves gross negligence, in failing to light the street, and in failing to place guards or barriers at the slip, to protect pedestrians from falling or walking into the water.

It appears that the slip was crossed by a bridge, which was much narrower than the street. The sidewalks on each side of the street ran to near the slip and then curved, so as to pass on the bridge, so that, in approaching, a person failing to follow the curve would, by pursuing a direct line, walk into the slip.

There was no railing, wall or guard, on the outer edge of this curved sidewalk leading to the bridge. Hence, a person proceeding straight forward would meet with no obstruction to being precipitated into the slip. This was certainly extremely dangerous to persons passing in the dark. Persons would be liable to be precipitated into this slip, filled with mire and water, which, under any circumstances, would be dangerous to life, and extremely so in the dark, when objects could not be seen, and the means of escape so readily employed as in the light.

Where persons passing in the dark were not familiar with the locality and its hazards, they would be extremely liable to fall into the slip; and persons acquainted with the place, when passing in the dark, would be in great danger without extreme caution. This, we think, is fairly deducible from the evidence in the case. The bridge was within the corporate limits of the city, under its care, jurisdiction and control. Having permitted the excavation to be made, it was the manifest duty of the city to have made it secure, and fully protected the public against such hazards, by erecting railings, guard or barriers, suitable and sufficient to protect persons from walking into the slip, under any circumstances, in passing. Or even if it had been a natural channel, or one made before the limits of the city were extended, so as to embrace this slip, the duty would have been the same. One of the objects of creating the city government was, among others, to improve the streets and pass-ways, so as to render them commodious, easy and safe to all persons using them. Having failed in this duty, the city must be held responsible for all damages resulting therefrom.

An attentive consideration of the evidence shows, that the jury were warranted in finding that deceased came to his death from the want of necessary and proper protections at this bridge. He was undeniably drowned at that place, and when last seen he was at a short distance from the bridge, and when he left Mr. Denny's he seems to have proceeded in the direction of the bridge. It is but reasonable, then, to suppose that it was on that occasion that he fell into this pool and was there

drowned. All of the circumstances tend to this conclusion, and we are not disposed to disturb the finding of the jury.

The city having failed to secure this passage over this pool against danger, and this being a neglect of a duty, it is liable under the statute for the damages sustained by the loss of the life of deceased. And being so liable we deem it unnecessary to determine whether appellant was derelict in their duty in failing to light this street. We, therefore, refrain from expressing any opinion on that question.

It was also urged that the court below erred in permitting evidence to be introduced showing the noxious condition of the water in this pool. It tended to show that the danger to life would be enhanced by getting into a body of water so polluted and emitting such noxious gases. If they were calculated to suffocate persons brought within their influence, then they increased the peril to life and diminished the chances of escape. And if this was the case, then the duty of the city to erect protections to prevent persons from falling in was increased, and the omission of the duty was more negligent than if the water had been free from such exhalations. This evidence was therefore admissible for the purpose of showing the greater degree of care required of the city in protecting the public. Had appellant desired it, the court below would have instructed the jury that this was the only purpose for which this evidence was admissible.

The instructions given by the court below were substantially correct, and we think did not mislead the jury in their finding. The judgment of the court below must be affirmed.

Judgment affirmed.

Syllabus. Opinion of the Court.

EDWIN S. HUMPHREY
v.
THOMAS CLEMENT.

1. CONTRACT PAYABLE IN GOLD — *construction of a contract.* A contract for the payment of a certain sum of money "in gold," may be discharged by the payment of the same sum in legal tender notes. This rule applies as well in a suit in equity for a specific performance, as in an action at law upon the contract.

2. CHANCERY — *specific performance — of the decree providing against a contingent right of dower.* In a proceeding to compel the specific performance of a contract for the sale and conveyance of land, the court decreed a conveyance, upon payment by the purchaser of $880, the amount due on the contract, and that in case the wife of the defendant should refuse to join in the deed, the purchaser might retain $250 out of the purchase money. *Held,* that this provision in the decree, authorizing the purchaser to retain $250 out of the purchase money, as an indemnity against the contingent right of dower, was erroneous, there being no grounds upon which to base such judicial action.

3. CONTRACTS — *for the conveyance of lands — what must contain — to guard against this contingency.* A contract for the sale and conveyance of lands in order to protect the purchaser against the consequences resulting from a refusal of the wife of the vendor to join in the deed, should specify what proportion of the purchase money he may retain, in the event the wife should refuse to release dower.

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

The opinion states the case.

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

Messrs. FARWELL & HERRON, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, brought by Thomas Clement against Edwin S. Humphrey, to compel the specific performance of a contract for the sale and conveyance of a tract of land, executed by said Edwin S. to Zopher P. Humphrey, and by the latter assigned to the complainant. The answer admits the making of the contract, and the tender of the purchase

money, when due, in United States legal tender notes, but sets up an agreement by Zopher P. Humphrey to pay the purchase money in gold, and a similar agreement by Clement when the contract was assigned to him. The contract bound the appellant to convey the land by deed of general warranty in fee simple, and the answer also sets up that he has tendered such a deed, which the appellee refused to accept. On the hearing it appeared the reason why appellee refused this deed was because the wife of appellant had not released her dower. The court decreed a conveyance which would vest a perfect title, on the payment by appellee within ten days of $880, the amount due on the contract, and that in case the wife of the appellant should refuse to join in the deed, the appellee might retain $250 out of the purchase money.

The decree for a conveyance was clearly proper. We have already decided in the case of *Whetstone* v. *Colley*, 36 Ill. 328, that a contract for the payment of a sum of money specifically in gold, could be discharged by the payment of the same sum in legal tender notes, and that in a suit upon such a contract, a judgment could only be rendered for the amount due upon its face, which judgment would, of course, be payable in such notes. Notwithstanding this is a bill for a specific performance, we must apply the same rule here. We cannot say, on the law side of the court, that we can recognize no difference between gold and legal tender notes, and on the equity side, that we will recognize a distinction. If Clement paid, or offered pay, the amount due on this contract, on the day it became due, in notes which the law pronounces a legal tender in payment of debts, there at once vested in him a perfect right to a conveyance, and this right a court of chancery must enforce. The sort of discretion which the books speak of as sometimes exercised in cases of specific performance, is not a discretion which justifies the court in disregarding the law, or in saying that is not money which the law says is money. For the purpose of paying a debt, we can recognize no difference between the gold dollar and the legal tender paper dollar, and in this respect equity follows the law.

A more difficult question is presented by the other branch of the case — the provision in the decree authorizing the appellee to retain $250 of the purchase money as an indemnity against the contingent right of dower. The appellee has cited several decisions of highly respectable courts, in which a similar jurisdiction has been exercised. The object is an equitable one, and we would gladly seek to attain it, if we had any grounds, or facts of a definite character, upon which to base a decree and determine the amount to be retained as indemnity. But there are none of such character as to form the proper foundation of judicial action. In fixing $250, or any other sum, the court is simply making a guess — as mere a guess as if we were to undertake to say, whether a white ball or a black would be drawn by lot from an urn containing an equal number of each color. If the husband were dead, the value of the wife's dower might be approximately estimated by the tables of mortality, though even these tables, while furnishing reliable evidence of the value of a considerable number of lives, taken in the aggregate, are but an uncertain guide in fixing the probable duration of any individual life.

But the fact in the present case, which reduces the decree to a mere guess, is, that the husband is still living, of about the same age and health of the wife, and, therefore, with at least equal probabilities of surviving, and yet the court must necessarily base ts decree on the theory that the wife is to be the survivor. Yet we have no evidence, or indication even, that such will be the fact, and the foundation for the decree is therefore utterly wanting. While the husband lives, the wife's contingent right of dower is not an incumbrance on the land. No recovery could be had because of such prospective dower on the covenants in the deed. How then can $250 of the purchase money be withheld? On this decree, as rendered, Clement gets the land, and keeps nearly one-third the purchase money. No security is required of him for its payment on the death of the wife, or in the event she should hereafter release her dower, nor is Clement required to pay interest upon the money. These, it is true, are defects in the decree which might

be remedied, but, as already remarked, we regard the decree as wrong in principle. It is an instance in which a court of chancery, in an extreme anxiety to do equity, really does a wrong, for want of the means with which to act. Clement certainly ought not to be compelled to take a title with a cloud upon it when he has bargained for a perfect one, and no court would compel him to take such title. But, on the other hand, when he comes into court and asks for a decree, the court should not attempt to go beyond its power. It can give him the husband's title, but it cannot compel the wife to release her dower, and it cannot decree compensation when there is no basis whatever for determining the amount.

Clement must take his deed and rely upon its covenants. This is all the remedy the court can furnish. A purchaser of land, who takes only a contract, should, in order to protect himself against such a contingency as that presented by this record, cause to be inserted in the contract a clause providing what proportion of the purchase money shall be retained as compensation, in case the wife refuses to release dower. The decree of the Circuit Court will be modified in conformity with this opinion, and the cause is remanded for that purpose.

Judgment reversed.

ANSON BLAKE
v.
JAMES F. FASH.

1. EVIDENCE — *admissibility of secondary — to prove contents of a deed which had been voluntarily destroyed.* Where a party has voluntarily destroyed a written instrument, he cannot prove its contents by secondary evidence, unless he repels every inference of a fraudulent design in its destruction.

2. The general rule is, that the highest and best evidence of which the case is susceptible must be produced.

3. DEED — *when it takes effect.* A deed takes effect from its delivery, and the presumption is, that it was delivered on the day of its date.

4. EVIDENCE — *explaining date of a deed.* Parol evidence is admissible to contradict the date of a deed, as not the date of its delivery; the date of the instrument not being essential to its operation.

5. ESTOPPELS — *in pais — relating to realty — cannot be asserted in a court of law.* Estoppels *in pais* relating to real estate, cannot be made available in a court of law.

APPEAL from the Circuit Court of Marshall county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The opinion states the case.

Messrs. WILLIAMSON & MCCOY, for the appellant.

Messrs. LELAND & BLANCHARD, and Mr. H. B. HOPKINS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of ejectment, brought in the Peoria Circuit Court, and by change of venue taken to Marshall county, wherein Anson Blake was plaintiff and James L. Fash defendant, and a verdict and judgment for the plaintiff.

To reverse this judgment, the defendant has brought this appeal and assigned various errors, upon which the appellant makes three principal points. First, that it was error to allow the appellee to prove the contents of the lost deed from H. W. Sargent to Ann Davis; second, that the appellee is estopped from setting up his title; and, third, that the court improperly admitted in evidence certain tax receipts, letters of Washington Corkle and the copy of an undelivered deed of Ann Davis to Bishop Chase.

Both parties claim title through Henry W. Sargent.

In 1840, Sargent conveyed the land in controversy to Ann Davis. It appears that the appellee was her son-in-law, having the general management of her business, which was of such a nature as to require an office to be kept in which to transact it, she being the owner of considerable real estate and possessed of ample means. In 1843, appellee was declared a bankrupt by the District Court of the Southern District of New York,

where these parties resided. In October, 1847, appellee made application to Sargent for a deed to him for the land, stating that he had purchased it of Mrs. Davis; that the deed to her had not been recorded, and requested Sargent to take it back and make a deed direct to appellee, which Sargent hesitated to do unless he could be advised by his attorney that it was right, and on such advice being given, on the 6th of October, 1847, Sargent received back his deed and destroyed it, and made and delivered one to appellee, dating it back to October 1, 1840, the date of the deed to Mrs. Davis. Appellee put his deed on record October 29, 1847.

The rule in regard to secondary evidence of this character is understood to be this: if a party has voluntarily destroyed a written instrument, he cannot prove its contents by secondary evidence unless he repels every inference of a fraudulent design in its destruction. The general rule is, that the highest and best evidence of which the case is susceptible must be produced. The production of the original instrument fulfills this rule, and if it exists it must be produced, in order, as Lord COKE said, that the court may give a right construction to it from the words, and to see that there are no material erasures or interlineations, or conditions, or limitations, or power of revocation.

We think the proof, in this case, repels any idea of a fraudulent design in the destruction of the deed to Ann Davis, and the execution of the deed to appellee. Who was to be defrauded? Not the appellant, for he had then no interest in the land, either present or prospective, for such interest as he has now was not obtained until 1854. Not Ann Davis, for she, in fact, conveyed the land to appellee, in 1855. We are at a loss to perceive on what grounds fraud can be imputed, and, that being repelled, secondary evidence was admissible to prove the contents of the deed, which was done by the testimony of Sargent, and of Anson Blake, Jr., who had made a copy of the deed to Ann Davis in October, 1840.

The second point made sets up a defense in the nature of an equitable estoppel. The appellant contends, that, inasmuch

as appellee received and put on record a deed bearing date October 1, 1840, he gave the world to know he had title by that deed, on that day, and that a party purchasing by the record ought to be protected.

As a general principle, a deed does not take effect from its date, but from its delivery; but the presumption is, it was delivered on the day of its date, and the date may be contradicted as not essential to its operation. It is always competent to show that the date inserted in a deed was not the date of its delivery.

The appellant insists, that, by recording the deed, with its date, appellee declared, in effect, that the deed was delivered to him on that date, and took effect then. This would be undoubtedly correct, in favor of an innocent purchaser, and appellee would be equitably estopped from showing that his deed was not delivered at its date. But this estoppel is simply an equitable right, which cannot be asserted in a court of law under our system of jurisprudence. The legal title is still in appellee, and that must prevail in a court of law. *Miller* v. *Graves*, 38 Ill. 466, and cases there cited.

On the remaining point, the tax receipts were mere make-weights, tending to show that Ann Davis exercised acts of ownership, by paying the taxes on the land subsequent to the unrecorded and destroyed deed from Sargent. We do not think either the tax receipts or the letters of Washington Corkle had any important bearing on the merits of the case, and their admission in evidence could have had no injurious effect upon the appellant. His case turns on the second point made, which we have discussed and disposed of.

The appellee was entitled to recover at law, on the title he exhibited, if the destruction of the deed from Sargent to Ann Davis, of October 1, 1840, did not divest her of her title, for she, on the first of August, 1855, conveyed the land to appellant, and thus a regular chain of title was established. If it did divest her, then taking a deed from Sargent, and antedating it, and placing it upon record, vested the legal title in appellee, and such deed took effect from the day of its delivery. The

appellant, claiming under the decree in bankruptcy of 1843, must, for the reasons we have given, assert in equity such title as he may have obtained thereby, as his right is wholly of an equitable nature.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

ALEXANDER C. DAVIS
v.
LEOPOLD HOEPPNER.

1. NEW TRIAL — *motion for, on the evidence.* The jury seeing the witnesses on the stand have opportunities superior to an appellate court to determine the weight proper to be given to evidence when conflicting. So has the circuit judge who presides at the trial better means of determining whether the verdict is sustained by the evidence. An appellate court will not, therefore, interfere to set aside a verdict because it is against the weight of evidence, unless it is clearly unsustained.

2. EVIDENCE — *conflicting — duty of jury.* Where the evidence is conflicting, it is the duty of a jury to reconcile it if that may be done; if not, then to reject such portions as they regard unworthy of belief.

3. ADMISSIONS — *by witness, how far evidence.* Statements made by a person in the employment of another as to the amount his employer owes another, are not binding upon his principal, but are proper evidence to contradict the witness and to show whether he is disposed to testify fairly.

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

This was an action brought by appellee before a justice of the peace against appellant to recover the balance of an account for work and labor. On a trial before the justice of the peace, appellant recovered a judgment for twelve dollars and seventeen cents. The case was then removed to the Circuit Court of Jo Daviess county. At the March Term, 1866, of that court a trial was had by a jury.

Henry Davis, a son of defendant, testified that plaintiff worked for his father from the 15th of May, 1865, till the 27th

of January, 1866; that he was his father's book-keeper, and kept plaintiff's account; that plaintiff attended to the stock, cut wood and did a little work on the farm; that plaintiff milked the cows and fed the stock on Sundays; that no money was due him; that he did not remember of saying to Stinele that there was thirty-five dollars due him, but may have said so the day plaintiff left.

That he was not present when the contract was made, but heard defendant say he was to pay him one dollar and a half per day; that he had plaintiff to come on Sunday and attend to the cattle; that he made out the account filed by defendant, which shows plaintiff to owe defendant twelve dollars and seventeen cents, and that it is correct; that defendant, in the same connection that he said that he was to pay plaintiff, also said plaintiff was not to charge for attending to the cattle on Sundays.

That he did not think he said to Stinele that he would pay plaintiff thirty-five dollars; and did not recollect saying to him after trial, before the justice of the peace, that plaintiff would have done better to have taken the thirty-five dollars; defendant did not authorize witness to pay plaintiff thirty-five dollars; plaintiff lost time.

Stinele testified, that plaintiff began to work in May, 1855, and quit in January, 1866; that Henry Davis told witness the day plaintiff quit work, that there was thirty-five dollars due him; after the trial by the justice, he said plaintiff would have done better if he had taken the thirty-five dollars.

Zachary P. Davis testified that he was present when the contract was made, and gives it as his brother spoke of it; that he heard his brother or father, but which he does not know, say that thirty-five dollars was due plaintiff when he left.

The jury found a verdict in favor of plaintiff, for fifty dollars. A motion for a new trial was entered, and plaintiff remitted all of the verdict but thirty-five dollars, whereupon the court overruled the motion for a new trial, and rendered a judgment for the balance of the judgment, after the remittitur was entered. Defendant below brings the case to this court

by appeal, and urges a reversal, because the verdict is contrary to evidence, was contrary to the law, and because a new trial should be granted.

Mr. LOUIS SHISSLER, for the appellant.

Messrs. SMALL & MILLER, for the appellee.

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

This was an action originally commenced before a justice of the peace by appellant, on an account for labor, against appellee. On a trial appellant recovered a judgment against appellee for the sum of twelve dollars.

The cause was removed to the Circuit Court by appeal, and on a trial in that court before a jury a verdict was found in favor of appellee for the sum of fifty dollars. Appellant entered a motion for a new trial, when appellee entered a remittitur for fifteen dollars, and the court overruled the motion and rendered a judgment for the balance against appellant. He prosecutes an appeal to this court and assigns for error that the verdict is contrary to the evidence; that it was contrary to law; that the jury disregarded appellant's instructions; and that the court should have granted a new trial.

The jury, having all the witnesses before them, should be better qualified to determine the weight proper to be given to evidence, than persons who have not heard it nor seen the witnesses testify, and the circuit judge who presides at a trial has better opportunities of determining whether a verdict is sustained by the weight of evidence, than an appellate tribunal. On a motion for a new trial because the verdict is not sustained by the evidence, the judge trying the case, as a matter of fact, reviews all of the evidence, considers the manner of the witnesses on the stand, their intelligence and opportunities for being informed as to the subject about which they testify, together with all the circumstances lending weight, or impair-

ing the force of the testimony. Such being the duty of the jury in trying the issues, and of the circuit judge in reviewing the testimony, on the motion for a new trial, this court should never interfere to reverse a judgment because the verdict is not supported by the evidence, except in a clear case,—never, where there is no more than a doubt of the correctness of a finding.

Such has been the rule of this court ever since the power was given to it to review the finding of the jury. In this case there was perhaps a conflict in the testimony, and it was the province of the jury to reconcile it, if that could be done, and if not, then to reject such portions as were unworthy of belief. They were the judges of the weight that the evidence was entitled to receive, and having performed the duty which the law has imposed upon them in that respect, their finding will not be lightly disturbed. In this case there was, we think, evidence to warrant a verdict for thirty-five dollars. It is, however, urged, that, to find that sum, appellee must have been allowed for labor performed on Sundays during the period which he labored for appellant. Had appellee lost no time after he commenced to work, until he quit, it would, at the contract price, exclusive of Sundays, have amounted to three hundred and thirty-one dollars and fifty cents. The amount paid was only claimed to be two hundred and eighty-one dollars and ninety-two cents, which would leave a balance of forty-nine dollars and sixty-eight cents. But the witness, Henry Davis, son of appellant, who does not appear to have testified very fairly, says, that appellee did lose time, and that the account he rendered was correct, from which it appears that about forty days were deducted for loss of time.

It appears that this witness, who was his father's book-keeper, stated, when appellee called on him for a settlement, "that there was due him thirty-five dollars," and after the trial before the justice of the peace, "that appellee would have done better to have taken that sum, than to have sued." He, however, attempts to break the force of the first statement by saying, "that he had not then examined the account, and was mis-

taken." As to the other statement, he says "he has no recollection of having made it." And while these statements were not binding on appellant, and were correctly excluded by the court as evidence to prove appellant's claim, they were proper to be considered by the jury, to enable them to place a correct estimate upon the value of his evidence. The jury were thus enabled to determine his disposition to testify fairly, and for that purpose alone, it was proper to be considered by the jury.

The evidence of Stinele was, "that appellee commenced work for appellant in May, 1865, and left in January, 1866." Uncontradicted or unexplained, the jury, on this evidence, would have been warranted in at least averaging the time, if not in allowing the greater part of both months, as he does not speak of the loss of any portion of the time. Taking the time of commencing and leaving off, as fixed by Henry Davis, and if there had been no loss of time, the verdict of the jury would have been very nearly, if not entirely, correct. They evidently were not inclined to place unlimited confidence in the evidence of Henry Davis, judging from the verdict which they rendered.

Again, the other son of appellant, who was called as a witness by him, states, that he heard either his brother Henry or his father, but he was not sure which, say, about the time appellee left, that there was due him thirty-five dollars. Being a son, and called by appellant, the jury would be warranted in the conclusion that it was said by the father. It would seem to be implied that this witness had heard both his father and brother speak of the matter; and that it was not claimed by them that appellee owed appellant, but that the reverse was true. We are not prepared to say that the verdict, as it was modified, embraced any thing for labor on Sundays, or that it is not supported by evidence. The evidence may not be of that clear and convincing character as to leave the question free from doubt; still there is, we think, enough to support the verdict upon which the judgment was rendered, and the judgment of the court below must be affirmed.

Judgment affirmed.

EDMUND S. HOLBROOK
v.
BENJAMIN S. PRETTYMAN *et al.*

1. CHANCERY PRACTICE — *irregular practice.* Where a defendant to a bill in chancery, was ruled to answer within a certain time, and after the expiration of the rule, filed his answer, and afterward obtained leave to amend it, but, instead thereof, filed a cross-bill, and took a rule upon complainant in the original bill, to answer *instanter*, and at the same time, and in the same order, took a *pro confesso* decree upon his cross-bill, granting him affirmative relief,— *held*, that the complainant should have had a reasonable time given him, to answer the cross-bill. That under such circumstances, to allow defendant to take a *pro confesso* decree *instanter*, was irregular and unreasonable.

2. SAME. In such case, while leave to file an amended answer was pending, and the amended answer was not filed, the complainant was under no obligation to reply to the original answer.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. JAMES HARRIOTT, Judge, presiding.

This was a bill in chancery, filed by the plaintiff in error, Edmund S. Holbrook, against the defendants in error, Benjamin S. Prettyman, and others, in the Circuit Court of Tazewell county. The sole question presented by the record is as to the regularity of the proceedings had in the cause in the court below, the facts concerning which are fully stated in the opinion.

Mr. E. S. HOLBROOK, *pro se.*

Mr. B. S. PRETTYMAN, *pro se.*

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

In this case the defendant was ruled, on the 9th of September, 1864, to answer in sixty days. He filed an answer November 10th, in vacation, and after the expiration of the rule. At the next term of the court he took leave to amend his answer, and, on the last day of the term, without filing the amended answer, filed a cross-bill, took a rule to answer

instanter, and at the same, and in the same order, took the cross-bill for confessed, and took a final decree in his favor, granting him affirmative relief upon his cross-bill.

It was irregular, while the cause was in this condition, to give the defendant a rule on the complainant to answer *instanter* and a decree *pro confesso* for want of such answer The defendant had himself filed his answer to the original bill after the expiration of the rule, and had then asked leave to amend it. While this leave was pending and the amended answer not filed, the complainant was under no obligation to file a replication to the original answer. To allow the defendant thus circumstanced to file a cross-bill, and take a *pro confesso* decree *instanter*, thus disposing of the entire cause in his own favor, was very unreasonable. A reasonable time should have been given the complainant to answer the cross-bill.

Decree reversed.

THE AMERICAN EXPRESS COMPANY
v.
CORDELIA D. PARSONS.

1. TROVER — *conversion of a note — measure of damages.* In an action of trover and conversion for a note, the measure of damages, *prima facie*, is the sum due on the instrument.

2. CASE — *measure of damages.* In case, and other actions for wrongs, where there are no circumstances which authorize punitive damages, the true measure is the amount the plaintiff has really sustained. Where it appears that a note intrusted to an express company was lost through negligence, the injury is the same as if it had been converted, and the measure of damages should be the same.

3. BAILEE — *his liability.* If a bailee is robbed of goods, it is no defense to an action against him, that the owner may still pursue the thief and recover the property by replevin. An express company, undertaking to collect a note, must employ the usual means therefor, or be liable for damages resulting from their negligence.

4. SAME. Notwithstanding the company is *prima facie* liable for the sum of money due on the note, they have the right to establish, by any legitimate evidence, that the damages were less in fact. Should it appear that the maker

was insolvent, or that there was a legal defense to the note, or other facts rebutting the presumption of loss, it will reduce the damages.

5. INSTRUCTIONS — *when not error to refuse.* It is not error to refuse an instruction announcing a correct legal principle, if there is no evidence in the case upon which it can be based. It was not error to instruct the jury that, if the company, or those to whom the note was intrusted, fail to show the circumstances of the loss, it may be presumed to have been through carelessness. When a party is intrusted with property, and is not able to account for it, except that it is lost, if not a legal presumption of carelessness, it is so far conclusive that a court would not reverse for giving such an instruction.

6. BAILEE — *his rights.* In case of the loss of a note, as in this case, if the debt may yet be collected, the trouble, expense and inconvenience should fall on the company and not the creditor. By paying the damages occasioned by the loss of the note, the company became invested with the right to look to the maker for the amount due on the note to indemnify them for the money thus paid.

APPEAL from the Superior Court of Chicago; the Hon. JOHN M. WILSON, Chief Justice, presiding.

This was an action on the case commenced by John B. Parsons against the American Express company, on the 5th of March, 1861, in the Superior Court of Chicago.

The declaration contained four counts, but subsequently a *nolle prosequi* was entered to the first and second. The third count averred, that, on the 25th of December, 1860, plaintiff caused to be delivered to defendants a certain promissory note made by one Daniel McNair, dated the 12th of February, 1859, payable to James H. Baldwin, for the sum of $545, twelve months from date; which was guaranteed by Hammett & Bro., and indorsed by Baldwin in blank and delivered to plaintiff before delivering the same to defendants; that defendants negligently, carelessly and improperly lost the note, whereby plaintiff lost the sum of money therein named.

The fourth count is in trover and in the usual form, and is for the note described in the third count. Defendants pleaded the general issue. On the 12th day of December, 1865, the death of plaintiff was suggested and the suit was revived in the name of his administratrix. A trial was subsequently had before the court and a jury.

Statement of the case.

William A. Baldwin testified that he took the note to the company for Parsons, and took their receipt, which is this:

"AMERICAN EXPRESS CO., CHICAGO, Jan. 23, 1860.

"Received from J. B. Parsons, the following note for collection: Daniel McNair, Galveston, Texas, $545. Proceeds of collection will be returned in funds current where collections are made, and no paper protested unless we have special instructions to do so.

"For the proprietors, COOPER."

Which was read in evidence. Baldwin stated that he had called at the office of the company, after leaving the note, several times, and they informed him they had heard nothing from it after it was sent, and finally they informed him that it had been lost. That Parsons demanded the note but the company did not return it to him. The agent of the company informed Baldwin that they were not running to Galveston, but they had such arrangements with the Adams Express Company, that they could collect the note.

James H. Baldwin stated that the note was given to him, and he describes it as it is set out in the declaration; and he states that the maker was considered as responsible.

Thomas Wright testified that defendant delivered the note to the Adams Express Company; defendants had arrangements with that company to make such collections.

The court gave for plaintiff this instruction:

"The court instructs the jury, that, if they believe, from the evidence, that the plaintiff gave to the defendants, and the defendants received from the plaintiff, the promissory note in question, for collection, for a compensation or reward therefor to be paid by plaintiff to defendants, and that the defendants, or other persons to whom they intrusted it for collection, lost it by carelessness, then the plaintiff is entitled to recover the value of the note; and that the value, in the absence of evidence to the contrary, is the amount of the note; and that, if the plaintiff is entitled to recover the value of the note, she is

also entitled to interest on that value, from the time the note became due to the date of the verdict; and that, if the jury believe, from the evidence, that the defendants, or those to whom they intrusted it, lost it, and it is not shown under what circumstances it was lost, it is presumed that it was lost by carelessness."

To which the defendant excepted.

Defendant asked, but the court refused to give, this instruction:

"If the jury find for the plaintiff under the first count, the proper measure of damages is not necessarily the amount of the note in question; and that, if the maker of the note has been all the time, and still is, responsible, good and solvent, the damages should be only such actual damage as the plaintiff's intestate sustained under the circumstances of the case, which may be nominal only."

To the refusal of which defendant excepted. They also asked other instructions embodying the reverse of the rules announced by plaintiff's instruction, but were refused by the court, and exceptions were taken.

The jury found a verdict for plaintiff for $763. Defendant entered a motion for a new trial which the court overruled, and rendered judgment on the verdict. The case is brought to this court by appeal. A reversal is relied upon because the court gave plaintiff's and refused defendants' instructions, and because the motion for a new trial was refused.

Messrs. MCALLISTER, JEWETT & JACKSON, for the appellants.

Mr. GEORGE F. BAILEY, for the appellee.

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

That appellants are liable for damages in this case, is not, nor can be, contested. But it is urged that the court below

adopted, in the instruction given, a wrong measure for such damages. It informs the jury, that, "if the company lost the note by carelessness, then the plaintiff is entitled to recover the value of the note, and that the value, in the absence of evidence to the contrary, is the amount of the note." There seems to be no question that the note was lost, and the jury were warranted by the evidence in finding that it was through the carelessness of the other company with which they had arrangements to make such collections. The law seems to be well settled, that, in an action of trover for the conversion of a note, the amount expressed in it is, *prima facie*, the measure of damages, and it devolves upon the defendant to prove that it was different. So then if a recovery had in this case been under a count in trover, this was the true measure of the damages.

But, if the finding was under the count in case, for the negligence in losing the note, the question arises whether a different rule should prevail. In all actions for wrongs, unaccompanied with circumstances which authorize a jury to give punitive damages, the true measure is the amount of damages the plaintiff really sustained; and, in an action of case like the present, this would no doubt be the rule. But, when appellee proved the loss of the note through negligence, *prima facie* the sum due on the note would be the actual loss which he sustained. In case, as in trover, the note is lost to the owner, and his injury by the loss would be the same. Whether lost by negligence or delivered to a wrong person, can make no difference as to the injury sustained. In this case he has lost his note, and it is by the negligence of the bailee. It is conceded that appellee's action at law is gone, but it is contended that his remedy in equity is complete. Even if this were granted, would it follow that appellee was bound to resort to it? He has by the negligence of appellant been deprived of the evidence of the debt, and the evidence shows that the maker of the note was solvent, and had the company presented the note it would probably have been paid.

If a bailee was robbed of goods through his negligence, it would not be an answer to an action on the case to say, that

the owner could pursue the thief, and recover his property by an action of replevin, and could only recover the expense of the replevin suit. Yet in that case the ownership would not be changed, and he could recover as effectually as appellee can in this case. Appellants undertook to collect the money, and it was their duty to have used the usual means by themselves or their agents to do so, or answer in damages for loss occasioned by their negligence.

Notwithstanding the sum of money due on the note, with interest, is *prima facie* the measure of damages, the defendants may prove, by any legitimate evidence, that the damage was in fact less. If they had in this case shown that the maker was insolvent, or that there was any legal defense to the note, or any other state of facts by which his loss was reduced, it would have lessened the damages to what the real loss was shown to have been.

In this case, appellants gave no such evidence to the jury. It then follows that if their instructions on this question did present correct abstract legal propositions, no injury has resulted by their refusal, or by giving appellee's instructions.

It is not error to refuse to give instructions which contain correct legal propositions, if there is not evidence upon which to base them. We have, however, been referred by appellant to the case of *Hamilton* v. *Cunningham*, 2 Brockenbrough, 350, as an authority in this case. We have examined and carefully considered it, and fail to see that it militates against the views here expressed. The facts of the two cases are different. In that, the bills of exchange were remitted and received as a payment, or the means of payment, of an existing indebtedness, and the question was, as to which should sustain the loss, the debtor or the creditors. The creditors having failed to give notice of the protest of the notes received in payment of the bills, and having given credit to the debtor, the creditors were held to be liable for the loss. That case was decided on the principles of commercial law. In this case the note was received by an agent to collect for a compensation, and through their carelessness the note was lost, and they

are *prima facie* liable for the face of the note. By its loss the holder is deprived of the evidence of his debt, and he should not be required to be at the trouble and expense of supplying it; that should fall upon the party whose wrong has produced the injury.

If a recovery of the debt may yet be had, it is but reasonable for appellants to take the hazard, incur the expense and suffer the inconvenience. They have the proof in their power, and a court will, upon indemnifying appellee, permit appellants to proceed in her name for its collection. Their negligence has produced the difficulty, and they should suffer the inconvenience and consequent loss. They have no right to shift it to others who have in no way contributed to the injury. By appellee suing and recovering the principal and damages in this case, appellants thereby become invested with the right to look to the maker for the means of indemnifying themselves for money when paid in this action.

It is again urged that the court erred by instructing the jury, that, if it appeared that the note was lost by the defendants, or those to whom it was intrusted, and it is not shown under what circumstances it was lost, it is presumed that it was lost by carelessness.

When a party is intrusted with property, and is unable to account for it only by proving that it has been lost, and can show no circumstances attending its loss, — if not a legal presumption of carelessness, it is of that strong character that the court would not be inclined to reverse a judgment for giving such an instruction, even if it were not a legal conclusion. It is so strong that such an instruction could not mislead a jury by informing them that it created a legal presumption. We can imagine no answer that could be urged against its forcible character. The statements of the facts produce convictions of carelessness to every mind.

The judgment of the court below must be affirmed.

Judgment affirmed.

MERCHANTS' DESPATCH AND AMERICAN EXPRESS COMPANY
v.
JAMES R. SMITH AND WILLIAM K. NIXON.

JUDGMENT — *evidence.* A judgment not supported by the evidence in the case is erroneous. Thus, where, in an action on the case against the American "Express company," "Merchants' Despatch," and certain individuals by name, the court gave judgment against the American Express company and the Merchant's Despatch, for the value of cases of plate glass which were shipped from New York to Chicago, and when there opened the glass found broken; and the evidence offered in the case, and under which the glass was shipped, was a bill of lading purporting to be issued by the Merchants' Despatch, without using the name or referring to the American Express company therein, and nothing in the record tending to show that the express company ever assumed any liability in regard to the carriage of the goods, — *held,* that, there being no proof tending to show the American Express company ever undertook the carriage of the glass, the judgment was unsupported by the evidence and was erroneous.

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

The case is sufficiently stated in the opinion of the court.

Messrs. MCALLISTER, JEWETT & JACKSON, for the appellants

Mr. JAMES L. STARK, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action on the case brought by Smith & Nixon against the American Express company, the Merchants' Despatch, and certain individuals by name. The defendants pleaded the general issue, and, on trial by the court, a judgment was rendered against the American Express company and the Merchants' Despatch. They bring the record to this court.

It appears that certain cases of heavy plate glass had been shipped from New York to the plaintiffs, and, when the cases were opened in Chicago, a part of the glass was found broken. The bill of lading under which the glass was shipped, and

which was offered in evidence by the plaintiffs, purports to have been issued by the Merchants' Despatch. The name of the American Express company is not used in the bill of lading, nor is any reference made to it. There is nothing in the record which, as the case comes before us, even tends to show that the American Express company ever assumed any liability in regard to the carriage of these goods. It is urged by counsel for the appellees that the American Express company and the Merchants' Despatch are merely different names for the same corporation, or that the latter is the name under which the former transports its heavy merchandise. The proof offered in support of this proposition is wholly insufficient to establish it, and the proposition itself is inconsistent with the case made by the plaintiffs upon the record. They have brought suit against the American Express and the Merchants' Despatch as distinct corporations, have declared against them and recovered judgment against them as such, and, in the absence of proof against the former, they cannot sustain the judgment against it by insisting that the Merchants' Despatch is liable, and that the two companies are really the same. The case is based upon the theory that the two companies are not the same. As the record now stands, we can only say, as above remarked, that there is no proof even tending to show that the American Express company ever undertook the carriage of this glass, and we must therefore reverse the judgment. If there is really no such corporation as the Merchants' Despatch, and the American Express does assume that name for the transaction of a certain portion of its business, then the suit should be dismissed as to the Merchants' Despatch, the declaration amended, and the proper proof made to charge the American Express.

The judgment is reversed and cause remanded, with leave to the plaintiffs to amend their declaration.

Judgment reversed.

Syllabus. Statement of the case.

ABRAHAM F. CROSKEY
v.
WILLIAM SKINNER.

1. PROMISSORY NOTE — *assignment and guaranty.* The rule is firmly established, that the holder of commercial paper with a general indorsement may fill it up with any contract consistent with such paper, and in accordance with the agreement of the parties when the indorsement was made. Also, such indorsement may be filled up at any time before or at the trial. The contract of assignment and that of guaranty are not the same, but different.

2. SAME. On the contract of assignment, the indorser is liable only in the event that the money cannot be made by legal proceedings against the maker; while, under the contract of guaranty, he becomes liable if the money is not paid according to the terms of the guaranty.

3. ASSIGNMENT — *alteration of.* Where a holder fills up a general indorsement with both an assignment and a guaranty, and the indorser files a plea denying the guaranty, verified by oath, the holder may abandon his claim to a recovery under the guaranty, and, upon proper proof of diligence or insolvency, recover on the assignment; and, when the question of authority to write the guaranty is withdrawn, the court will not, in the absence of evidence, presume that it was unauthorized. Even if the wrongful writing of a guaranty in such an indorsement could be held to be an alteration of the contract of assignment and could have that effect, there must be evidence that it was wrongful.

4. SAME. There being no doubt of the right to fill up the indorsement with an assignment, it is not perceived how filling in the guaranty could affect the assignment, whether authorized or not at the time. But if it could be so held, the court would not presume a want of authority in the absence of proof. It does not matter whether the assignment were filled up before or on the trial. The writing of an unauthorized guaranty over such an indorsement in no wise affects, alters or modifies the contract of assignment.

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

This was an action of assumpsit brought by William Skinner, in the Cook Circuit Court, against Abraham F. Croskey. The declaration contained five counts, — the first on a guaranty of three notes made by Phillips to Croskey; the second on liability as indorser; the third the same liability, and the fourth and fifth on the assignment and the insolvency of the maker. Defendant filed a plea denying the execution of the guaranty,

verified by affidavit, and to the other counts the general issue was filed.

A trial was had before the court, a jury being waived by consent of both parties Plaintiff, during the progress of the trial, entered a *nolle prosequi* as to the first and third counts of his declaration.

It was stipulated, that the signature of defendant indorsed on the back of the notes was genuine. It was proved that the indorsement was in blank after the suit was commenced, and that what is now written over the signature was not then on the notes.

The court found the issues for the plaintiff, and assessed the damages at $1,672.84, and rendered judgment for that sum. Defendant brings the case to this court by appeal, and asks a reversal, because the court rendered judgment for the plaintiff.

Messrs. BARKER & TULEY and WM. HOPKINS, for the appellant.

Messrs. GOUDY & CHANDLER, for the appellee.

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

This was an action of assumpsit, brought by appellee in the Cook county Circuit Court, against appellant, to recover on an alleged liability, growing out of an indorsement of three promissory notes, made by one Phillips to appellant. The declaration contains five counts. The first three alleged, that appellant assigned and guaranteed the payment of the notes at their maturity; the last two, the assignment and the insolvency of the maker, so that a suit would have been unavailing. Appellant filed pleas denying the execution of the guaranty, and the general issue to the fourth and fifth counts. After evidence was heard on the trial, appellee entered a *nolle prosequi* to the first and third counts of his declaration, and the cause then proceeded to judgment, under the remaining counts of the declaration.

On the trial below, the appellee read in evidence the three notes described in the declaration, bearing the signature of

appellant indorsed thereon, which seems to have been admitted to be genuine. On the back of each note, there was this indorsement: "For value received I hereby assign the within note, to William Skinner, or order, and do hereby guarantee the payment thereof at maturity. A. F. Croskey." Evidence of the insolvency of the maker was introduced, and no question is made upon its sufficiency. A judgment was rendered in favor of appellee, which appellant seeks to reverse by this proceeding. It is urged, as the proof shows, that there was only a blank indorsement on each note after the suit was brought; that the court below erred in rendering judgment for appellee, because, the indorsement being in blank when the suit was brought, the liability of an assignor only existed, and that the holder had no right to fill it up with a guaranty, and that the contract of assignment was, by such an alteration, discharged.

The rule is uniformly and firmly settled, that the holder of commercial paper, with a general indorsement, may fill it up with any contract consistent with such paper, and in accordance with the agreement of the parties when the indorsement was made and the note delivered. And the indorsement may be filled up at any time before, or even upon, the trial. It is also true, that the contract of assignment, and that of guaranty, are not the same, but are two separate and distinct contracts. On the contract of assignment, the indorser only becomes liable in the event that the money cannot be made by legal proceeding, while under the contract of guaranty he becomes liable unless the terms of the guaranty are performed. *Hance* v. *Miller*, 21 Ill. 636. The liability of an assignor is fixed by the statute, unless limited by the terms of the indorsement. On the other hand, that of the guarantor depends entirely on the terms of the contract of guaranty. Again, the liability of an assignor can only be incurred by the holder of the legal title to the note; but the liability of a guarantor may be assumed by such a holder, or by a stranger to the instrument.

In the case of *Hance* v. *Miller* it was urged, that, by writing the guaranty above the signature of the maker without author-

ity, the contract of assignment was altered and rendered void. But this court then held, that, as the question of authority to write the guaranty over the indorser's signature had been withdrawn from the consideration of the court, and no evidence having been adduced to show whether it was authorized, this court would not, in the absence of evidence, presume that it was unauthorized; and that, even if writing a guaranty without authority, in connection with an authorized assignment, were to have that effect, which was not conceded, still there was no evidence sustaining the conclusion that there was a want of authority. So, in this case, the counts on the guaranty were *nol. pross'd*, and all claim to a right to recover on that ground withdrawn.

There can be no doubt that the holder had a right to fill up the assignment, and, as it in no wise depended on the validity of the contract of guaranty, we do not perceive that the assignment was affected by it, whether authorized or not. But, if it could be held to have that effect, we would not presume a want of authority, in the absence of proof to destroy the validity of the assignment, apparently properly made. It may be that there was a verbal agreement to guarantee the payment of these notes at maturity, and yet appellee have no means of proving such guaranty. If such a guaranty was made, it would not be fraudulent to write it over appellant's name.

Nor do we see, that it can matter whether this assignment was written before or after the commencement of the suit. In this case, there was no evidence that the assignment was unauthorized, and we are at a loss to perceive, even if the contract of guaranty was unauthorized, how writing it on the note could affect a separate and distinct contract, in no wise dependent on the guaranty for its validity, or in the least altered, changed or modified by such a contract. It then does not affect the rights of the holder by the assignment, whether the written guaranty was warranted or not, as the validity of such contract depends upon itself.

The judgment of the court below must be affirmed.

Judgment affirmed.

WILLIAM P. HENDERSON *et al.*

v.

PRESTON CUMMINGS.

1. AGENCY — *ratification.* Where an attorney compromised a debt of his principal, who, after a full knowledge of all the facts attending it, retained the money paid on such compromise, he will be held bound by it, and will not be permitted to ratify it so far as it is for his interest and repudiate the residue.

2. CHANCERY PLEADING — *objection that a bill is multifarious cannot be taken in this court for the first time.* The objection that a bill is multifarious cannot be raised for the first time in this court. It should be made in the court below, either by demurrer, plea or answer.

3. SAME — *what deemed a waiver of such objection.* And, where a party files his answer, and goes into an examination of the testimony on the merits, he will be considered as having waived such objection.

WRIT OF ERROR to the Circuit Court of Bureau County; the Hon. MADISON E. HOLLISTER, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Mr. J. I. TAYLOR, for the plaintiffs in error.

Messrs. KENDALL & IDE, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It is to one point alone we have deemed it necessary to direct our attention, as that is decisive of this case, and must affirm the decree, and it is this: If the plaintiffs in error desired to repudiate the compromise made by their attorney, Hemenway, with the defendant in error, after they had obtained full knowledge of all the facts attending it, they should have tendered back the money received on the compromise, and then taken out their executions. Retaining the money after all the facts had become known to them through their agent, however, must be held to be a ratification of the arrangement made. A party cannot be allowed to ratify a proceeding so far as it is for his interest, and repudiate the residue. Under

the arrangement made by Hemenway, plaintiffs in error received a considerable sum of money in compromise of a debt due them by the defendant in error, who is shown to have been at the time, if not in insolvent circumstances, at least in a precarious and uncertain condition as to available means to pay his debts. Justice will not allow the plaintiffs in error to retain the fruits of the compromise, and at the same time repudiate it.

Had they been driven to the necessity of paying back this money before they took out executions, it is quite probable, from the testimony, there would have been no repudiation. Having chosen to retain the money, they must abide the terms of the compromise. It must be taken as one entire thing, and is not to be acquiesced in in part and repudiated in part.

On the question that the bill was multifarious, the interests of the plaintiffs in error being separate and distinct as to these moneys, we have to say, the objection comes too late. It was not made by demurrer in the court below, or by plea or answer, and cannot now be made here for the first time. Filing answers, and going into an examination of the testimony as to the merits of the whole matter in controversy, was a waiver of the objection. 1 Daniel's Ch. Pr. (rev'd ed.) 352, where numerous authorities on the point are referred to in the notes.

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

Decree affirmed.

CHARLES M. CHADWICK
v.
JOHN PARKER.

1. LEASE—*forfeiture—re-entry.* At common law, a lease containing a condition for a re-entry for non-payment of rent, the law not favoring forfeitures, required of the landlord, before he could re-enter, that he should demand the precise amount due; that it be made the day it fell due; to be made at a convenient hour before sunset; on the land at the most conspicuous place, unless a different place is named in the lease, then, at that place; the demand

must be made in fact and, to be availing, had to be pleaded and proved. The tenant had the whole day in which to make payment, but, failing to do so, the reversioner might then re-enter.

2. SAME. As leases of every kind frequently contain these conditions, in favor of trade and agriculture, and as forfeitures are odious to the law, such forfeitures are never enforced but upon a strict compliance with all the requirements of the law. All leases having such conditions are, without reference to the length or value of the term, attended with the same consequences, and are liable to be swept away, if the rent is not paid on the day it falls due, notwithstanding it may owe almost its entire value to the expenditure of the labor and money of the tenant. It is only reasonable that the landlord should, on the day his rent falls due, indicate his intention of terminating the lease, and the tenant have the entire day within which to make payment.

3. FORFEITURE — *after changed by statute.* The act of 4 George II, chapter 28, section 2, amended the common law, only requiring the landlord, if a sufficient distress could not be found, to sue in ejectment, and, if a recovery be had, and execution be had, without the tenant paying the rent, and failing to file his bill in six months, the term was ended, unless the judgment should be reversed.

4. SAME — *construction of the act.* The British courts, in construing this act, held that it gave an additional remedy to the landlord; that he might proceed under the statute, or resort to the common law, as he might prefer, but, in adopting either course, he must conform to the law regulating that mode of terminating the lease.

5. LEASES — *regulated by statute.* The act of 1865 declares that in all cases of tenancies, when default shall be made in the payment of rent due, or in any of the covenants of the lease, it shall not be necessary to give more than ten days' notice to quit, or of the termination of such tenancy; and it may be terminated on giving such notice to quit at any time after default in any of the covenants of the lease. That no other notice or demand shall be necessary. It also declares, that, in all cases of a lease or contract, when all of its covenants are performed, the lease or contract shall be notice of its termination, and no other notice be required.

6. SAME. The second section of the act of 1865, designed to dispense with the necessity of demanding the rent on the very day it falls due or the breach of covenant occurs, and to extend the right when the lease contains no clause for a re-entry; and it contemplates a notice to quit, and one of the landlord's intention to terminate the lease. While it does not in terms require ten days' notice of an intention to terminate a lease, it declares that more than that need not be given, and thereby renders ten days' notice before the lease terminates sufficient.

7. SAME — *payment of rent — notice.* It was the intention of the legislature to give the tenant ten days' notice, within which he might pay the arrears of rent, and thus prevent a forfeiture. It could not have been the legislative

Statement of the case.

intention to bring even future leases under so rigid a rule as to permit a landlord to declare an instant forfeiture of a lease, because the rent was not paid on the day it falls due, although payment may have been prevented by accident or uncontrollable necessity, but rather to give a reasonable opportunity to avoid such disastrous consequences.

8. RENT—*failure to pay after demanded.* When ten days expires after the notice and demand without the payment of the rent in arrear, the tenancy is terminated, and the landlord may sue and recover possession.

9. EVIDENCE—*readiness to pay rent.* In such a case it is not error to reject evidence that the tenant offered to pay part and was ready on the premises to pay the balance when it became due, as he had the opportunity of paying when the demand was made and the notice given, and for ten days after.

APPEAL from the Superior Court of Chicago; the Hon. JOHN M. WILSON, Chief Justice, presiding.

This was an action of forcible detainer, brought by John Parker, before a justice of the peace of Cook county, against Charles M. Chadwick, to recover the possession of a house and lot in the city of Chicago. On the 2d of April, 1866, a trial was had, resulting in a judgment in favor of defendant. The case was removed by appeal to the Superior Court of Chicago.

On the 15th day of June, 1866, the case was tried before the judge and a jury. It appears that appellant leased of appellee the premises in controversy, and entered into their possession and occupancy. Having failed in the payment of several installments of the rent, appellee gave to appellant this notice:

"To CHARLES M. CHADWICK:

"You are hereby notified, that, in consequence of your default in the payment of rent according to the terms, conditions and covenants of a certain lease, bearing date March 7, 1865, made and executed by me to you, and by you subscribed, of the premises known as 115 and 117 Dearborn street, Chicago, now occupied by you, said rent being due and unpaid on the fifth day of August, the fifth day of September, the fifth day of October, the fifth day of November, the fifth day of December, 1865, and on the fifth day of January, the fifth day of February, and the fifth day of March, 1866, I have elected to

determine said lease, and you are hereby notified to quit and deliver up possession of said premises to me, within ten days from this date.

"March 14, 1866. JOHN PARKER."

It appeared that the payments named in the notice were in arrear and unpaid. There was no evidence of a payment or tender of the rent due on the lease within ten days after this notice was served, and the demand of payment was made.

On the trial, appellant offered to prove that he had offered to pay the rent on the several days it fell due for the first five months, and for the balance of the time he was ready on the several days the rent fell due, on the premises, with the money to pay the rent. This was objected to, and the objection sustained by the court, and appellant excepted. He also offered to prove that he had tendered the money falling due in August, September, October and November, which was rejected, on objection by appellee.

The jury returned a verdict of guilty. A motion for a new trial was entered by appellant, and overruled by the court, and a judgment was rendered on the verdict.

Messrs. McALLISTER, JEWETT & JACKSON, for the appellant.

Mr. GEORGE H. BELLOWS, for the appellee.

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

This was an action of forcible detainer, brought before a justice of the peace, for the recovery of the possession of a house in Chicago; it was tried before him, and removed by appeal to the Superior Court; and an appeal is prosecuted to this court, from the judgment rendered on the trial in that court. It appears, that the lease was for a term of five years, commencing on the 5th day of July, 1865, and ending on the corresponding day of July, 1870, at a rent of $541.66\frac{2}{3}$, monthly, in advance. The lease, among others, contained this covenant: "It is expressly understood and agreed by and between the parties

aforesaid, that, if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment thereon, the same ought to be paid as aforesaid; or, if default shall be made in any of the covenants or agreements herein contained, to be kept by the said party of the second part, his executors, administrators or assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his or their election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law, to re-enter." It appears, that appellant executed notes to appellee for each month's rent falling due the first year, and bound himself, on the first day of June of each year, during the continuance of the lease, to give similar notes for the rent falling due each month of the succeeding year. On the back of each there was an indorsement, that they were given as collateral security for the rent of premises, as by a lease between the parties, of even date, and subject to all matters of defense, the same as the covenants in the lease, and shall be notice to the holder. On the 14th day of March, 1866, appellee made a demand on the premises, for rent due on the 5th day of August, and each intervening month, of appellant. It was not paid, and appellee gave him a notice that the lease was determined, and subsequently brought this suit to recover possession of the premises.

It is conceded, that the demand of the rent and the notice of the termination of the lease occurred about three o'clock in the afternoon of that day. It is contended, that the demand of rent should have been on a day previous to the day on which the notice of the termination of the lease was given; that appellant had the whole day on which the demand of rent was made to pay it, and that the two acts could not be simultaneous. There was no place named in the lease where the money should be paid.

At the common law, where a lease contained a condition for re-entry for non-payment of rent, the law, not favoring forfeitures, required several things to be done by the lessor to entitle him to re-enter. It required a demand of the precise amount of the

rent due, neither more nor less; that it be made upon precisely the day when due and payable by the terms of lease, or if a further day was specified within which it might be paid to save the forfeiture, then upon the last day of that time. It was required to be made at a convenient hour before sunset; upon the land, at the most conspicuous place; as, if it was a dwelling-house, at the front door, unless some other place was named in the lease, when it was necessary to make it at that place. It was required that a demand should be made in fact, should be pleaded and proved, to be availing. The tenant, however, had the entire day within which to make payment. But, if he failed to do so, then the reversioner was entitled to re-enter. 1 Saund. 287, note 16; *Foster* v. *Wandless*, 7 T. R. 117; *Chapman* v. *Wright*, 20 Ill. 120. If any of these requirements were not observed, the lessor could not declare a forfeiture and re-enter the premises.

This strictness is supposed to be necessary to protect the interests of agriculture and trade; and, because at law forfeitures are odious, and are never enforced except in strict conformity to all of the requirements of the law; leases of every description frequently contain these conditions. They are not unfrequently inserted in leases for life, for years, and other terms. If contained in the longest as well as in the shortest terms, a failure to pay rent on the day would, it is believed, be attended with the same consequences. A lease for ninety-nine years, containing such a provision, and upon which the most valuable and permanent improvements have been made by the lessee, and the greater portion of the term unexpired, is liable to be swept away if the rent is not paid on the day it falls due, and this notwithstanding the term may have become of great value, by the improvements placed upon the premises.

Long leases of farms, of business houses, and of manufacturing privileges are frequent, where it is intended that all of the improvements shall be placed upon the premises by the lessee, which is well calculated to advance these great interests. And if they may be forfeited because a tenant shall neglect a few hours, or if from sickness or uncontrollable necessity he is pre-

vented from making payment at the precise time agreed upon, he shall forfeit his lease, without any notice or act done on the part of the landlord, great wrong and injury would result. Can it be said, that, because the landlord has been disappointed, for but a day, it may be, in getting his rent, a long, highly improved and valuable lease, made so by the labor and expenditure of the tenant, shall be forfeited to compensate for the want of the use of his rent for so short a period? Is it not more reasonable, just and in harmony with the interests of society, that the landlord should be required at the time to indicate his option, whether he would terminate or continue the lease, and at least give the tenant an opportunity of making the payment at any time during the day the demand was made, and thus prevent such disastrous results? Although inconvenient, these old requirements of the common law are not devoid of justice.

Again, they were well calculated to prevent the necessity of a resort to equity, in many cases, to avoid the forfeiture. In this manner, the law proceeds to a large extent upon equitable principles; and, although the relief afforded may not have been as ample as in a court of equity, still justice was more cheaply and expeditiously administered. But the developments of trade, with its vast interests, demanding changes in all departments of business, to facilitate its operations, and to conform to the different habits which had been wrought in the community, induced the British parliament to amend the law by the act of 4 George II, chapter 28, section 2, which declared, that when a half year's rent should be in arrear, and the landlord had a right of re-entry for the non-payment thereof, the lessor might, without any formal demand or re-entry, serve a declaration in ejectment for the demised premises; and should a recovery be had by the landlord, and execution be had, without the tenant paying the rent in arrears, with the costs, or he should not file his bill within six calendar months after such judgment shall be executed, then the lessee, his assignees and all others should be barred in law or equity, without first reversing the judgment, from claiming the same; and the land-

lord should thenceforth hold the premises, discharged from the lease. The act provided, that to recover, the landlord must prove that there was a right of re-entry given by the lease, that a half year's rent was due before the declaration was served, and that no sufficient distress was found on the demised premises, "countervailing the arrears then due." Thus, it appears, that parliament were not unmindful of the important interests with which they were dealing, as they have studiously guarded the rights of the lessee, while changing the remedy of the lessor.

In giving a construction to this act, the court of King's Bench, in the case of *Foster* v. *Wandless*, held, that the statute was adopted to do away with the niceties of the common law. That it showed, however, that these niceties were required, and that they must have been complied with before the passage of the act; and that it did not apply to a case where there was a sufficient distress on the premises. That in such a case, the landlord must resort to his right at common law, and failing to comply with the common law, he could not recover. From this it appears, that that act was in aid of the common law, and was not intended to repeal it, but to afford an additional remedy. But failing to bring himself fully within the provisions of the act, the lessor could not regain possession, unless he showed that he had complied with all of the requirements of the common law; that he might proceed under either, but must bring himself fully within one or the other to succeed.

Our general assembly, at the session of 1865 (Sess. Laws, 107), introduced important changes in this branch of the law. The second section declares, that in all cases of tenancies where default shall be made in the payment of rent due, or in any of the covenants of a lease, it shall not be necessary to give more than ten days' notice to quit, or of the termination of such tenancy; and that the same may be terminated on giving such notice to quit at any time after such default in any of the covenants of such lease. The form of the notice is prescribed. It also declares, that no other notice or demand of possession, or termination of the tenancy shall be necessary. The third sec-

tion prescribes the mode of serving the notice and the return. The seventh section declares, that in all cases of a lease or contract, where all of its covenants are fulfilled, the lease or contract shall be sufficient notice of its termination, and no other notice shall be necessary.

The second section was obviously designed to dispense with the necessity of making the common law demand of the rent on the very day it fell due, and to give a remedy where the lease contains no clause for a re-entry. This section seems to contemplate two notices, — one to quit, and the other of the landlord's intention to declare and insist upon a forfeiture, — or why declare that it should not be necessary to give more than ten days' notice of the termination of the lease? While it does not, in terms, require ten days' notice to be given to terminate a lease, it declares, that it shall not be necessary to give more than ten days' notice of such termination. If the intention was to only require notice to quit before bringing suit, why embrace a notice of the termination of the lease? If the default of itself worked a forfeiture, then the lease was ended, and no other act could be required. But, as it is at the option of the landlord to continue or terminate the lease after a default has occurred, and as this act dispenses with the necessity of demanding payment on the day, and authorizes a forfeiture subsequently to be declared, we must suppose that the general assembly intended to give the lessee some benefit by the notice of the termination of the lease, and we can see none by informing him that it ended on the day he should have paid the rent which was in arrear.

If, however, it was intended, that, after a default in paying the rent, the landlord might give ten days' notice that if the rent was not paid the lease would then be terminated, we can see that there would be some mutuality, — that tenants having long and valuable leases could have that period within which to pay the money and prevent a forfeiture; and such was, no doubt, what was intended.

It is believed, that, as a matter of fact, vast interests in leasehold property exist in this country, — that millions depend

upon them; and it could not have been the intention of the legislature to even bring future leases under such rigid rules, as to subject every lease in the State, whether it is held for agricultural, commercial, or manufacturing purposes, under a rule that the failure to pay on a specified day should, without further notice or opportunity of payment, of itself, end the lease, independent of all agreement of the parties, to say nothing of those already made. Such a construction would render, in a large number of cases, such a breach of contract more highly penal than the commission of any misdemeanor defined in our Criminal Code. In many instances it would involve the loss of thousands of dollars, and would of itself entail ruin upon the unfortunate tenant, who, from sickness or unavoidable necessity, should be prevented from making payment at the time. Such consequences, we believe, have never been visited upon unfortunate tenants in any country.

The act makes no exception and has no saving clause in favor of any class of leases, or for misfortune or accident. Such could never have been intended by the legislature; and we cannot so hold, until they speak in language so plain that it cannot be misunderstood. But having provided for ten days' notice of the termination of the lease, if the landlord shall rely upon the statute he should bring himself within its provisions. If his lease contains a clause of re-entry, he can, if he choose, resort to his common law remedy, or failing in that, he may, after default, give notice that unless the arrears are paid within ten days his lease will terminate, and that he must quit the possession of the premises, on the notice provided by the statute, and on the failure of the tenant to pay such arrears, he may, after the expiration of the time, bring his suit without further notice. If the lease contains no such clause, then the landlord may, after default in payment, give a similar notice, and with like effect. This was no doubt what was intended by the legislature, as it brings within its provisions a large class of cases, not embraced in the common law; and affords a remedy in such cases, not previously possessed, of terminating a lease and regaining possession, where an insolvent

tenant would not pay his rent, instead of leaving the landlord, as he was before, to his action for the recovery of his rent.

In this case more than ten days elapsed after the notice was given, and the suit was brought, and the appellant should, to prevent a forfeiture, have tendered the rent in arrear before the expiration of ten days from the time the notice was served. We have seen that the statute gave him this right; but, failing to pay, his lease became forfeited, and appellee had a right to maintain his action.

Appellant offered to prove, that he had tendered the rent for several months, and was ready and willing to pay the balance on the premises when it fell due. This evidence was rejected by the court. We do not under our statute see, that it was the duty of the landlord to call upon the tenant for the money at the premises, unless he intended to declare a forfeiture under the common law. But, even if he was bound to demand payment then, still he should have been ready, and paid it when it was demanded, on the 14th of March. He did not pay it on that day, nor within the succeeding ten days, and we are clearly of the opinion that it was not error to reject this evidence.

We do not perceive any error in this record, and the judgment must be affirmed.

Judgment affirmed.

Henry F. McCloskey
v.
Cyrus H. McCormick *et al.*

1. Chancery—*mistake in written instrument.* A court of chancery will correct a written instrument, where clearly made to appear that it was entered into and executed under mistake.

2. Practice—*objections to bill in chancery—how made.* Technical objections to a bill in chancery, to be available at any time, can only be raised by demurrer.

3. Res adjudicata—*defense of.* The fact that a complainant in chancery commenced an action at law, which he finally abandoned because it would be

ineffectual, is no bar to the assertion of his rights in a forum where a remedy can be given.

Appeal from the Circuit Court of Jo Daviess county; the Hon. Benjamin R. Sheldon, Judge, presiding.

The case is sufficiently stated in the opinion of the court.

Mr. D. W. Jackson, for the appellant.

Mr. Charles Blanchard, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

This was a bill in chancery, filed by McCormick, to correct a written instrument. It appears McCormick sold to McCloskey a warehouse in the city of Galena, with all the personal property in it excepting a quantity of salt in tierces and barrels. The agent of McCormick gave the purchaser a written memorandum of the purchase, specifying four hundred and forty-two tierces and one hundred and six barrels as the quantity reserved, and transferring all other movable effects in the house. The bill charges, it was the intention of the parties that all the salt should be reserved, and that the number of one hundred and six barrels was specified under the supposition that there was no larger number in the house, whereas there were in fact one hundred and fifty-six barrels. The bill further alleges a demand on the defendant to surrender the fifty barrels, and his refusal, on the ground that the memorandum of sale gave him the title, and prays for a correction of the error and general relief.

The answer sets up that the complainant brought an action at law against the defendant for recovery of the fifty barrels; that he recovered judgment therefor in the Circuit Court; that the defendant appealed; that the Supreme Court reversed the judgment on the ground that the memorandum or contract of sale could not be contradicted by parol evidence; that the cause was remanded and then dismissed by the plaintiff, and that those proceedings are a bar to the prosecution of this suit.

The Circuit Court decreed the defendant should pay the value of the salt, and the defendant appealed.

The decree was unquestionably correct. The proof shows the mistake beyond all controversy, and the avowed intention of the defendant to avail himself of what he deemed a legal advantage, even though unconscionable and obtained by accident. His own witness and clerk swears he disclaimed any moral, but claimed a legal, right to the salt.

Counsel for appellant urge various objections of a very technical character to the bill, in regard to which it is only necessary to say, that, if available at any time, they were only so by demurrer, to which the defendant did not resort. The bill shows substantial grounds for relief, and it is sustained by the proof.

Neither were the proceedings in the action at law a bar to this suit. In that action the plaintiff took a nonsuit after this court had decided that the memorandum of sale had amounted to a contract, which, being in writing, could not be contradicted by parol evidence in an action at law to recover the value of the salt, and that the only remedy for the mistake was by an application to a court of equity. The fact that the complainant commenced an action which he finally abandoned because it would be ineffectual, is no bar to the assertion of his rights in a forum where a remedy can be given.

It is objected that the complainant's attorney, who drew the written instrument, was liable to complainant for the value of the salt, and therefore an incompetent witness. It appears he inserted in the instrument the number of barrels given him by Langfeldt, the clerk of the complainant. There was therefore no negligence on his part, and he would not be liable in case the complainant should not succeed.

There is no error in the record, and the decree must be affirmed.

Decree affirmed.

Syllabus.

NATHAN B. BRADLEY *et al.*
v.
ANDREW T. KING *et al.*

1. TENDER — *on the sale of chattels — what is a sufficient tender thereof — and of a plea of tender.* A contract of sale of a quantity of lumber provided that the lumber should be inspected by a particular person, and should "inspect at least twenty-five to thirty per cent better than common." In an action by the purchaser against the vendor for failing to deliver the lumber, the defendant pleaded a tender of performance, averring that the lumber tendered was inspected by the person named, but not that it was inspected "twenty-five to thirty per cent better than common." The plea was defective in failing to show that the lumber tendered was of the quality required by the contract.

2. SALES — *sale for delivery at a specified time — acceptance of part after the time.* On a sale of chattels to be delivered by a certain time, if the vendor fails to make delivery within the time, an acceptance of a part afterward will operate as a release of damages for non-delivery only as to the portion accepted, there being no express waiver.

3. SAME — *when payment is to be made on delivery — effect of refusal to pay.* And where the contract provides for payment on delivery, and the vendor fails to deliver within the time stipulated, but the purchaser accepts part afterward, such acceptance places the purchaser under the same obligation, as to payment, that he would have been under had the property been delivered and accepted within the time stipulated in the contract, and if the purchaser refuses to perform this obligation on his part, the vendor is excused from further delivery.

4. SAME — *whether the sum due for the part thus accepted may be set-off against damages for non-delivery of the residue — and how the purchaser may avail thereof.* In an action by the purchaser against the vendor for non-delivery within the stipulated time, a plea that a part was delivered and accepted afterward, but that the purchaser refused to pay for the part thus accepted, on its delivery, as required in the contract, is a good plea. If the purchaser sought at the time of the delivery of such part to pay for it by setting off the damages for non-delivery of the residue, it was incumbent on him to have made a distinct offer so to do to the vendor.

5. In order to defeat the effect of such a plea, the purchaser should either traverse the averment of refusal to pay, and prove on the trial of the issue that damages were due him equal to the value of the property delivered, and that he offered the vendor to release the damages to that amount, or he may reply these facts specially to the plea.

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

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

Messrs. KNOWLTON & JAMIESON, for the appellants.

Messrs. SCATES, BATES & TOWSLEE, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 23d of February, 1864, N. B. Bradley & Co. entered into sealed articles of agreement with A. T. King & Brothers, by which the former bound themselves to deliver to the latter in Chicago, by the 1st of September, 1864, one million feet of lumber. King & Brothers, on their part, agreed to pay $2,000, at the signing of the contract, $1,000 on the 15th of March, 1864, $1,000 on the 1st, and $1,000 on the 15th of April, and the balance as fast as the lumber should be received. On the 1st of September there had been delivered on this contract about two hundred and eighteen thousand feet. Between that date and the 29th of September, nearly six hundred thousand feet more were delivered, the last cargo having been delivered on or near that day. This suit is an action of covenant brought by the purchasers against the vendors for an alleged failure to deliver the lumber as required by the terms of the contract. The plaintiffs recovered a verdict and judgment, and the defendants appealed.

The court sustained a demurrer to the defendants' second and third pleas, and in this the appellants insist there was error. The second plea was a plea of performance in part, and tender of performance of the residue. It was, however, clearly defective. The contract provided, that the lumber should "inspect in Saginaw, at least twenty-five to thirty per cent better than common." It further provided, that it should be "inspected by Yawkey & Co., of East Saginaw, Michigan." The plea averred, that it was inspected by Yawkey & Co., but not that it inspected "twenty-five to thirty per cent better than com-

mon." The plea failed to show, that the lumber tendered was of the quality required by the contract.

The third plea avers, that, for the last cargo, amounting to one hundred and seventy-four thousand nine hundred and ninety-two feet delivered to, and accepted by, the plaintiffs, they refused to make payment. This is a good plea. Although the acceptance by the plaintiffs of a part of the lumber after the 1st of September was a release of damages for non-delivery only as to the portion accepted, there being no express waiver, yet when, on the 29th of September, the defendants delivered, and the plaintiffs accepted, a cargo, it was clearly accepted on the terms of the original contract as to payment. Its acceptance placed the purchasers under the same obligation as to payment that they would have been under had the cargo been delivered and accepted prior to the 1st of September, and that obligation was, by the terms of the contract, payment on delivery. If the purchasers refused to perform this obligation on their part, the vendors were excused from further delivery. The payment for the lumber at the time of its receipt was a condition precedent, so far as concerned the right of the plaintiffs to demand a further delivery. *Gardner* v. *Clark*, 21 N. Y. 399; *Dunham* v. *Mann*, 4 Seld. 512. The counsel for plaintiffs urge, in reply to this position, that, although they accepted a part of the lumber after the 1st of September, yet the acceptance of such part was optional with them, and did not oblige them to accept the residue, and that, having the right to claim damages for so much as was not delivered and accepted, they had the right to pay for the last cargo by setting off the damages due them for the undelivered portion. Inasmuch as they could plead such damages as a set-off to a suit brought by these defendants for the value of the last cargo, it would seem to follow that they did have such right of payment. But that does not affect the sufficiency of the plea. If the plaintiffs sought at the time of the delivery of the last cargo to pay for it by setting off their damages, it was incumbent on them to have made a distinct offer so to do to the defendants. In order to defeat the effect of this plea, they should either have traversed

the averment of refusal to pay, and proved, on the trial of the issue, that damages were due them equal to the value of the cargo, and that they offered the defendants to release the dam ages to that amount, or they might have replied these fact specially to the plea. But the plea, on demurrer, should hav been held good.

The demurrer to the rejoinder to the replication to the fifth plea was properly sustained. The rejoinder was defective in the same manner as the second plea, of which we have already spoken.

It is unnecessary to comment specially on the instructions, as, on another trial, the court will instruct in conformity with the views expressed in this opinion. The judgment is reversed and the cause remanded.

Judgment reversed.

ANDREW T. KING *et al.*
v.
NATHAN B. BRADLEY *et al.*

1. SET-OFF — *of a judgment after an appeal therefrom.* It has been held in England that a judgment may be pleaded as a set-off, notwithstanding an appeal therefrom and supersedeas; but this court is of a different opinion, though upon the facts in this case it was not necessary to decide the question.

2. SAME — *whether the damages recovered in such judgment may be set off pending the appeal.* In an action by a vendor against his purchaser for the price of a part of the chattels sold, which had been delivered and accepted, the purchaser may set off his damages for the non-delivery of the residue of the property, although he has recovered a judgment for those same damages, there being an appeal from such judgment pending, and a consequent suspension thereof.

3. SAME — *how far such set-off may be limited by the judgment recovered.* But the vendor may meet the evidence of such damages by proof of the former judgment, and insist that the amount of the judgment shall be the limit of the defendant's set-off.

4. SAME — *the damages being thus set off, satisfies the judgment — injunction.* A plea proposing to set off such damages, and the offering of evidence under it, would be a satisfaction of the judgment already obtained, and its collection may be enjoined in the event of its affirmance in the appellate court.

APPEAL from the Superior Court of Chicago.

The case is stated in the opinion.

Messrs. SCATES, BATES & TOWSLEE, for the appellants.

Messrs. KNOWLTON & JAMIESON, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This case grows out of the same transaction with that of the preceding case, *Bradley* v. *King*, the parties in the present suit being reversed. This suit was brought to recover the value of the last cargo of lumber received by the defendants under the circumstances set forth in the opinion in that case. The third and fourth pleas were pleas of set-off. The third set up the damages claimed by the defendants for the non-delivery of a part of the lumber deliverable by the plaintiffs under the same contract upon which this suit is brought. The fourth set up the judgment recovered by the defendant for the same damages in the former suit. To the third plea the plaintiffs replied, that the damages were merged in the judgment mentioned in the fourth plea. To this replication defendants rejoined, that the judgment had been appealed to the Supreme Court and thereby superseded. To this rejoinder the plaintiffs demurred and the demurrer was sustained.

To the fourth plea of the judgment the plaintiffs replied the appeal and *supersedeas*. The defendants demurred, and the court overruled the demurrer. Under these rulings the defendants were denied the privilege of setting off either their judgment, or the damages for which the judgment had been obtained. The action of the court on these demurrers is assigned for error.

Counsel for appellants cite the cases of *Evans* v. *Prosser*, 3 Durn. & East, 96, and *Reynolds* v. *Biering*, 4 Doug. 81, in support of the position that a judgment may be pleaded as a set-off, notwithstanding an appeal and supersedeas. These cases do so hold. We are reluctant to disregard so respectable authority, but in our opinion such a rule might

easily lead to manifest injustice. If the judgment could be pleaded it would of course be conclusive against the plaintiff, and the defendant would thus get the full benefit of a judgment whose collection had been suspended, and which might afterward be reversed. The very judgment pleaded in this case has been reversed by us at the present term in the other suit above referred to, and as this plea can no longer be of any benefit to the defendant, it is not necessary for us to decide this question.

It is clear, however, that these defendants should have been permitted to set off either their judgment or the damages for which the judgment was obtained. The pendency of an action for the claim set off does not defeat the right. 1 Chitty, 572; *Barkerville* v. *Brown*, Burr. 1229. Upon this principle we can perceive no good reason why these defendants, though not permitted to plead their judgment, should have been denied the right to plead their damages. This could have worked the plaintiffs no injustice. Such a plea, and the offering of evidence under it, would undoubtedly be a satisfaction of the judgment already obtained by the defendants, and have enabled the plaintiffs to enjoin its collection in the event of its affirmance in the appellate court. The effect of allowing this plea would have been to have given the plaintiffs another trial on the question of damages, sustained by the defendants for the non-delivery of the lumber, the very object the plaintiffs were seeking by their appeal. Or, if the plaintiffs had preferred to abide by that judgment, rather than re-open that question, they would undoubtedly have been at liberty to have met the defendants' evidence by proof of the former judgment, and on their motion the court would have told the jury, that the amount of such judgment must be the limit of the defendants' set-off. There is, therefore, some peril to a defendant in such a plea, but no possible wrong to the plaintiff, and if a defendant for the sake of setting off his claim, chooses to abandon his judgment, and incur the hazard of another trial, he should be permitted to do so.

We are, therefore, of opinion that the demurrer to the re-

joinder to the plaintiffs' replication to the third plea should have been carried back and sustained to the replication. This replication, in setting up the judgment, so far from showing that nothing was due upon the damages claimed in the plea, really showed that damages were due to the amount of the judgment. The pleading of the judgment as a merger of the damages was in itself an affirmation of its validity. As an answer, then, to the plea, the replication was not good. It only answered the plea so far as the latter claimed damages in excess of the amount of the judgment. It should have admitted the defendants' claim for damages to that extent, and pleaded it in bar of the excess.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLIAM BURRIS
v.
GEORGE W. JACKSON *et ux.*

CONSTRUCTION OF A LEASE — *as to the length of the term provided for.* A lease baring date on the 22d of May, 1860, provided that the lessee should have certain land, "forty acres of said land being now broken, and the balance of said tillable land, estimated at one hundred and twenty acres, said lessee is to break, this season, if practicable, from which said lessee is to have three crops off of said forty acres, and four crops off the balance of the land he breaks, estimated at one hundred and twenty acres." "The crops taken off of said land, leased as aforesaid, shall be as follows, to wit: From the forty acres now broken, in three years from the 1st day of March, 1860, and from the one hundred and twenty unbroken, in four years from the 1st day of March, 1861, and at the end of said time, or sooner if the number of crops provided for in said lease are had and obtained from said land, the said land to be surrendered to the lessor." *Held*, that the lease terminated on the 1st day of March, 1865. The provision that the unbroken land should be broken in 1860, "if practicable," did not authorize the lessee to occupy such portion as it might not be "practicable" for him to break that season, beyond the four years from the 1st of March, 1861.

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

This was an action of forcible detainer commenced before a justice of the peace by George W. Jackson and Henrietta A. Jackson, his wife, in the right of the latter, against William Burris. The cause was removed into the Circuit Court by appeal, where a trial resulted in a verdict and judgment for the plaintiffs. The defendant thereupon appealed to this court.

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

Messrs. ECKELS & KYLE, for the appellees.

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

This was an action of forcible detainer commenced before a justice of the peace. A trial was had before the justice of the peace which resulted in a judgment in favor of plaintiffs. The cause was taken to the Circuit Court by appeal, and, upon a trial being had in that court, plaintiffs again recovered, and defendant, to reverse that judgment, brings the case to this court by appeal. The only question presented by this record for our consideration is the true construction of the lease under which appellant entered and occupied the premises. If the lease is as he contends, then the suit was prematurely brought; but, if, as appellants insist, the lease had expired, the action was well brought.

The lease is this:

"This agreement made this 22d day of May, 1860, between James Gwin, of the first part, and William Burris, of the second part, witnesseth, that the said Gwin, in consideration of the covenants on the part of the said Burris, hereinafter contained, doth covenant and agree, to and with the said Burris, to lease said Burris all the tillable land lying and being in said Bureau county and State of Illinois, and being the south one-half of section No. 11, in township 16, range 6 east, forty acres of said land being now broken, and the balance of said tillable land, estimated at 120 acres, said Burris is to break this season, if practicable, from which said Burris is to

have three crops off of said 40 acres, and four crops off the balance of the land he breaks, estimated at 120 acres. The said Burris, in consideration of the above covenants on the part of the said Gwin, doth covenant and agree, to and with the said Gwin, to build a post and three rail fence around the said land when broken. The crops taken off of said land, leased as aforesaid, shall be as follows, to wit: From the 40 acres now broken in three years from the 1st day of March, 1860, and from the 120 unbroken, in four years from the 1st day of March, A. D. 1861, and at the end of said time, or sooner, if the number of said crops provided for in said lease are had and obtained from said land, the said land to be surrendered to said Gwin or his agent. The fences at the termination of said lease to be in good order and repair; said Burris is to pay the taxes on the south-west quarter of said land from the time assessed in 1861, to the termination of this lease; said Burris agrees that he will permit his successor, or the lessee of said land, to prepare the ground for seeding at any time after the crops, provided herein to be received and had, are taken off by said Burris, or his assigns; full possession to be surrendered to said Gwin, his heirs or assigns at the termination of said lease. Witness our hands," etc.

It is agreed, that Henrietta Jackson is the owner of the premises and entitled to all of the rights under the lease that Gwin could have if living. That appellant was and is in possession; that the proper notices to quit were given him before the commencement of the suit; that the lease was properly executed by the parties; that appellant broke about one hundred and twenty acres of the quarter during the summer of 1860; that he run two teams in breaking, and, being a farmer of limited means, this was all he could reasonably break during that season; that he afterward, in 1862, broke the remaining thirty acres, which is the portion in controversy; that he cultivated this thirty acres during the years 1863 and 1864 with the acquiescence of appellees, and paid no rent beyond the breaking.

Appellant expressly covenants, that the crops shall be taken off of the forty acres then broke, in three years from the 1st of March, 1860; and the four crops from the unbroken land within four years from the 1st of March, 1861, and at the end of that time to surrender the land to Gwin, or his agent, or sooner if the crops were sooner obtained. These covenants are clear and unambiguous. Unaffected by other provisions of the lease no person could be at a loss in determining, that the term fully terminated, at the farthest, on the 1st of March, 1865. No other construction could be given to this language, but the doubt sought to be created, arises from the preceding part of the lease. It is recited, that appellant is to break the one hundred and twenty acres during the season of 1860, if practicable, and is to have four crops from the same.

It is contended, that appellant was only bound to break the land if practicable, during the year 1860, and was, at all events, without reference to the time when the land might be broke, to have four crops from that portion; that it was not practicable to break it during that season, and therefore the lease did not expire until he obtained the four crops from that part of the land. When considered in connection with appellant's covenants, the language was, we think, designed to apply to the time when the breaking should be done. It is manifest that both parties intended that this ground should be broken in the summer of 1860, but it is no doubt true that appellant desired to have the provision inserted, that it should only be done if practicable, to avoid all questions of breach of covenant, and forfeiture of the term. Hence it was provided, that this land should be broken during that season if practicable. Even if the word "practicable" does not apply to the crops as well as the breaking, the subsequent covenants of appellant remove all doubt. In their absence, there might be doubt as to which was the true construction; but they are so clear and explicit, that we cannot hesitate to say, that the lease terminated on the 1st of March, 1865. It therefore follows, that the suit was not prematurely brought, and may be maintained. The judgment of the court below is affirmed. *Judgment affirmed.*

JOHN CLARK
v.
JAMES M. BARKER.

1. FORCIBLE ENTRY AND DETAINER — *against whom the action will lie.* In case of a tenant holding over against his landlord, either the tenant, or any person claiming under him, is, by the express provision of the statute, liable to this action.

2. But, in the case of a forcible entry, it is the person who makes it who is liable to the action.

3. Probably, also, the action might lie against any person going in under the person who had made the forcible entry, collusively, with knowledge of such force, and for the purpose of availing himself of it, because such person might be well considered as himself committing the forcible entry.

4. But, where a person has entered into the possession of premises, peaceably and in good faith, as the tenant of a purchaser from one who had previously made a forcible entry, the tenant, or even his landlord, not being a privy to the wrongful act of the grantor, or having any knowledge of it, such occupant is not liable to be turned out by this summary remedy.

APPEAL from the Circuit Court of Warren county; the Hon. JOHN S. THOMPSON, Judge, presiding.

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

Mr. A. G. KIRKPATRICK, for the appellant.

Mr. Jos. K. RIPLEY, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of forcible entry and detainer commenced on the 11th of January, 1864, by Clark against Barker. The complaint alleges, that, on the 21st of March, 1857, Clark was in the actual possession of the premises, and on that day H. H. Boggess, N. P. Earp and B. F. Mason made a forcible entry; that Boggess and Earp were agents for Robert Holloway and H. M. Boggess, who claimed some title to the land and had sold it to Mason; that after said entry said parties

placed Mason in possession, and that he continued in possession until March 13, 1861, when, acting in collusion with one William H. Pierce, he sold to the latter and put him in possession, and that Pierce has ever since continued in possession by himself or tenants, and that Barker, the defendant, is his tenant. On the trial, the jury found a verdict for the defendant, on which the court gave judgment, and the plaintiff appealed.

It is unnecessary to consider the questions made by appellant's counsel upon the instructions given on the trial, as it is perfectly manifest, from an inspection of the entire record, that the verdict of the jury was correct, and a different one would have been set aside. Both parties in this case claim the prior possession, and we do not undertake to decide which of them had it. But conceding, as claimed by plaintiff, that he was in actual possession, and that his possession was forcibly invaded, this invasion, as appears by both the complaint and the proof, was committed by Mason in March, 1857. Mason continued to hold the possession thus taken until March, 1861, occupying the house during that time and fencing and cultivating the land. This covered a period of four years. At that time he sold to Pierce and gave him possession, and, on the trial, the deed from him to Pierce, bearing date March 13, 1861, was put in evidence by the defendant. Pierce continued to hold until the commencement of the suit, a period of nearly three years more. The complaint alleges, that the sale from Mason to Pierce was collusive. But on the trial there was not a particle of evidence offered to show this, nor was any attempt made to show, that Pierce had notice of the fact that four years before he went into possession Mason had obtained his possession by force. So far as the record discloses, Pierce and his tenant, the defendant, were utter strangers to all that transaction. How, then, can they be made liable to the action of forcible entry and detainer?

The provision of the statute is: "If any person shall make any entry into any lands, tenements or other possessions except in cases where entry is given by law, or shall make such entry by force, or if any person shall willfully and without force hold

over any lands, tenements or other possessions after the determination of the time for which such lands, tenements or possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession, such person shall be adjudged guilty of a forcible entry and detainer." Now, in case of a tenant holding over against his landlord, either the tenant or any person claiming under him is by the express provision of the act liable to this action. The relation of landlord and tenant exists, not only between the original parties, but between the landlord and any person claiming under the tenant, so far as may be necessary to enable the landlord to regain possession. But, in the case of a forcible entry, it is the person who makes it who is liable to this action. Probably, also, the action might lie against any person going in under the person who had made the forcible entry collusively, with knowledge of such force, and for the purpose of availing himself of it, because such person might be well considered as himself committing the forcible entry.

But we cannot hold that one taking possession in good faith, and in violation of no law, is liable to be turned out by this summary remedy, because the person from whom he purchases may, years before, have made an entry by force. The action lies against a person guilty of a forcible entry, and how can the purchaser be said to be guilty of an unlawful act of which he has never heard. In order to reach him in this action, the plaintiff must show him to have been in some way privy to the unlawful entry, or to have so acted that he may fairly be considered as adopting it and making the act his own. If we were to hold the contrary rule, the result would be that the honest occupant of land who had entered peaceably and in good faith, would be liable to be visited with a punishment designed only for the wrong-doer. In the present case the alleged forcible entry occurred within three months of seven years prior to the bringing of the suit.

The views we have here expressed are in accordance with

those expressed by this court in *Ballance* v. *Curtenius*, 3 Gilm. 454. The cases are alike in principle.

In the absence of any evidence whatever that this defendant, Barker, or even his landlord, Pierce, was privy to the forcible entry in 1857, if one was made, or that they even had any knowledge of it, the verdict and judgment of the Circuit Court were clearly right.

Judgment affirmed.

JOSIAH L. JAMES
v.
HENRY C. MOREY.

1. STATUTE OF FRAUDS — *where a parol promise has been performed.* Where one party made a verbal promise to give another a certain sum of money if the latter would marry within a year, and upon his marrying the money was voluntarily paid, it cannot be recovered back, whether this promise was originally within the statute of frauds or not.

2. SAME — *how to raise the question as to the application of the statute.* In this case, the party who made the promise to give the sum of money to the other if he would marry, brought suit against him to recover a debt, and on the trial the defendant set up a credit which he had entered in his favor on the plaintiff's books, as he alleged, with the plaintiff's consent, of a residue of the sum which the plaintiff had promised to give him, he having married within the time stipulated. The plaintiff, to raise the question whether his promise to the defendant was not within the statute of frauds, moved to exclude all the evidence on that subject. This was held not to be the proper mode of presenting that question; the proper course was to ask the court to instruct the jury that they were to disregard all evidence touching the promise of the plaintiff, unless they believed from the testimony that he had authorized the defendant to enter the credit, or had assented to such entry after it was made, and they were not to allow the amount thus credited merely because it had been promised.

3. PRACTICE — *obviating error by concessions from the opposite party.* Where the plaintiff in a suit, who has a verdict returned in his favor, asks a new trial on the ground that the verdict is too small, it is not error for the court to state, that the new trial will be allowed unless the defendant will consent that the verdict shall be raised to the amount shown by the instrument sued on to be due, and upon such consent being given, to enter the judgment accordingly.

Opinion of the Court.

4. VERDICT IN DEBT—*the proper form thereof.* In an action of debt to recover rent due upon a lease, the jury returned a verdict for the plaintiff for a given sum, specifying neither debt nor damages, and the clerk improperly recorded it as a verdict for damages; it should have been treated as a finding for the debt.

5. SAME—*whether such improper entry of the verdict is ground of reversal.* But, in order to avoid the granting of a new trial on the motion of the plaintiff, on the ground that the verdict was too small, the defendant consented that it should be raised to a larger sum; and, the judgment being so entered, the act of the clerk in entering the original verdict in damages was not considered a sufficient reason for reversing the judgment.

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.

Mr. GEORGE W. THOMPSON, for the appellant.

Mr. JOSHUA C. KNICKERBOCKER and Messrs. RUNYAN & AVERY, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by James against Morey, for rent. The defendant was in the employment of plaintiff as clerk, and the plaintiff promised him, if he would marry within a year, to give him one thousand dollars. He did marry, and the plaintiff gave his wife a lot worth five hundred dollars. He allowed the rent to run until the sum of $637.50 had accrued, and then credited himself on the books of plaintiff with $500, as the balance of the one thousand. Both parties testified, and it is at this point that the substantial difference between them begins. The defendant swore that this credit of $500 was talked over between the plaintiff and himself in the office, and the plaintiff assented to the credit. This is denied by the plaintiff, who testifies there was no such conversation, and that he did not know of the entry for more than a year after it was made. On this point the jury seem

to have given credence to the defendant, and the matter was within their exclusive province.

It is urged, however, that this promise to pay the thousand dollars was within the statute of frauds. The only mode in which the plaintiff sought to raise this question was by a motion to exclude all the evidence upon that subject. This motion was properly refused, because, even if the promise had been within the statute, its complete performance, if the testimony of the defendant was true, made the statute inapplicable. The testimony of the defendant as to the express authority given him by the plaintiff to enter the credit of $500 may have been true or false, but the court had no right to determine it was false, as it would have done by allowing the plaintiff's motion to suppress all testimony relating to the promise. If this testimony of defendant was true, the statute of frauds had nothing to do with the case. The thousand dollars, according to this evidence, had been voluntarily paid, and could not be recovered back, whether the promise was originally within the statute or not. In order to present this question, the plaintiff should have asked the court to instruct the jury that they were to disregard all evidence touching the promise to pay the thousand dollars, unless they believed from the testimony that the plaintiff had authorized the defendant to enter the credit of $500, or had assented to such entry after it was made, and they were not to allow the $500 merely because it had been promised.

As the record stands, the question raised in the argument is not before us, and we do not decide whether the promise to pay the thousand dollars was one which could have been enforced by defendant or not.

The jury found a verdict for $26.48, which was admitted to be insufficient, and the court, on the motion for a new trial, held, that the motion would be allowed, unless the defendant would consent that the verdict should be raised to $144.54, the amount due by the lease. The defendant consented, and the judgment was so entered. It was decided by this court in the case of *Carr* v. *Minor*, 42 Ill. 179, that this was not error.

An objection is also taken to the form of the verdict, which, as returned by the jury, was for $26.48 for the plaintiff, specifying neither debt nor damages. The clerk improperly recorded it as a verdict for damages, but it should have been treated as a finding for the debt. A judgment was entered for the increased amount, and we do not consider the act of the clerk in entering the original verdict in damages, a sufficient reason for reversing the judgment.

Judgment affirmed.

ABRAM L. SMALL
v.
CYRUS BRAINARD.

INSTRUCTIONS—*should not assume facts as proven.* In an action of trespass, an instruction to the jury that the plaintiff was "entitled to recover all damages proved to have been sustained by him on account of the trespasses committed by the defendant on the plaintiff's premises as alleged in the declaration," was held to be erroneous, because it assumed the defendant committed the trespasses, and that the only question before the jury was the amount of damages.

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

This was an action of trespass brought in the court below by Cyrus Brainard, against Abram L. Small, and a trial resulted in a verdict and judgment for the plaintiff. The defendant thereupon appealed to this court.

Mr. H. LORING and Mr. T. P. BONFIELD, for the appellant.

Mr. M. B. LOOMIS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trespass brought for digging a ditch and causing the water to overflow upon the plaintiff's land.

The defendant pleaded not guilty and several special pleas. On the trial the court gave for the plaintiff the following instruction:

"The court instructs the jury for plaintiff, that he is entitled to recover in this action all damages proved to have been sustained by him on account of the trespasses committed by defendant on plaintiff's premises, as alleged in the declaration in this cause."

The appellant objects to this instruction, that it assumes the defendant committed the trespasses, and that the only question before the jury was the amount of damages. The objection is well taken, and we cannot say, on an examination of the entire record, that the jury were not misled. We are the more inclined to reverse the judgment on account of this instruction, because we do not find in the evidence a very good basis for the estimate of the damages, $150, found by the jury. Witnesses give it as their opinion that the plaintiff's land was injured to that extent, but they do not state wherein the injury to that degree consists, nor the facts upon which their opinion is founded. The judgment is reversed and the cause remanded.

Judgment reversed.

ASAHEL H. WARNER
v.
SAMUEL H. OSTRANDER.

1. MEASURE OF DAMAGES—*in trespass against an officer for levying upon and selling the property of plaintiff under execution against another.* While it is true, as a general rule, that the value of property wrongfully sold on execution is the measure of damages sustained by the owner, still, that is not true except in cases where the purchaser has obtained the property.

2. A rule of more general application is, that in cases not requiring punitive damages, the loss actually sustained is the true measure.

3. So, where the property of the plaintiff was levied upon and sold under an execution against another person, but remained in the possession of the owner,

who sold it and received the benefit of the proceeds beyond the amount for which it had been sold on the execution, there being no circumstances connected with the levy and sale calling for punitive damages, the proper measure of damages in an action of trespass by the owner against the officer would be the actual damage sustained, — that is, the amount for which the property was sold on the execution.

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

The opinion states the case.

Mr. STEPHEN R. MOORE, for the appellant.

Mr. H. LORING and Mr. C. A. LAKE, for the appellee.

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

This was an action of trespass, brought by Samuel Ostrander against Asahel H. Warner, for levying upon and selling a quantity of personal property, under an execution against Peter Ostrander. There was evidence tending to prove that the property, which consisted of grain and other farm produce, had been raised by Peter Ostrander for appellee, and, on the other side, it was urged, as a defense, that the evidence showed that the ownership in appellee was only colorable, and was claimed by him to prevent its sale for the payment of the debts of Peter Ostrander. The jury found that the property delonged to appellee, and assessed the damages against appellant at the sum of $500. A motion for a new trial was overruled, and a judgment was rendered on the verdict, to reverse which this appeal is prosecuted.

It is, among other assignments of error, insisted, that the seventh instruction given for appellee misled the jury. It is this:

"If the jury believe, from the evidence, that the personal property in question was, at the time of the levy and sale thereof, the property of plaintiff, and that the defendant is guilty of the trespass thereto as charged by plaintiff, then, as

a general rule, the plaintiff has a right to recover a verdict against the defendant for the value of the property at the time of said sale, but the jury should be governed by the circumstances as they appear in evidence, in assessing the damages, if they find for plaintiff."

In view of the evidence in this case we are clearly of the opinion that this instruction was wrong. The execution was for the sum of $384. That was the sum for which the property was sold and bid in by the purchaser. Independent of other proof, that would be the measure of the damages if the levy and sale were wrongful. There was, however, other evidence tending to show that the property was of greater value than the amount for which it was sold. But Huling, who purchased the property at the sheriff's sale, testifies, that he left it on the farm; that the Ostranders sold and disposed of it and got the benefit of it, beyond the payment of the execution; that he only obtained his debt, and did not remove or appropriate any portion of the property.

If this property belonged to appellee, which under the evidence seems to be doubtful, we do not see that he could have sustained any damage over and above the amount of the execution. The property was left on the farm precisely as it was before the sale occurred, and if Peter Ostrander was the agent of appellee, it was still in his possession; was sold by him, and the presumption would be that he, as agent, accounted to appellee for the overplus. While it is true, that, as a general rule, the value of property wrongfully sold on execution is the measure of damages sustained by the owner, still that is not true except in cases where the purchaser has obtained the property. A rule of more general application is, that in cases not requiring punitive damages, the loss actually sustained is the true measure. In this case there seems to be nothing in the evidence from which it can be inferred that the levy and sale were wanton, willful or oppressive; and the true measure of damages in such a case would be the actual damages sustained by the owner. The verdict was larger than the evidence

warranted, and we think this instruction misled the jury and may have contributed to their finding. As the case will be passed upon by another jury, we deem it improper to discuss the question whether the evidence established the transaction to be fraudulent. But, for the error indicated, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

EDWARD L. ALEXANDER
v.
HENRY W. CROSTHWAITE.

WITNESS — *competency* — *interest.* A co-defendant sued as a partner, and suffering default, is disqualified by interest from being a witness, as against his co-defendant, to prove the partnership; and he is not made competent by the act of 1861 allowing parties to be called as witnesses.

WRIT OF ERROR to the Circuit Court of Warren county; the Hon. JOHN S. THOMPSON, Judge, presiding.

The opinion states the case.

Messrs. A. G. & I. M. KIRKPATRICK, for the plaintiff in error.

Mr. J. H. STEWART, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Alexander and Wilson were sued as copartners. Wilson suffered default. Alexander pleaded in abatement, denying the partnership. Issue was joined on this plea, and on the trial the plaintiff called Wilson as a witness to prove the partnership. Alexander objected, but the court overruled the objection. The precise question involved in this case has been decided by this court in the case of *Brown* v. *Hurd*, 41 Ill. 121. It is there held, that a co-defendant sued as a partner, and suffering default, is disqualified by interest from being a

witness, as against his co-defendant, to prove the partnership, and that he is not made competent by the act of 1861. The judgment must be reversed and the cause remanded.

Judgment reversed.

ALFRED POPPEN
v.
ISRAEL B. HOLMES.

1. SALE OF IMPOUNDED ANIMALS — *necessity of a judicial investigation.* The act of 1861, which gives to towns the power to restrain or prohibit the running at large of certain animals, and authorizes the distraining, impounding and sale of the same for penalties incurred, and the costs of the proceedings, does not give to towns the power to confer upon any of its officers authority to make sales of impounded animals except upon the contingency that penalties have been incurred.

2. But to ascertain whether a penalty has been incurred or not is a proceeding purely judicial in its character, and the power cannot be exercised by the pound-master by virtue of his office; nor can a town by its by-laws authorize the pound-master to sell property without a judicial ascertainment that some law has been violated.

3. And a sale of property by the poundmaster without such judicial ascertainment being first had, will not divest the owner of his title.

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

This was an action of replevin brought in the court below, by Israel B. Holmes against Alfred Poppen, to recover a horse claimed by the plaintiff as his property. The defendant claimed title by virtue of a sale of the horse by the pound-master of the town of Ridott, in Stephenson county, the horse having been impounded under certain by-laws of the town prohibiting the running at large of horses and some other animals during certain seasons of the year.

The sale was made by the pound-master without any judicial proceeding being had to ascertain whether any law had been

violated, and under authority alleged to have been conferred upon him by the by-laws of the town.

Those by-laws, after prohibiting the running at large of certain animals, and fixing the penalty for a violation thereof and providing for impounding such animals as might be found at large, provide as follows:

"SEC. 6. On receiving any animal or animals into the pound, as above directed, the pound-master of the town shall give immediate notice thereof to the owner or bailee of said animals, if known, and request said owner or bailee to pay the costs and charges of distraining, impounding and taking care of said animal or animals, and all lawful fees of the pound-master, and take them away; and, in case the owner or bailee of said animal or animals so impounded, within six hours after *such* notice is given to him, her or them, fails or neglects to take away said animal or animals, and also to pay all costs and charges of taking up, impounding and taking care of said animal or animals in the pound, together with the lawful fees of the pound-master in respect to said animals, then such animal or animals shall be sold by the pound-master, as provided in the next succeeding section of these by-laws.

"SEC. 7. Whenever the pound-master of this town shall receive into the pound any animal or animals according to the preceding section of these by-laws, and shall have given the notice required in the next preceding section, and the owner or bailee of such animal or animals fails to pay the charges and costs in the next preceding section mentioned, and take such animal or animals away within the time required in said section, then it shall be the duty of the pound-master forthwith to advertise and sell said animal or animals so impounded at public auction, to the highest bidder, for cash in hand, and out of the proceeds of said sale to pay all the costs and charges of taking up, impounding and taking care of said animals in the pound, together with his fees in respect to the same, and the balance, if any there be, he shall pay to the owner of the animal or animals sold as aforesaid; the sale of any animal or animals,

impounded under the provisions of these by-laws, shall be conducted, as near as may be, according to the law regulating sales of property by constables, under execution from justices of the peace."

The finding of the court, before whom the trial was had, without a jury, was in favor of the plaintiff, and judgment was entered accordingly. Thereupon the defendant took this appeal.

Messrs. MEACHAM & COCHRAN, for the appellant.

Messrs. BAILEY & BRAWLEY, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The question presented by this record is, whether the sale of appellee's horse, by the pound-master of the town of Ridott, divested the title of the owner. The horse had been impounded because running at large in violation of the town by-laws. There were no judicial proceedings before a magistrate prior to the sale, but the pound-master, the day after impounding the animal, advertised it for sale "in satisfaction of fine and costs of proceeding."

The authority of towns upon this subject is derived from the following statute:

"The electors of each town shall have power, at their annual town meetings, * * * to restrain or prohibit the running at large of cattle, horses, mules, asses, hogs, sheep or goats; to authorize the distraining, impounding and sale of the same for penalties incurred, and the cost of the proceedings, and to determine the time and manner in which such animals may go at large." Sess. Laws 1861, pp. 221, 222.

It will be observed that the power to make sales is given only for penalties incurred and the cost of the proceedings; and a town cannot, by its by-laws, confer such authority upon its officers in any other contingency. But to ascertain whether a

penalty has been incurred or not, is a proceeding purely judicial in its character, and that power cannot be exercised by the pound-master by virtue of his office. The by-law may impose a reasonable penalty for the offense of allowing animals to run at large, may authorize the animals to be impounded, and may direct an inquiry to be had before a magistrate as to whether the penalty has been incurred, with a right of trial by jury. If it has been incurred, the magistrate may be directed to enter a judgment against the owner for the penalty and costs, and an order directing the pound-master to sell the property. If the owner is known, he should receive personal notice, and, if not known, there may be constructive notice to him, as the unknown owner of the impounded property, by posting, the property being described in the notices. A by-law thus framed would be free from objection; but one which authorizes the pound-master to sell property without a judicial ascertainment that some law has been violated, would confer upon the pound-master a species of power never contemplated by the statute above quoted, to say nothing of constitutional objections to its exercise.

Judgment affirmed.

HENRY C. PITNEY *et al.*

v.

WILLIAM H. BROWN.

WILLS — *whether distribution shall be made per stirpes or per capita.* The will of Aaron Pitney, after directing the conversion of his property into money, and the payment of an annuity to his wife, and certain legacies to other persons, provided as follows as to the residue: "The balance remaining of said fund I hereby direct shall be equally divided between the children of my late brother, Mahlon Pitney, and my brother-in-law, William H. Brown, of the city of Chicago, a large portion of my property having been received through his father and the father of my late wife, Betsey H. Pitney." There were three children of Mahlon Pitney, and it is *held*, as between them and Brown, the distribution should be made *per capita*, and not *per stirpes*.*

* NOTE BY REPORTER. Other clauses of this will were construed in the case of *Brown et al., Exrs.*, v. *Pitney*, decided at the January Term, 1866 (39 Ill. 468).

Statement of the case.

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

This was a suit in chancery, instituted in the court below, in the right of Henry C. Pitney, Phoebe T. Watkins, and Mary E. Brayton, the children of Mahlon Pitney, deceased, in order to obtain a judicial construction of the will of Aaron Pitney, deceased, particularly of the fourth clause thereof, touching the equal distribution of the residuary fund therein provided for

The will is as follows:

"Realizing the uncertainty of life, and being now of sound mind and in the full enjoyment of all my faculties, I make this my last will and testament, as follows:

"1. I order and direct that as soon after my death as may be, my executors, hereafter appointed, shall pay all my just debts and funeral expenses.

"2. Within one year after my decease, I further order and direct my executors to sell, for the best price that can be obtained for the same, either at public or private sale, as my executors may deem advisable, all my real estate, situate, lying and being in the city of Chicago, county of Cook, State of Illinois, being the house and lot now occupied by Mrs. Phillips as a boarding house, and also a forty acre tract of land in the county of Cook (description of land), and I hereby empower my said executors to make good and sufficient deed," etc.

3. Legacy to Margaret Pitney, personal property.

"4. I hereby direct my executors, within the time aforesaid, to sell my real and personal estate, to create the fund above mentioned, and out of the same to pay my debts and funeral expenses, and the sum of $600 each and every year to my said wife, and legacies as may be mentioned herein; and after paying all such debts, etc., the balance remaining of said fund I hereby direct shall be equally divided between the children of my late brother, Mahlon Pitney, and my brother-in-law, William H. Brown, of the city of Chicago, a large portion of my property having been received through his father and the father of my late wife, Betsey H. Pitney."

5. Appoints William H. Brown and Henry O. Pitney executors.

6. Specific legacies to R. H. Burnap and Ella McNully.

The court below adjudged and decreed, that, by the just and true construction of testator's intention in the fourth clause of the will, touching the distribution of the surplus or residue of testator's estate in equal parts or shares, one equal half part of said residue was intended to be given, and was given, to William H. Brown, and the other equal half part of the same to the complainants, the children of testator's deceased brother, Mahlon Pitney.

The complainants appeal from that decree to this court, and insist, that, under the fourth clause of the will, the legatees should take *per capita*, and not *per stirpes*, as held by the Circuit Court.

Messrs. SCATES, BATES & TOWSLEE, for the appellants.

Messrs. MATHER & TAFT, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Aaron Pitney died leaving a will, by which, after directing the conversion of his property into money, and the payment of an annuity to his wife, and certain legacies to other persons, he provides as follows as to the residue:

"The balance remaining of said fund I hereby direct shall be equally divided between the children of my late brother, Mahlon Pitney, and my brother-in-law, William H. Brown, of the city of Chicago, a large portion of my property having been received through his father and the father of my late wife, Betsey H. Pitney."

There are three children of said Mahlon Pitney; and the question presented by this record is, whether the residue of the fund referred to in the will is to be divided, one-half to Brown and the other half to said three children, or whether it is to be

divided equally among all the legatees, one-fourth to each — in other words, whether the distribution is to be *per stirpes* or *per capita*. When the testator directed the fund to be "equally divided," did he mean equally as between Brown on the one side and the children of Mahlon Pitney on the other, or did he mean equally as between all the individuals who were to be the recipients of his bounty?

The language is susceptible of either interpretation; and, if the question were a new one, it would be difficult of decision, though we are inclined to think that equality *per stirpes* would be the more natural construction. But the point has so often been decided by the courts, both of England and of this country, that there is an established canon of interpretation in regard to these words, from whose authority we do not feel at liberty to depart. With a long line of precedents all pointing in one direction, and on a question of admitted doubt, it is our duty to follow the rule, even if questioning its soundness.

The rule is thus stated by Jarman (vol. 2, p. 111): "When a legacy is to the children of several persons, they take *per capita*, and not *per stirpes*. The same rule applies when a bequest is made to a person, described as standing in a certain relation to the testator and to the children of another person, standing in the same relation; as, to my brother A and the children of my brother B, in which case A takes only a share equal to that of one of the children of B." See also *Logan* v. *Hamilton*, 1 Cox, 250; *Northey* v. *Strange*, P. Wms. 343; *Blackler* v. *Webb*, id. 383; *Butler* v. *Stratton*, 3 Brown C. C. 367; *Warrington* v. *Warrington*, 2 Hare, 54; *Payne* v. *Wagner*, 12 Simons; *Collins* v. *Hoxie*, 9 Paige, 89; *Conner* v. *Johnson*, 2 Hill Ch. (S. C.) 40.

The counsel for appellee, while admitting the general rule to be as stated by Jarman, unless a contrary intent is indicated in the will, insists that such intent is indicated in the present will by the clause referring to the fact that a large portion of the testator's property came from the father of Brown, who was also the father of the testator's wife. But we can only regard this clause as giving a reason for making Brown a

legatee at all, and not as indicating the extent of the legacy. It is to be remembered that Brown would have taken nothing if there had been no will, and the children of Mahlon Pitney would have taken all. It was natural, then, that the testator should show his heirs, on the face of the will, why he diverted from them any part of his property; but we are quite unable to see how this explanation indicates, in the remotest degree, an intention to give either more or less than the share expressed in other portions of the will.

We must hold, that, by the established rules of construction, all these legatees took *per capita*.

The decree must be reversed and the cause remanded.

Decree reversed.

JOSHUA J. MOORE
v.
GEORGE TITMAN.

1. MORTGAGE — *relation of parties to each other — and as to strangers.* A mortgage, as between the parties to it, is considered simply as a security for a debt, but, as between the mortgagee and a third person, the former is regarded as the owner of the freehold.

2. SAME — *rights of the parties — rents and profits.* A mortgagee, for condition broken, may enter upon the mortgaged premises and appropriate the rents and profits arising therefrom to the benefit of his security. But a mortgagor in possession is not required to account for the rents and profits to the mortgagee, during his possession.

3. SAME — *payment of taxes by mortgagee — cannot affect the rights of mortgagor.* A mortgagee cannot affect the rights of the mortgagor by purchasing the mortgaged premises at a sale for delinquent taxes; nor will he be permitted to set up as a bar to redemption the payment of taxes and possession acquired prior to a foreclosure; nor will payment of taxes and seven years' possession by him, their relations not being adverse, create the bar of the statute.

4. SAME — *rights of parties — mortgagee in possession.* A mortgagee in possession is bound to pay the taxes, and will be allowed for all necessary expenses incurred to preserve the property and protect the mortgagor's title, to be paid out of the rents and profits arising therefrom.

5. SAME — *mortgagee of a lease, renewal by — inures to the benefit of the mortgagor.* Where a mortgagee of a lease obtains a renewal, such renewal inures to the benefit of the mortgagor, he paying the mortgagee's charges whether such lease expired before renewal or not.

6. SAME — *sale under by mortgagee and purchase by, will not bar redemption.* A mortgagee or a trustee is prevented from purchasing at his sale of the premises under a power contained in the deed, so as to bar the equity of redemption.

7. SAME — *relation of the parties.* Although the relation of trustee and *cestui que trust* may not be created by the mortgage as between the parties, yet they are not on the same footing as to each other as a stranger to the estate; and many acts, which a third person might perform, and thereby acquire an interest in the premises, would not, if performed by a mortgagee, give him any new rights as against the mortgagor, but would inure to the benefit of the estate.

8. SAME — *of the purchase by the mortgagee of an outstanding title — by consent of the mortgagor.* Where a mortgagee, by an agreement with the mortgagor, purchased an outstanding prior incumbrance against the premises, after foreclosure, and before the right of redemption by the mortgagor had expired, and with the understanding, that such title, like his own, should be subject to redemption, — *held*, that, under such agreement, the mortgagor had a clear right of redemption from the outstanding title, which a court of equity would enforce.

9. SAME — *such agreement not within the statute of frauds.* Such an agreement is not within the statute of frauds, the relation of the parties being that of mortgagor and mortgagee, and the purchase having been made by the consent of the mortgagor, and for the benefit of the estate.

APPEAL from the Circuit Court of Peoria county; the Hon. MARION WILLIAMSON, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. E. N. POWELL, for the appellant.

Messrs. MILLER, VAN ARMAN & LEWIS and Mr. D. MCCULLOCH, for the appellee.

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

This was, originally, a bill in chancery to foreclose a mortgage, brought by Titman against Moore, to the September Term, 1860, of the Circuit Court of Fulton county. The

venue was subsequently changed to Peoria county. On a trial of the cause a decree of sale was pronounced at the May Term, 1861, and a sale was made by the master on the 12th day of July following, at which Titman became the purchaser. But, before the mortgage on which this decree and sale were had was given, one Joseph C. Hoagland had recovered a judgment against Moore in the Circuit Court of the United States, which was a prior lien on the mortgaged premises; and on the 4th day of February, 1861, the marshal made a deed to the assignee of the purchaser under the Hoagland judgment. On the 6th of June, 1862, Titman purchased this Hoagland title and received a deed therefor. Moore subsequently prosecuted a writ of error to reverse the decree of foreclosure therein, and, at the April Term, 1864, of this court it was reversed and the cause remanded. The case was subsequently redocketed in the Circuit Court, and at the April Term, 1865, complainant, Titman, filed an amended bill. At the June Term, 1865, Moore filed a cross-bill, claiming that the Hoagland title was purchased by Titman under an agreement with Moore that it should be conveyed to him upon his refunding the purchase money and interest, and that the time for redeeming from the sale under Titman's decree should be indefinitely extended.

The bill further claims that Moore was to have, by the agreement, such reasonable time as he might desire for the payment of the money. Titman answered the cross-bill, denying the making of the agreement and setting up the statute of frauds.

It further appears that in the spring of 1863, Titman recovered possession of the land by an action of forcible detainer, and has ever since held the possession. A hearing was had on the original and supplemental bills of Titman, the cross-bill of Moore, the answers, replications and proofs, and the court rendered a decree dismissing the cross-bill, and declaring Titman entitled to the possession, rents and profits under the Hoagland title. Moore brings the record to this court and assigns various errors.

The relation which a mortgagor and mortgagee bear to each other partakes in some respects of several other estates, but in

many particulars differs from every other character of title. As now considered, it is, as between the parties, a security for a debt, but, as between the mortgagee and a stranger, the former is regarded as the owner of the freehold. And, after the condition is broken, the mortgagee may enter and render his security productive by the perception of the rents and profits. But, like the owner of the freehold, the mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession.

Like a trustee, a mortgagee cannot affect the rights of the mortgagor by purchasing the property at a sale for delinquent taxes accruing upon the premises. *Chickering* v. *Failes*, 26 Ill. 507. In that case it was also held, that the mortgagee, before a foreclosure, by paying the taxes and acquiring possession, could not set it up as a bar to a redemption. Nor could seven years' possession and payment of taxes create the bar of the statute.

The mortgagee in possession would be allowed for necessary repairs of the property and would be bound to pay the taxes. He is, in such a case, like a trustee, entitled to be allowed for necessary expenditures to preserve the property, to be deducted from the account for rents and profits. He will also be allowed for doing that which is necessary for the protection of the title of the mortgagor. *Sandon* v. *Hooper*, 6 Beav. 248; *Pelly* v. *Wathen*, 7 Hare, 373. It has been repeatedly held, that if a mortgagee of a lease obtain a renewal, it will inure to the benefit of the mortgagor, he paying the mortgagee for his charges. As said by Lord Chancellor NOTTINGHAM, "The mortgagee but grafts upon his stock, and it shall be for the mortgagor's benefit." *Rushworth's Case*, Freem. 12; *Luckin* v. *Rushworth*, Finch, 392. Nor will the case be altered by the expiration of the lease before it is renewed. *Rakestraw* v. *Brewer*, 2 P. Wms. 510; *Nesbett* v. *Fredenrick*, 1 Ball & B. 29.

It has also been held, that a mortgagee is, like a trustee, prevented from purchasing at his sale of the premises, under a power contained in the deed, so as to bar the equity of redemption. *Benham* v. *Rowe*, 2 California, 387; *Slee* v. *Manhattan*

Co., 1 Paige, 48; *Dobson* v. *Racey*, 4 Selden, 216; *Hoyt* v. *Mortruse*, 16 N. Y. 231. And where a prior incumbrancer, *bona fide*, purchases a subsequent incumbrance, he will be entitled to what is due upon it. *Morret* v. *Paske*, 2 Atk. 54; *Darcy* v. *Hall*, 1 Vern. 49; *Beamley* v. *Holland*, 5 Ves. 620, note. But it has been held to be otherwise, if he purchase with notice of an intervening security. *Long* v. *Clopton*, 1 Vern. 464. And where a person stands in any fiduciary relation toward the owner of the estate, he will, as against another incumbrancer, be allowed only what he paid for it, since any purchase by him of an incumbrance at a lower price than the amount due upon it, is for the benefit of the estate. *Morret* v. *Paske*, 2 Atk. 54.

It will sufficiently appear from these authorities, while the relation of trustee and *cestui que trust* may not be created by the execution of the mortgage, as between the mortgagor and mortgagee, still they are not on the same footing as strangers to the estate. There are many acts which third parties might perform, and thus acquire interests in the estate of the mortgaged property, the performance of which by either party to the deed would give him no new absolute right as against the other. Their relation to each other in reference to the property is such, that in many things their acts are held to be performed for the benefit of the estate, and to preserve the security.

It is not necessary to hold in this case that the relation of trustee and *cestui que trust* existed between appellant and appellee. The latter held a mortgage on the premises in controversy executed by appellant. This mortgage had become due, and a decree of foreclosure had been rendered, the property sold, and the right of redemption by the mortgagor was within about six weeks of expiring when this purchase was made by appellee of the outstanding title then held by Hoagland. At the time this purchase was made appellant might still have redeemed from the sale under appellee's decree. And it is clear that the purchase was made by appellee with the consent of appellant, and it seems to be equally clear that

appellant was to have further time to redeem from appellee's sale, and to refund him the money he then paid to Hoagland to extinguish his title.

We do not deem it necessary to review the evidence in this case, because, although there are some minor differences between the witnesses, it is evident, even from the evidence furnished by the appellee, that the purchase of Hoagland's title by appellee was through the suggestion of appellant, and that they co-operated in its purchase, with the understanding that appellant should have an extension of the time to redeem, and should have the same right to redeem the Hoagland title as his own mortgage to appellee. The witnesses differ as to how long the time should be extended, but that it was to be extended there can be no doubt. The statute of frauds does not apply, because it is not an attempt to enforce a mere parol agreement, that one man should buy land for the use of another, but the equity of the appellant arises from the fact, that he occupies the relation of mortgagor to appellee, and allowed the latter to buy in the outstanding title under an agreement, that he was purchasing it to attend upon his mortgage, and to be, like his own title, subject to redemption. We do not say, that a mortgagee can in no case buy in an outstanding title, and hold it against the mortgagor without a right of redemption by the latter; but we do say, that the mortgagee cannot buy in an outstanding title, under an arrangement with the mortgagor that it is to be held, like the mortgage, subject to redemption, and, when the title is acquired, turn around and insist that he has purchased as a stranger. This would be a short mode of foreclosure which the law will not tolerate.

We speak of these parties as mortgagor and mortgagee, because the twelve months had not expired after the sale under the foreclosure, and the mortgagor had still a right to redeem. Had that right expired, the case would then have come before us in a very different aspect.

We further remark, that we are not deciding upon the right of Moore under this agreement to an extension of the right of redemption from the foreclosure sale, beyond the twelve months.

That portion of the agreement could not have been enforced, from the want of sufficient consideration. But we are not asked to enforce that part of the agreement. When Moore and Titman finally differed in regard to the possession of the land, and the rents and profits, Moore brought the record to this court, and obtained a reversal of the decree of foreclosure. As Titman was the purchaser at the master's sale, his title fell with the reversal, and thus the relation of mortgagor and mortgagee was restored, and with that relation the right to redeem from the purchase of the Hoagland title. This satisfactorily explains the delay of Moore in filing his bill to redeem. Such a bill would have been of no avail until the sale and master's deed were removed from his path. He could not enforce the agreement to extend the time of redemption, resting in parol and without consideration. But, that difficulty being removed, he was in a position to ask the court to permit him to redeem from the Hoagland title, on the ground, that such an agreement between the mortgagor and mortgagee as was made in this case — an agreement that the mortgagee shall buy in an outstanding title for the benefit of the estate, and hold it, like his mortgage, subject to redemption — is an agreement which a court of equity will always enforce. This is clear from the authorities above quoted.

The outstanding title is bought by the mortgagee under and in consequence of the mortgage. But for his agreement that it should attend the mortgage and be subject to redemption, we might presume the mortgagor would have made other arrangements for its purchase. To allow the mortgagee to repudiate his agreement for redemption would be to permit him to commit a fraud on the mortgagor.

We are, therefore, of the opinion that the Circuit Court should have permitted Moore to redeem. An account should have been stated between the parties, in which Moore should have been charged with the amount on the certificate of purchase held by Titman on the day of the purchase from Hoagland, and with the amount paid by Titman to Hoagland on the purchase. As the mortgage debt was at that time drawing ten per cent

interest, it is but reasonable to charge Moore with that rate of interest. On the other hand, he will be entitled to an account of rents and profits received by Titman since he went into possession, less taxes which he has paid and for reasonable repairs he may have made to keep up the premises.

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

Decree reversed.

ROBERT FERGUS *et al.*
v.
JAMES H. WOODWORTH *et al.*

1. HOMESTEAD—*mortgagor.* To entitle a mortgagor to a homestead in the mortgaged premises, such mortgagor must not only be the head of a family, but, at the time of mortgaging, therewith reside and so continue to reside on the mortgaged premises.

2. SALE—*judicial—where impeachable for being en masse.* A sale of property by a judicial officer ought not to be set aside, except for such irregularities as manifestly produce injustice and wrong. If, however, a sale of property in gross produces such inadequacy of price as to amount to a great wrong and oppression, a court of equity might entertain jurisdiction, even two or three years after the sale, and afford relief against the purchaser if he had not parted with the title, upon reasonable excuse being shown for the delay.

3. PURCHASER—*decree—effect of reversal.* If a judgment or decree be reversed for error after sale of property thereunder, it is a settled principle of the common law coeval with its existence, that the defendant shall have restitution of the purchase money, and the purchaser shall hold the property sold, *except* where the plaintiff in the judgment or decree becomes purchaser and still holds the title.

4. SAME—*notice lis pendens.* The rule of notice *lis pendens* does not apply to a purchaser under a decree of foreclosure who is not a party to the record. The law does not require such purchaser to inspect the record, and to see that it is free from errors. He only has to see that the court has jurisdiction, and there is such a judgment or decree, unreversed, as authorizes the sale.

APPEAL from the Superior Court of Chicago; the Hon. JOHN M. WILSON, Chief Justice, presiding.

Statement of the case.

On the 13th day of December, 1859, Robert Fergus, being the owner of sub-lot one (1), and the north twenty-five (25) feet of sub-lot two (2) of the subdivision of original lot six (6), in block three (3), in the fractional section fifteen (15), addition to Chicago, being sixty-five (65) feet fronting on State street, between Monroe and Adams streets, and one hundred and twenty-four feet in depth to the alley in rear, according to the plats of the same duly recorded in Cook county registry, including the three brick stores and other buildings standing and being thereon, executed a mortgage thereon, in which his wife, Margaret Fergus, joined, to secure the payment of $13,000 to David Sears, Jr.

Said Sears assigned the mortgage to Edward I. Tinkham, who, upon default, foreclosed in the Superior Court of Chicago, and the master in chancery, under the decree of the court, sold the premises to Woodworth, who became the purchaser thereof under an agreement between him, P. W. F. Peck and E. I. Tinkham. After the time for redemption had elapsed, the master conveyed the premises to Woodworth by master's deed.

Woodworth caused a writ of assistance to be placed in the hands of Hammond, then sheriff of Cook county, Johnston having in the mean time bargained with Woodworth for said premises.

Robert and Margaret Fergus then filed a bill against Woodworth and Hammond, and restrained them from taking possession of a part of the mortgaged premises claimed as their homestead.

Woodworth answered this bill, denying the claim of homestead, and filed a cross-bill praying that the premises be decreed to be free from the homestead claim, and that possession thereof be surrendered to him.

Fergus and wife then sued out a writ of error upon the decree of foreclosure, upon the ground that interest had been compounded, and at the April Term, 1865, of this court, the decree was reversed, upon the ground that the decree was for about sixty dollars more than was alleged to be due in the bill for foreclosure.

After the reversal of the decree of foreclosure, Fergus and wife filed a supplemental bill, setting up the reversal of the decree of foreclosure, under which Woodworth derived title, and alleging that Woodworth's purchase was not *bona fide*, and stating that the master had improperly sold the premises *en masse*, when he should have sold them in parcels.

Woodworth denied that his purchase was not *bona fide*, and insisted that the master in chancery made sale of the premises in a proper manner.

Messrs. HERVEY, ANTHONY & GALT, for the appel ants.

Mr. P. L. SHERMAN, for the appellees.

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

The first question presented by the record is, whether appellants, Fergus and wife, have homestead rights in the premises in controversy. The mortgage to Sears was not given to secure purchase money, or indebtedness incurred in the improvement of the property, and was executed after the homestead law and amendatory act were passed. The question is thus free from all considerations but that of residence. Fergus was at the time the head of a family and residing with the same, but it is not pretended that they or their family were on these premises. On the contrary, they, with their family, were residing in another house, owned by them, on a different street in the city, and they did not return to reside on this property until some time after the foreclosure and sale under the mortgage. And it also appears, that, when the mortgage was given, the several portions of the house were occupied by different tenants, and so continued until after the sale was made by the master.

The building consisted of a block extending the length of the front of the lot, and was about sixty-six feet. The building was three stories high, and was divided by partition walls into three parts. The lower story was occupied as stores, and

the upper stories were used for dwellings. After the spring of 1860, appellant Fergus occupied the north store room as a printing office. This excludes every supposition that this property was in fact the residence of Fergus and family, whatever may have been his intention when he left it, or during the time he resided on Quincy street.

The fact, that he previously occupied and resided on this property, as a home, could not give it the character of a home, after removing, not only his family, but the house in which they had lived, from the premises to a different part of the city and occupying it as a dwelling, for himself and family, for several years. It is true, that a portion of the family testify, that, while erecting the building on these premises, he and his wife spoke of planning the upper stories of the northern part of the house for a residence for himself and family. But he resided on Quincy street from some time in 1858 or 1859 until the early part of 1862, when he returned with his family, and resided in the upper stories of the northern part of the building until the trial below. So that, if it was his design to make this his home at the time he was erecting the block, he delayed its execution for three or four years, if it was not abandoned at the time of its completion.

We are not prepared to hold, that the head of a family may abandon the lot of ground, remove his dwelling to other premises, remove his family to the latter place, incumber the premises on which he formerly resided, and after an absence of three or four years, return to his former home, and claim and hold it as a homestead against such an incumbrance, merely by showing that it had been his home, and that he had during his abandonment of the property as a residence, a secret intention at some time in the future to resume it as a home. It cannot be pretended that Fergus apprised Sears at the time the mortgage was given, that he claimed homestead rights in the property, nor is it so stated in the mortgage. There is nothing appearing in the record which in the least was calculated to apprise Sears, or those claiming under the mortgage, that there was any pretense that it was held, or even intended to be held, as a

homestead by the mortgagors. While such notice may not be necessary in all cases to entitle a party to assert the right, it would be inequitable and productive of great injustice to permit a mere secret intention, without any thing to put creditors and purchasers upon inquiry at least, to control in the stead of a residence upon the premises, and to enable the mortgagor to enforce the right under the statute. On the contrary, every thing connected with these premises was calculated to produce conviction, that the property had been permanently abandoned as a home. It was occupied by tenants for business purposes, and as dwellings, and the mortgagor was residing with his family in other property as a home. We are, for these reasons, of the opinion that Fergus and wife had abandoned these premises as a residence at the time they executed the mortgage, and that they then or since that time have had no right to claim it as a homestead against this mortgage. To permit its assertion, under such circumstances, would lead to the perversion of the law into an engine of fraud and wrong, that could never have been designed by the general assembly when it was adopted.

It is likewise insisted, that, as the property was sold by the master *en masse*, the court below erred in not setting aside the sale. Appellants, Fergus and wife, were defendants to the bill for a foreclosure, were duly served with process, were properly in court, and must, therefore, be presumed to have been fully informed of every step that was taken in the progress of the case. They must have known of the sale and the manner in which it was made. A report was made by the master of the sale and how it had been conducted, and it was approved by the court without objection. They filed no objection to the report, nor did they in any manner oppose the approval of the sale on the master's report. If mere irregularities existed, they should have appeared and insisted upon them to prevent the approval of the sale, and moved at the coming in of the master's report, or at least within a reasonable time, to have the sale set aside and to have the property again offered. While a court of equity would not apply it as an inflexible rule, that such a motion should be interposed, on the coming

in of the report, at the next term after the sale, still, if not then made, or at least before the time for a redemption has expired, the court would not set aside the sale for trifling objections, or mere informalities, or because property susceptible of division had been sold *en masse*, unless it appeared that real injustice and wrong had resulted. After the time for redemption has expired and his equity is barred, the mortgagor should not be heard to impeach the sale, except by showing that there was fraud or oppression, and that substantial injury had resulted, and even then, it might be necessary to afford a reasonable excuse for having delayed such a length of time before asserting his rights. A party should not be permitted to remain inactive until long after the sale, and then, if to his interest, avoid it, or, if not, permit the purchaser to hold the property. It is highly desirable that there should be some degree of stability given to judicial sales. They should not be set aside except for such irregularities as manifestly produce injustice and wrong. In this case the parties have slept upon their rights, and have been guilty of such *laches* as must prevent them from having this sale set aside, simply by showing that the property could have been divided, and might have by that means brought more than it did. They have delayed too long in the assertion of the right, and must be considered as having waived it.

If, however, the sale of property in gross produces such inadequacy in the price as to amount to great wrong and oppression, a court of equity might entertain jurisdiction even two or three years after the sale, and afford relief against the purchaser, if he had not parted with the title, upon a reasonable excuse being shown for the delay. It is insisted, that the price of the property was greatly depressed by the sale being *en masse*, and a large amount of evidence was taken to establish and to rebut the presumption that such was the fact. And in this, as in most cases involving the value of property, and especially so when it is to ascertain its value several years previous to the time of the inquiry, there is great diversity of opinion. Some of the witnesses fix its value at the time it was

sold at double the amount at which it was struck off to the purchaser, while others say it sold for all it was then worth, and opinions vary between these points, and scarcely any two fully agree, concurring on any one price.

It is apparent, that property at the time this sale was made was depressed, and quite unsalable. It appears that Fergus offered the property in the early part of 1863, to Otis, for $21,000. This then clearly shows, that he did not regard the property as worth double the sum for which it was sold. And, if he considered the price grossly inadequate, it is strange that he did not move to have the sale set aside for that reason. This is a significant fact in reference to the value. And another equally important is, that we find he was in the market offering it for sale before the redemption expired, and, if so grossly inadequate, it is strange that he did not effect a sale, redeem the property, and save a large surplus; or that he could not raise on the property by a loan a sum sufficient to redeem, and thus preserve it from sacrifice.

Again, the proof shows, that other property, situated near to this, was sold about the same time at private sale, at but slightly higher rates. While witnesses give the opinion, that the property was sacrificed at the sale, we must believe that they do not distinguish with sufficient accuracy between present values and those of that period. Property has been constantly advancing in value since that period; and the price bid, as compared with the present value of this property, would no doubt show great disparity; but the sale must be tried by values then existing, and not by present prices. From all the evidence in this record, we are unable to say that the bid was so small that the sale should be set aside, or that it operated as a fraud on appellants' rights, or was oppressive. If injury resulted from the smallness of the bid, it is perhaps no greater than usually occurs in sales of this magnitude. We should not feel warranted in vacating this sale after the delay that has occurred, on the evidence in this record, either on account of the smallness of the price bid, or because the property was not divided and sold in separate parcels.

We now come to the question whether appellee Woodworth was affected by the reversal of the decree of the court, under which he purchased. It has been said, if a judgment or decree is reversed for error, it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution of the purchase money, and the purchaser shall hold the property sold. 10 Peters, 473. To this rule there may be an exception, and it is where the plaintiff in the judgment or decree has became the purchaser, and still holds the title under his purchase. In this case Woodworth was not the complainant, nor was he even a party to the record in which the decree was rendered. He does not therefore fall within the exception, unless his connection with the case shall produce the same result as if he had been a complainant. His interest was acquired subsequently to the rendition of the decree, and he in fact bid off the property in his own name, and obtained the master's deed after the time for redemption had expired.

It is, however, urged that he either purchased as the assignee of the decree in his own right, or as Peck's agent, who was the beneficial owner of the mortgage at the date of the decree. That Peck thereby became chargeable with notice of the errors in the decree, under which the sale was made. We do not understand that the rule of notice of *lis pendens* applies to a purchaser not a party to the record. Before the sale is made the suit is terminated, the controversy is ended, and the rights of the parties to the record are fixed. The claim has ripened into a judgment or decree, and it must be presumed that all defenses have been made and judicially passed upon and determined, and that nothing remains but for the plaintiff to have the fruit of his judgment or decree — to have execution. Woodworth was not, then, a purchaser chargeable with notice *lis pendens*, and the rules applicable to such notice cannot affect his rights. That notice only applies to charge a purchaser with all of the defenses involved in the litigation, so that he shall be bound by the determination of the matter in controversy, and will not be heard to insist upon defenses or grounds of recovery that might have been presented. He

takes the place of the party of whom he purchases, and is bound by the decree to which his vendor was a party.

At the time the decree of foreclosure was rendered, Peck did not own the mortgage, but he simply held it as collateral security for a debt which Tinkham owed him. That he might still retain it as a security, and have the control of it, after it was reduced to a decree, it was agreed that the mortgage should be foreclosed in his name; but, from some cause not very clearly appearing, the foreclosure was had in the name of Tinkham. So that Peck was not a party to the record; but, after Peck learned how the decree had been rendered, he took the necessary steps to have it transferred to him as a security for his debt against Tinkham. And the evidence shows that Woodworth agreed with Peck to bid it off in his name, and to pay him the amount of his claim on Tinkham, and to secure which he held the decree of foreclosure. After paying that sum, Woodworth was to hold the decree, or its avails, to secure the refunding of the amount he should advance to Peck, and the balance to secure a debt which he held against Tinkham, in favor of the insurance company. By this arrangement, with Tinkham's assent, Peck held a first lien on that decree, to secure the payment of about $10,000, and Woodworth a second lien, to secure a debt of several thousand dollars owing by Tinkham. At the sale, however, Woodworth purchased the property, and received a certificate of purchase from the master in his own name. Subsequently, he assigned the certificate of purchase to Peck, when an agreement was drawn up and executed by the parties, declaring their rights under this purchase, as it had been previously understood. It declared that Peck should hold the certificate until his debt should be paid, which Woodworth undertook to do, and then it was to become Woodworth's, and the balance of the purchase money over and above the payment to Peck was to be applied on the debt which Tinkham owed to the insurance company.

Woodward was only induced to become the purchaser as a means of collecting the debt Tinkham owed the insurance company, and of which the former was the agent. And the agree-

ment was entered into as the means of paying to Peck the portion of the purchase money coming to him, by getting time. Not having the $10,000 to pay Peck, and he not desiring to become the owner of the property, he was willing to give time to Woodworth within which he might make payment, and then he could look to the property to be reimbursed, and to collect the debt due the insurance company; so that, when he became the purchaser under this arrangement, he virtually paid the purchase money. He, soon after the purchase, gave up the note to Tinkham, and discharged the debt the insurance company held against him. When Woodworth assigned the certificate of purchase to Peck, and became liable to Peck for the amount of his debt, he gave the note he held on Tinkham to him. Woodworth afterward paid Peck, obtained the certificate of purchase, and procured a deed for the premises, under the master's certificate.

From these facts, we can only infer, that Woodworth was the purchaser of the property at the master's sale; that all of the previous negotiations only related the means of paying the purchase money, upon which Peck held a lien. He did not become the purchaser of the decree, so as to control or satisfy it, except by purchasing the mortgaged premises. He had not then become liable to pay any thing on account of the decree, nor was it intended that he should, until the purchase should be made. He only became liable to Peck after the property was struck off at the master's sale. He no doubt agreed to purchase in the name of Peck, but as Peck was not the complainant in the suit, and only held a lien on the mortgage to secure his debt against Tinkham, we do not see that it could have mattered if the purchase had been made in the name of Peck. Neither he nor Woodworth were parties to the record. Nor do we see, that Peck or Woodworth were chargeable with a knowledge of errors in the decree. Woodworth was regarded as the purchaser by all parties, and we do not see that he differs from ordinary purchasers at a judicial sale. Nor can the fact that he commenced negotiations for a lien on this

mortgage before it was foreclosed matter, as it was not consummated until after the decree was rendered.

Even if the purchaser of a decree or judgment at law could be held to notice of irregularities in the decree or judgment, so as to affect his purchase, on a reversal, there seems to be no evidence that Woodworth ever, either in law or equity, was the owner of this decree. He had only negotiated to become the purchaser under the sale on the decree. Had he made an arrangement with Tinkham and Peck to purchase at the sale, and given his note to Peck for the amount of his debt, and surrendered the note he held to Tinkham, no one would have doubted that he was a purchaser of the premises. And we can perceive no material difference. The two cases are similar in principle. In any light in which we can view this case, we do not see that Woodworth occupied the place of a complainant, or even a party to the record; and we understand that the rule can only affect such a party, or one strictly occupying that relation.

The law proceeds upon the ground, that a plaintiff is bound to know whether his judgment or decree is regular, and, if it is not, he becomes a purchaser in its satisfaction, with a full knowledge of the errors it contains. But the rule does not apply to persons not parties to the record. The law does not require a purchaser to inspect the record and to see that it is free from error. He only has to see that the court has jurisdiction, and there is such a judgment or decree unreversed as authorizes the sale. If such was not the rule, no one would become a purchaser at a judicial sale, and all competition would cease, and plaintiffs would become purchasers at their own price. Stability and confidence must be given to judicial sales to the fullest extent compatible with the interests of parties, as well the purchaser as the defendant. We will not presume, that, because a person not a party to the record may have negotiated to pay the purchase money in a particular mode, if he shall become the successful bidder, he has therefore become acquainted with error in the record, under which the sale is made; or even that a purchaser not a party to

the record, having such notice, should have his purchase set aside. A purchaser at a judicial sale, who has paid his money, should not be required to pursue it in the hands of the plaintiffs on the reversal of a judgment. Litigation should not be thus increased. But, when a plaintiff becomes a purchaser, and continues to hold the title at the time his judgment or decree is reversed, he can suffer no wrong or inconvenience by having the sale set aside. He is only placed where he should have been when he recovered his erroneous judgment. It was wrongful, and he should not be permitted to retain its fruits. But the purchaser, not a party to the record, paying his money, stands in a different position.

In this case Woodworth purchased the property, paid his money, and obtained his deed, before the case was removed to the Supreme Court to be reviewed. He did not pay his money while the writ of error was pending, or after the decree was reversed. He seems in all things to have acted in good faith, and to have been a *bona fide* purchaser at the master's sale; and we are clearly of the opinion, that the sale should not be set aside. The court below did not err in dismissing the bill, and the decree must be affirmed.

Decree affirmed.

ARCHIBALD Y. GRAHAM *et al.*
v.
ROBERT HOLLOWAY.

1. RESCISSION OF CONTRACTS — *by the acts of the parties.* As a general rule, a breach of contract by one party absolves the other from a performance of its terms and conditions. When such breach occurs, the other party is at liberty to rescind the agreement.

2. SAME — *as to the mode of rescission.* The party having the right to rescind may manifest his intention to do so in a variety of modes; one of which is by suing, and recovering damages sustained by the breach.

3. SAME — *effect of rescission.* And where a party elects to rescind by suing and recovering for a breach of the contract, he cannot afterward insist upon the performance of any of its conditions, unless the contract should be renewed.

Statement of the case.

4. SAME — *renewal after rescission.* The contract may be renewed after such a rescission, either by an express agreement of the parties, or by acts which show an intention to give it new force and effect.

5. SAME — *relations of the parties after such renewal.* But if a contract should be thus revived after having been rescinded by the recovery of a judgment for a breach of its conditions, the party who had rescinded cannot enjoy the fruits of his judgment and also insist upon the performance of the contract, — he cannot hold the two-fold and antagonistic position of a party to the contract, entitled to have its provisions executed, and a judgment creditor, whose rights as such are based upon a rescission of that contract.

6. So where a purchaser of land from one who held under a contract of purchase, having paid his purchase money, sued and recovered a judgment against his vendor for the money paid and interest, as damages for non-compliance of such vendor with his contract to convey, the recovery of such judgment operated as a rescission of the contract; and upon the original vendor filing his bill to subject the land to his lien for unpaid purchase money due from his vendee, such second purchaser who had recovered the judgment, filed his cross-bill asserting his rights as a purchaser, to the fee in the land after such prior vendor's lien was satisfied, and a decree was rendered recognizing him in that position, and at the sale under that decree he became the purchaser for the sum remaining due the original vendor, which was less than the amount of his judgment, and paid the money. Afterward, upon his attempting to collect his judgment, it was held, that, having assumed the position of a purchaser in his cross-bill, and obtained relief as such, he abandoned his position as a judgment creditor, and that, upon being reimbursed the amount he had bid at the sale to satisfy the prior vendor's lien, he must enter his judgment satisfied.

APPEAL from the Circuit Court of Warren county; the Hon. CHARLES B. LAWRENCE, Judge, presiding.

This was a suit in chancery, instituted in the court below, by Robert Holloway against Archibald Y. Graham, David Graham, Henry M. Boggess and Robert Moir. The object of the bill is to enjoin the collection of a judgment recovered by the Grahams against Holloway and Boggess, and to procure its cancellation.

The facts, so far as they are material to a proper understanding of the opinion of the court, are as follows:

On the 9th day of April, 1857, Perry Alexander, being the owner of a certain tract of land, sold the same to Holloway and Boggess, for the sum of $6,000; a part of the purchase price was paid down, and the residue to be paid in installments, and upon full payment Alexander was to convey.

On the 21st day of the same month, Holloway and Boggess sold the land to Archibald Y. Graham and David Graham for $10,000, which was to be paid in certain installments, and upon full payment being made, Holloway and Boggess were to convey with warranty. The Grahams entered under this contract, and remained in possession.

On the 25th of October, 1860, Boggess transferred his interest to Holloway. The Grahams having paid all the purchase money due under their contract, and Holloway and Boggess having failed to convey the land to them, and being unable to do so by reason of a portion of the purchase money due to Alexander remaining unpaid, they, the Grahams, commenced an action of covenant against Holloway and Boggess, to recover damages for non-performance of their contract to convey, and on the 22d of November, 1861, recovered a judgment therein for $12,670.59, being the full amount paid on the contract with interest, and collected thereon from time to time, to August, 1863, several sums, amounting in the aggregate to $1,153.60.

Alexander, on the 6th March, 1861, filed his bill for a specific performance of the contract made between him and Holloway and Boggess and prayed a decree for the payment of the balance due, and that his vendor's lien be enforced in default of payment. The bill made Holloway, Boggess, the Grahams and certain judgment creditors parties.

The Grahams answered this bill, and also filed their cross-bill, in which they recite the sale from Alexander to Holloway and Boggess, and that from the latter to themselves, and also the recovery of their judgment against Holloway and Boggess. They then claim that they are entitled to the fee simple title to the land, subject only to the claim of Alexander for the balance of purchase money due him. The cross-bill prays for relief as follows:

"Your orators pray that this their cross action may be adjudicated in the said complainant's said suit, and that a decree be rendered in both as if they were one; and that a decree be rendered in both thereof in favor of said Alexander and against

said Holloway and Boggess, for the amount which may be due and unpaid to him of the purchase money of their purchase aforesaid of him, together with such costs in the premises as your honor may deem equitable; and in favor of your orators for the amount which may be due and unpaid to your orators of the judgment aforesaid of your orators against them, and such costs, if any, as your honor may deem equitable, deferring the operation, lien and effect of so much of said decree as is in favor of your orators, until that portion thereof in favor of said Alexander is paid and satisfied; and that said decree be so made a lien on said real estate for the payment thereof in the manner aforesaid. That your honor, if consistent with his views of the equities in the premises, give to said Holloway and Boggess a long day, if not such an one as is, in which to pay and satisfy said decree, and to your orators in which to pay and satisfy so much thereof as may be in favor of said Alexander; and that, in case of such payment within such time so to be fixed, of the amount that may be so due said Alexander, and such costs in the premises as the court shall direct, by any person or persons, that said Alexander, by the decree of this honorable court, be required within a time thereafter to be fixed by the court, to convey to your orators or their assigns, said real estate, with such covenants as your honor may direct, conveying to them the right, title and interest of said Alexander and the other defendants to said bill, than your orators, thereto; and that in case of the failure of said Alexander so to convey within such time thereafter, that the then county judge of said county of Warren be by such decree required to so convey said real estate to your orators, within a further time, to be in such decree named therefor. That, in case only that no such payment is made on such decree, as that last aforesaid, within the time so limited therefor as aforesaid, that such real estate or so much thereof as may be necessary to satisfy said decree, be sold under the direction of this honorable court for the satisfaction of such decree. And that the proceeds of such sale be applied as follows, to wit: 1st. To the payment of such costs as may be directed by said decree to be paid. 2d. To the

payment of so much of such decree as may be made in favor of said Alexander, together with so much interest as may have then accrued thereon, and so much costs in the premises as may be directed by such decreee. 3d. To the payment of so much of said decree as may be made in favor of your orators, together with so much interest as may have then accrued thereon, and so much costs in the premises as may be directed in such decree, if any. 4th. And the remainder thereof after the making of such payments, if any, be disposed of by such decree. That your orators have such other and further relief in the premises, as to your honor may seem equitable and proper."

The court rendered a decree, finding the sum of $3,100.49 still due to Alexander from Holloway and Boggess, and decreed as follows:

"That said Holloway and Boggess, shall, within ninety (90) days from the date of this decree, pay to the said complainant the said sum of money so found due him upon said contract, with interest at the rate of six per cent per annum from date, together with the costs of this suit; and that, in default thereof, the master in chancery be required to sell said land at public vendue to the highest and best bidder, for cash, after advertising the time and place of said sale at least twenty days before such time of such sale in the Monmouth Review; and, thereupon, said master in chancery shall make a good and sufficient deed to the purchaser or purchasers thereof, conveying all the title which said complainant has in said land, and all the equity of redemption which said defendants, or either of them, may have in said land, and all claims which they may have therein; and, with the proceeds of said sale, the said master shall first pay to said complainant the said sum of money so found due him, as aforesaid, together with the interest and the costs of this suit. And it is further ordered that if said Grahams become the purchasers at such sale, that the master shall bring the deed into court to be delivered to them upon complying with the further order of this court in the premises; and if any other person or persons should become the purchaser or pur

chasers, then the residue of money is to be brought into this court to be appropriated under the order of the court. And, provided further, that the bid of said Grahams, at the sale, be made and given and received by the master, over and above said complainant's debt and costs of this suit, as cash. And, provided further, that if said Holloway and Boggess shall pay said complainant said debt and interest before the expiration of said ninety days, and the sale of said premises by the master, and the costs, said complainant shall convey to said Grahams within sixty days thereafter, according to the terms of said contract. And, provided further, that said Grahams shall first satisfy said judgment against Holloway and Boggess. Or, it is further provided, that said Grahams may pay said complainant his said debt, interest and costs, and thereupon said complainant shall make a deed, as aforesaid, to them, and deliver the same, provided the said Grahams first enter satisfaction of all such judgment, save the amount he may have paid Alexander, as aforesaid, for his debt and interest and costs he may have paid in the premises.

"And, it is further ordered and decreed by the court, that, in case the said Grahams should refuse to accept the residue of the money to be obtained from the sale of said land, as aforesaid, with the said conditions and provisions in the decree mentioned, then the master in chancery is ordered, after paying said complainant, as aforesaid, and the costs herein, to bring the residue of the money into court, to be appropriated according to equity and justice at the next term of this court, to which time this case stands continued."

The premises were sold in pursuance of this decree, and one Lafferty became the purchaser, at the sum of $3,271.70. The master executed a deed to Lafferty, and out of the proceeds of the sale paid the costs, $109.20, and to the complainant $3,162.50, his debt and interest.

Lafferty became the purchaser at this sale at the instance of the Grahams, and for them, they refunding to him the money he paid for the land. Afterward, at their request, he con-

veyed to one Moir, who held it in trust for the Grahams, thus vesting in them the land for the sum of $3,271.70, paid by Lafferty, their agent, at the master's sale.

The Grahams then proceeded to the collection of their judgment at law against Holloway and Boggess, and thereupon Holloway filed this bill, asking that the Grahams be enjoined from making further collections upon their judgment, and that they be required to enter the same satisfied, — insisting that by their cross-bill in the suit by Alexander they had abandoned their judgment and elected to resume their position as purchasers, and that the decree in that suit recognized their claims in that regard.

The Grahams, on the contrary, contended they had not lost the right to enforce the collection of their judgment by reason of any of the proceedings had in that suit.

Upon a final hearing the court decreed as follows:

"It is found by the court that there is equitably due from said Holloway, complainant, to said Archibald Y. Graham and David Graham the sum of $2,803.45 on the contract and judgment described in said bill of complaint, in manner following, viz: That there has been collected on said judgment, deducting expenses, including the sum of $115, attorney's fees, the sum of $1,221.56, and that there has been paid into court $2,803.45, which, with said sum so collected, makes the sum of $4,025.01, being the same amount with interest and expenses which said Grahams have been obliged to pay in order to secure the title to the premises described in the bill in this cause, and which sum this court decrees to be all the portion of said judgment which under the former decree said complainants are equitably entitled to collect, and as to the residue of said judgment said defendants are enjoined from collecting the same. And it further appearing to the court that said Holloway has paid the said sum of money to the clerk of this court, it is therefore ordered, adjudged and decreed by the court that said Archibald Y. Graham and David Graham be and they are hereby perpetually enjoined from all proceedings

on their said judgment; and that they are further ordered to enter satisfaction of their said judgment on the records of this court. That the said complainant pay the costs of this case made prior to the present term of this court, and that said defendants pay the costs of this term."

From that decree the defendants below prosecuted this appeal.

Messrs. GEORGE F. HARDING, T. G. FROST and JOHN J. GLENN, for the appellants.

Messrs. GOUDY & CHANDLER, for the appellee.

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

Appellants insist upon a reversal in this case on several grounds, but, after the most careful examination of the facts in the case, and after an attentive consideration of the elaborate arguments and petition for a rehearing, we are unable to see but one question requiring consideration. The whole controversy turns upon the question whether the agreement for the sale of the land by appellee and Boggess to appellants had been fully terminated for all purposes when the land was sold by the master under the Alexander decree.

As a general rule, a breach of contract by one party absolves the other from a performance of its terms and conditions. When such a breach occurs, the other party is at liberty to rescind the agreement. And he may manifest such an intention in a variety of modes, one of which is by suing and recovering damages sustained by the breach. It then follows, that, when appellants sued for and recovered damages for a failure to convey, they thereby rescinded the contract of purchase. They, by suing upon the covenants contained in the bond, precluded themselves, until the contract was renewed, from insisting upon any of its terms or conditions.

It is, however, true, that such an agreement may, like all others not prohibited by law, be renewed, and thenceforth it

would be restored to its former vigor. And such a renewal may be evinced by an express agreement of the parties, or by acts which establish an intention to give it new force and effect. Every day's observation teaches us that such renewal or waiver of the breaches of contracts, by one or both parties, are of frequent occurrence. And when such breaches are waived or the contract is renewed, it is then enforced precisely as if it had never ceased to be obligatory. This is so plain a rule of law, that a reference to authority is unnecessary to sustain the principle.

We see in this case, that, after Alexander had filed his bill to subject the land to the payment of the balance of the purchase money due him, appellants filed a cross-bill asking relief. In it they set up and relied upon their purchase from appellee and Boggess; that they had paid the purchase money in full; had entered into possession of the land as purchasers, and had made valuable improvements, and claimed equitable relief as purchasers. They prayed that time be given appellee and Boggess to pay the money, and, upon their paying it, that the premises be conveyed to them in fee. This equity they claimed as purchasers, and not as judgment creditors. It seems they could not have successfully claimed, in the latter capacity, as a large number of others were judgment creditors, having prior liens, and who had also been made parties to the bill. This clearly and unmistakably manifested an intention on their part to claim as purchasers and not as creditors.

Had they claimed in the latter right, they would not have asked that the land be conveyed to them in fee. And had they regarded the contract rescinded, for all purposes, they would not have claimed the land in fee subject only to Alexander's lien. They would have been compelled to admit that their co-defendants had prior judgment liens, entitled to preference in the fund arising from the sale of the land. Appellee and Boggess, in their answer to the cross-bill, insisted that the contract was rescinded, and that appellants only had the rights of judgment creditors. But, on the hearing in Alexander's suit, the court recognized the existence of the contract of purchase, by

decreeing, that, in case appellee and Boggess should pay Alexander, or if appellants should pay him and would release their judgment, except such sum as they might pay Alexander, then the land should be conveyed to them in fee. This undeniably established their rights as purchasers, and concluded all parties to that record from controverting it.

It is urged, however, with great apparent earnestness, that, notwithstanding the contract had been rescinded and merged in a judgment, appellants still retained an equitable lien as purchasers of the premises; that they had this special lien by virtue of their former contract of purchase, and were thus connected with the land by that link, and had, therefore, an equitable right to have their judgment satisfied out of the proceeds against senior judgment creditors, by reason of the nonperformance of the contract by appellee and Boggess. This seems to be the basis of all that appellants now claim for a reversal. This does not seem to consist with the prayer of their cross-bill, in which they claimed the fee to the land, and prayed a conveyance after Alexander should be paid. Nor does it accord with the decree which the court then rendered. They have acquiesced in the decree, having, so far as this record discloses, never sought to have it reversed, and we may conclude that they regarded it to their interest to permit it to remain in force.

It will hardly be contended that, if appellee and Boggess had paid Alexander, and he had conveyed to appellee, they could still have proceeded to collect their judgment. That would have violated every principle of equity and common justice, and yet they asked for and obtained a decree for such a conveyance, in case the money was so paid. We can hardly suppose that they believed, when they asked such a decree, that if they thus obtained the title, they could still proceed to collect their judgment.

We are at a loss to comprehend how a party may claim as a purchaser, and insist upon such a relation at one time, and for one purpose, and at another time and for another purpose ignore the relation of vendor and vendee, and claim the rights

of a judgment creditor. But it is insisted, that, although that relation had ceased, although the contract was at an end and merged in a judgment, still they were purchasers in equity so far as to follow their money into the land, and obtain it in preference to the claims of others doubtless as legal and just as theirs. While their claim is just, we do not understand, that, because their judgment was for money paid for the land, it thereby is any more equitable, that they should be preferred, after abandoning the agreement, than other legal demands which had been reduced to judgments and become prior liens upon the land.

We are aware of no principle in equity which gives a purchaser priority, who has abandoned his contract of purchase, and resorted to his remedy at law, for a breach of the agreement, over other judgment creditors of a prior date. If such an equity exists, it can only be because the relation of vendor and vendee exists. And when they claim and obtain all of the benefits incident to the relation of vendees, they are compelled to extend the same rights to their adversary.

Appellants said, in their cross-bill, "We are purchasers of appellee and Boggess, we have paid the purchase money, and are therefore entitled to the land when the prior incumbrance is removed;" and the chancellor recognized and established that claim. How then can they now say, they were not entitled to those rights, but to other and different rights? How can they say they were strangers to the property, and may so deal with it?

It is urged that appellants had a right to insist that the judgment should be satisfied out of the sale of the land in preference to all others but Alexander They so insisted in their cross-bill, but it was not recognized by the decree. It found that they had the rights of purchasers, and that, if they obtained the land without further expenditure of money, their judgment should be satisfied. They have obtained the land, and the amount paid by them to extinguish Alexander's lien has, with interest, been brought into court, and awaits their receipt. They then have the land at precisely what they paid

for it,—no more, no less. In what, then, does their right consist, to prevent them from being compelled to satisfy their judgment?

The decree in the Alexander suit authorized them to use their judgment on their bid, if they should become the purchasers, beyond the amount of Alexander's decree. They had the legal right to bid and become the purchasers at the master's sale, but did not have the right to apply their judgment in paying the master, unless authorized to do so by the court. And the decree further required, that, if they should purchase, the master should bring the deed into court Why this requirement? Evidently, that they might be compelled to satisfy so much of their judgment as remained over the sum they should pay to extinguish Alexander's lien. The chancellor could never have intended, when he required the master to receive their bid over and above the amount of Alexander's decree, to give them the benefit of their judgment in paying for the land, and still to permit them to collect their judgment. That would be inequitable and unjust.

Had they become the open and visible purchasers of the land, equity would have required them to satisfy their judgment, for the sum above the amount necessary to extinguish the prior lien, as we have seen. And, as a person is not permitted by indirection to do that which the law forbids him to do directly, they obtained no advantage by employing Lafferty to purchase the land, at the master's sale, in his own name, but on a secret trust for them. They could not, in that manner, evade the decree. Had they purchased in their own names, it would have been subject to the terms of the decree. This they seem to have understood, and hence the apparent effort to evade it, by having a secret agent to purchase for them. They are as fully estopped from denying that they purchased under the decree, as they would have been had they bid in person. Nor did the conveyance by Lafferty to Moir, to hold for them, in the least change the relation or rights of the parties.

Again, appellants were in possession of the land, having

entered under their contract of purchase from appellee and Boggess. They do not seem to have offered to restore it to their vendors, when they sued on the bond for a conveyance. They, no doubt, desired to hold and enjoy the benefits of the purchase, so far as was necessary to protect their interests, and, this being so, they must extend to their vendors corresponding rights. In other words, if they claim the benefits of the agreement, they must extend to their vendors the benefits of the contract. As a general rule, a party who elects to rescind an agreement, must restore to the other what he has received under it; especially so, when he relies upon compensation in damages for a breach of the contract. Had they restored the possession of the property, appellee and Boggess would then have had it in their power to have disposed of it to relieve themselves from the judgment appellants had recovered, to the extent of the surplus over Alexander's lien. But its value would have been depressed in market, had they offered it for sale, from the fact, that appellants were holding it under their purchase.

It would be highly inequitable to permit appellants to hold the property and all the benefits resulting from the agreement when in force, and at the same time exclude appellee from all of its benefits,—to treat them for some purposes as vendees, and for other purposes as strangers to the transaction. They have obtained the land at the price at which they purchased, and we cannot perceive in what respect they have been deprived of any right, or have sustained any loss; and, without one or the other, it is difficult to comprehend in what their equity consists. To permit them to enforce their judgment, they would obtain the land at about $3,000, not exceeding one-third they paid for it, and collect back the purchase money, equal to the entire amount which they have expended.

But, appellants having procured the decree under their cross-bill, and it still remaining in full force, and having purchased under it, they must be bound by it. Appellants having failed to enter satisfaction of their judgment, upon appellees bringing the money into court necessary to reimburse them, the court

below did right in rendering the decree appealed from, and it must be affirmed.

Decree affirmed.

Mr. Justice LAWRENCE, having heard the case in the court below, took no part in this decision.

ELISHA W. DUTCHER *et al.*
v.
EMILY LEAKE *et al.*

1. JUDICIAL SALE—*who is bona fide purchaser.* When a purchaser at a judicial sale combines and confederates with the officer and others to conduct the sale as secretly as possible to prevent competition, and represents to the party interested in such sale that it had been postponed, with the intention to deceive such party, to the end that he shall not be present to compete for the purchase of such property at such sale, such party is not a *bona fide* purchaser, and will not be protected against errors in the proceeding.

2. SAME—*inadequacy of the amount paid.* Although mere inadequacy of consideration, standing by itself, is not a sufficient reason for setting aside a judicial sale, yet if it exist in connection with other circumstances tending to impeach the fairness of the transaction and the good faith of the purchaser, it is entitled to great weight as determining the *bona fide* character of the purchaser and to his protection as such.

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

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

Mr. EMERY A. STORRS, for the appellants.

Mr. JAMES K. EDSALL and Mr. BERNARD H. TRUESDELL, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 6th of August, 1856, the Shelburne Manufacturing company, of which Frederick R. Dutcher was president, bor-

rowed from one Daniel Leake, now deceased, the sum of $9,822.92, and, to secure its payment, executed a deed of trust on certain real estate to Lemuel W. Atherton as trustee. On the 12th of November, 1860, the company borrowed another sum of $2,750 from said Leake, and executed another deed of trust to said Atherton. On the 1st of April, 1857, Atherton sold the real estate to Leake under the deeds of trust, and executed to him a deed. In June, 1857, Cummins and House filed a petition for a mechanic's lien against the company, making Leake and Atherton parties. Leake died on the 27th of September, 1857, intestate, and leaving infant children, who, on the 11th of June, 1858, were, with the administrator and administratrix of Leake, brought into court by a supplemental petition. The petition alleged that Cummins and House furnished lumber under a contract made in September, 1856, and that the last lumber was furnished in December, 1856. The decree found the company was seized, on the 16th of December, 1856, of a fee simple in the premises, and ordered the sale of the title of which it was seized on that day. On the 29th of January, 1861, the property was sold by the sheriff under the decree, and struck off to Elisha W. Dutcher for the sum of $540.19, and on the 7th of March, 1861, the sheriff made to him a deed.

In the mean time Emily Leake, the mother of the infant heirs of Daniel Leake, had been appointed their guardian, and in November, 1857, she obtained from the Circuit Court of Lee county permission to sell their real estate. Acting under this authority, she sold the premises in controversy, on the 6th of March, 1858, to Joel L. Coe, for $15,000, executed a conveyance, and took back a mortgage to secure the purchase money. This not being paid, Emily Leake and the minor heirs filed their bill against Coe to foreclose the mortgage, and made parties Frederick R. Dutcher, Edward F. Dutcher, Elisha W. Dutcher, Solon Cummins, Willis T. House and the Shelburne Manufacturing company, asking that the sale and decree in the mechanics' lien case be set aside. The Circuit Court, after hearing the case on the pleadings and proofs, so decreed,

and Elisha W. Dutcher, Frederick R. Dutcher and the Shelburne Manufacturing company appealed.

The counsel for the appellants does not deny that there are technical errors on the face of the record in the mechanics' lien case, for which that decree is liable to be set aside on a bill of review, which the bill in the present case was in part designed to be; but he claims for Elisha W. Dutcher the position of a *bona fide* purchaser at a judicial sale for a valuable consideration, and that his title is therefore unaffected by errors in the decree. If Dutcher occupied that position the sale could not be disturbed, but we have arrived at the contrary conclusion, and will briefly state the reasons for our opinion.

The gross inadequacy of consideration is the first thing to be remarked in connection with this sale. The property is shown to have been worth $15,000. About this there seems to be no controversy. It was struck off at the sheriff's sale for $540.19, about one-thirtieth part of its entire value. Now, although mere inadequacy of consideration, standing by itself, is not a sufficient reason for setting aside a judicial sale, yet, if it exist in connection with other circumstances tending to impeach the fairness of the transaction and the good faith of the purchaser, it is certainly entitled to great weight. If the consideration is adequate, that fact alone furnishes an argument in favor of the presumptive fairness of a sale, and would induce a court to lend a less ready ear to other circumstances of a questionable character. But, if property has been sacrificed at one-thirtieth of its value, and that too the property of infants, this fact may well turn the scale in a case where the other objectionable features might not furnish a just ground of interference. *Dickerman* v. *Burgess*, 20 Ill. 266.

Meeting this fact, then, at the very threshold of this case, we proceed to inquire whether, notwithstanding this circumstance, Elisha W. Dutcher can claim protection as a *bona fide* purchaser for a valuable consideration.

Frederick R. Dutcher was the president of the manufacturing company against which this judgment was rendered, and had been from the beginning a large stockholder and its

active manager. Elisha W. Dutcher and Edward F. Dutcher were his brothers. The decree in the mechanics' lien case was taken in May, 1859. The sale did not take place until January, 1861. The complainants in that suit had, in the mean time, received payment from some person, and had assigned their decree, as claimed by the appellants, to Edward F. Dutcher. Frederick R. Dutcher continued to control the premises and the business of the company. In his capacity as president he had executed the original deeds of trust to Atherton, and he knew of the subsequent sale under those deeds, and of the sale by the guardian to Coe, and that the title of the property was gone from the company, subject, however, to the decree under the mechanics' lien. Under these circumstances he himself directed the clerk to issue the execution under which the sale was made, and paid to the clerk his fees therefor. When the day of sale arrived, DeWolf, the administrator of the estate of Daniel Leake, having learned of the proposed sale, went to Frederick R. Dutcher, on the day for which the sale was advertised, and inquired of him if it was to take place on that day. Dutcher replied it would not, told DeWolf he need not attend, and promised to have the sale postponed. De Wolf was not only administrator of the estate, but attorney for Mrs. Leake, the guardian of the children, and had been instructed by her to bid at the sale. He was induced by the representations of Dutcher to stay away.

Notwithstanding these assurances of Frederick R. Dutcher, the sale was held in the afternoon, and was attended by circumstances which showed that the parties concerned desired to prevent fair and open competition, by having the sale consummated as quietly and rapidly as possible. The deputy sheriff, Hollenbeck, testifies, it was understood in the forenoon between Frederick R. Dutcher, A. W. Pitts, who appeared as agent for Elisha W. Dutcher, and himself, that the sale was to take place in the afternoon, and that Pitts was to be a bidder. Frederick R. Dutcher and Pitts notified him, when they desired the sale to be held, and he obeyed their wishes. They were the only persons actually present at the sale, which was held,

not at the door of the court-house, as usual, but some fifteen feet within the hall. The door of the county clerk's office, however, happened to be open, and the clerk, hearing the persons in the hall, stepped to the door as they were making the sale. He testifies the sheriff made some remark about the trouble they had had to get rid of Morely, a former administrator of the Leake estate. He also testifies that he heard no outcry of the sale for the purpose of attracting attention, no bid cried by the officer, and that the sale was over, and they had left within half a minute after he stepped to the door. The sheriff testifies that Pitts suggested the property be struck off as quickly as possible, and that it was struck off as soon as it could be. According to his recollection, no money was paid him on this bid, or at any other time, by Pitts or by Elisha W. Dutcher. The next day, which was Sunday, Frederick R. Dutcher took the deputy sheriff to Oregon, in Ogle county, the residence of Edward F. Dutcher, a distance of eighteen miles, and, not finding him there, proceeded to Polo, for the purpose of procuring his receipt, as assignee of the judgment, for the purchase money. The officer testifies that, according to his recollection, no money passed through his hands, though Edward F. Dutcher swears he "received from the officer the amount of the damages and interest in the case at that time."

It will be observed that Frederick R. Dutcher, on the theory of appellants, and if this transaction was an honest one, had no interest whatever either in the judgment or in the purchase, and yet he is the only one of these three brothers who appears in person on the scene; and he manages the whole affair, from the ordering out of the execution to the procuring of Edward F. Dutcher's receipt for the purchase money. As to why he did this, no explanation is offered. The pretended assignee of the judgment was not present at the sale to protect his interest. The pretended purchaser was not there. But Frederick R. Dutcher, who disclaims all interest in the affair, and who was agent for nobody, orders out the execution, pays the fees, tells a falsehood to the attorney of Mrs. Leake to prevent his attending the sale, appoints, in conjunction

with the nominal agent of his brother Elisha, the exact moment for the sale, and when it is completed, takes the officer and rides two days in order to procure a receipt from his brother Edward in favor of his brother Elisha, and make everything fair on the face of the papers. If the money for the purchase was really paid by Elisha to the officer, why did Frederick start on Sunday for Oregon, in an adjoining county, and follow Elisha W. Dutcher to Polo, in order to procure his receipt? If the money was paid by Pitts as agent for Elisha W. Dutcher, it could have been proven by him, but he was not called as a witness, and no explanation is offered of his absence. The only mode of reconciling the evidence of the officer that, according to his recollection, he received no money, with that of Edward F. Dutcher, that he received at Polo, from the officer, the damages and interest, is by the theory that Frederick R. Dutcher paid the money at Polo in the name of the officer, and in order to give color to a transaction that he had been at so much pains to carry through. But in view of all the circumstances, we are irresistibly led to one of two conclusions: either Frederick R. Dutcher, to whom Elisha W. had lent the use of his name, was the real party in this transaction, and for whose benefit the property was to be acquired at a small fraction of its value through this judicial sale, or that he and Elisha W. Dutcher were acting in concert, with the view of accomplishing the same purpose for their common benefit, the actual management of the matter being intrusted to Frederick. In either event, Elisha W. Dutcher would not only be chargeable with what occurred at the sale in the presence of his avowed agent Pitts, showing that the sale was not fairly conducted, but with the false statements of Frederick to the attorney of Mrs. Leake for the purpose of preventing his presence at the sale. That Pitts and Frederick R. Dutcher were acting in concert, is evident from the testimony of the officer, that they were together prior to the sale, and that he received his instructions from them jointly as to the time and manner of holding the sale. The false statements to the attorney of Mrs. Leake, and the means taken at the sale to prevent

competition, considered in connection with the gross inadequacy of the price, are sufficient reasons for setting the sale aside.

It is urged, however, by the counsel for appellants, that the bill does not charge the fraud in the sale with sufficient distinctness and particularity to justify the consideration of the proof as to irregularities in the sale. It is true there are no allegations in the bill which would justify the court in setting aside the sale on the ground of these irregularities alone, admitting them to be, in themselves, a sufficient cause. It must also be admitted that the averments in the bill in regard to fraud in the sale are very loose and general, and, so far as that portion of the bill goes, would have been liable to a demurrer, or perhaps the evidence offered in their support, if objected to, should have been excluded until the complainants had amended their bill. But there was neither demurrer nor objection to the evidence. The bill does charge that Edward F. Dutcher, Elisha W. Dutcher and Frederick R. Dutcher, combining and confederating together to injure the complainants, procured the execution to be issued; that Elisha W. Dutcher did not pay the amount of his bid to the sheriff; that his name was used in the transaction for the purpose of placing the title in a third person and an apparently innocent purchaser, and that the pretense of Elisha W. Dutcher to be a *bona fide* purchaser for a valuable consideration is untrue. The bill also charges the inadequacy of the consideration. The substance of these charges is, that Elisha W. Dutcher was not a purchaser in good faith for a valuable consideration, but was acting collusively with Frederick R. and Elisha W. Dutcher to defraud the complainants. The facts upon which we have commented do, in our opinion, establish that charge. If objected to on the hearing, all these facts would not have been admissible in evidence without an amendment of the bill charging them more specifically. But they were not objected to, and we do not deem it proper to reverse the decree and remand the cause merely that an amendment may be made which would have been made at the proper time if objection had been made to the evidence.

The decree must be affirmed. *Decree affirmed.*

Syllabus.

FRANKLIN PARMELEE *et al.*
v.
DANIEL LAWRENCE.

1. RELEASE—*of one of several obligors.* Where a release is given to one of several obligors, which is to operate as an absolute discharge of such obligor, it will also operate to release his co-obligors, notwithstanding the instrument contains an express provision that such co-obligors shall not thereby be released.

2. SAME—*ignorance of its legal effect.* The mere fact that when a release is executed the parties are ignorant that its legal effect will be to discharge the co-obligors, will not prevent its so operating, if executed and delivered unconditionally and without reference to its bearing upon other parties.

3. But it seems, if such an instrument provides, in terms, that the obligor seeking to obtain the release shall remain subject to the right of contribution in favor of his co-obligors in case they are compelled to pay more than their share of the claim, then the provision in the release that it shall not operate to discharge such co-obligors may be given effect according to its terms.

4. SAME—*intention of the parties.* But a release, like every other written instrument, must be so construed as to carry out the intention of the parties, as sought in the language of the instrument itself, when read in the light of the circumstances which surrounded the transaction.

5. So, where A receives a contract from B, knowing that it was designed by B to receive a certain interpretation and only to be used for a specific purpose, A has no right to give it a different interpretation, or to use it for a different purpose, although the purpose to which it may be diverted should be consistent with the language of the instrument itself.

6. So where an obligee executes to one of several obligors an instrument which, in form, is a release of such obligor, with a provision that it is not to operate as a discharge of his co-obligors, while the legal effect of the words used in the contract would be to release all, yet, if, when read in the light of the circumstances attending its execution, it appear that the party making the contract did not intend it to have that effect, and the party receiving the contract, knowing such intent, pretends that it will not operate to discharge the co-obligors, who were, in terms, expressly excluded from the operation of the release,—then the instrument will be construed merely as a covenant not to sue, not operating as a technical release, but leaving the co-obligors still liable, and entitled to contribution from the party seeking the release.

7. MORTGAGE—*what constitutes.* An absolute conveyance of property for money borrowed, with covenants back as a part of the same transaction, that upon the payment of the debt so created such property shall be reconveyed, amounts merely to a loan of money and a mortgage to secure its payment.

8. COVENANT TO RECONVEY — *nature of title.* And a covenant by the mortgagee to reconvey the premises by "good and sufficient deed," will be construed as a covenant to pass the same title conferred by the original conveyance.

9. INTEREST — *of recovery when contract is usurious.* After a transaction has been closed, usurious interest cannot be recovered back. But if the transaction is yet open and the debt unpaid, a court of chancery, in stating the account, will allow as a credit upon the principal whatever usurious interest may have been paid.

10. SAME — *construction of act of* 1867. The act of 1867, which provides that in suits upon written contracts made while the interest law of 1849 was in force, and before that of 1857 was passed, no portion of the usurious interest which the debtor may have voluntarily paid shall be deducted from the principal, can be given only a prospective operation in that regard, and cannot apply to usurious interest paid before its passage, because, as to such interest, under the law as it then existed, there was a vested right to have it deducted from the principal.

11. But that portion of the act of 1867 which takes away the three-fold forfeiture given by the act of 1845, may operate upon contracts made before its passage, as the law recognizes no vested right in a penalty which the legislature may not take away.

APPEAL from the Superior Court of the city of Chicago.

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

Messrs. MCALLISTER, JEWETT & JACKSON, C. BECKWITH, SIDNEY SMITH and Messrs. GOODRICH, FARWELL & SMITH, for the appellants.

Mr. CHARLES A. GREGORY and Mr. ISAAC N. ARNOLD, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court

On the 15th of September, 1856, Parmelee, Gage, Johnson and Bigelow, partners, doing business in Chicago under the name of F. Parmelee & Co., borrowed of Daniel Lawrence, of Medford, Massachusetts, the sum of $50,000. To secure its payment in five annual installments, with ten per cent interest, they conveyed to Lawrence certain real estate situate in the city of Chicago, a part of which was held by

them under a long lease, and a part under a contract of purchase. Their deed to Lawrence refers to these instruments, and binds the grantors to pay the rent and the unpaid purchase money, and the grantors covenant that the premises are free from all incumbrances, "except the said lease and articles of agreement." The deed also contains a covenant for quiet enjoyment. Contemporaneously with the execution of this deed, a contract was executed by and between the same parties which was, in form, a contract of sale for the same premises, and by the provisions of which Parmelee & Co. agreed to pay the $50,000 in five annual installments, with ten per cent interest, and Lawrence covenanted, upon such payment, to convey to them the premises free from all incumbrances, by good and sufficient deed. Parmelee & Co. also executed a separate instrument by which they agreed to pay an additional interest of two per cent per annum as long as the debt should remain unpaid. They paid the interest at twelve per cent to April, 1861, but none of the principal. From that date they ceased to pay. On the 4th of August, 1864, Parmelee, Gage, and Bigelow, filed their bill in chancery against Lawrence, in which, concealing the true nature of the transaction, claiming that they were purchasers from Lawrence, and suppressing the fact that they had conveyed to him, they set out the contract, aver their readiness to pay, but also aver that Lawrence was unable to convey to them a perfect title according to his covenants in the contract, as he had not the fee in the premises, but was nevertheless threatening to take legal steps to collect the money and to evict them from the premises. The bill was sworn to by one of the complainants, and prayed an injunction, which was granted. Johnson did not join in this bill, as the other partners had purchased his interest.

Lawrence answered, and also filed a cross-bill, setting forth the true nature of the transaction, bringing before the court the deed from Parmelee and his co-complainants to him, and claiming that the entire transaction amounted merely to a loan of money and a mortgage to secure its payment. He prayed a decree that the debt be paid or the premises sold.

On the 24th of September, 1864, Bigelow, Gage & Parmelee filed their supplemental bill, wherein they set up that, on the 12th day of August, 1864, at Boston, Mass., Bigelow had a settlement with Lawrence, of the moneys due Lawrence under the articles, and that Bigelow paid Lawrence $22,557, in full satis faction of Bigelow's share, and that Lawrence then and there, without the knowledge or consent of the appellants, executed, under his hand and seal, and delivered to Bigelow, the following instrument:

"Received, Boston, August 12th, 1864, twenty-two thousand five hundred and fifty-seven dollars, of Liberty Bigelow, in full payment of his portion of all money due me on articles of agreement between myself, him (said B.), F. Parmelee, D. A. Gage and W. S. Johnson, dated September 15, 1856, and recorded in the recorder's office of Cook county, Illinois, October 17th, same year, in book 171 of deeds, page 71; and I release and discharge said Bigelow, his property and estate, from all claims on account of the same.

"If the property mentioned in the above articles has to be sold under any order of the court at Chicago, the interest of said Bigelow in it is to be protected according to this settlement. Nothing herein contained shall in anywise affect my rights or demand against said Parmelee, Gage or Johnson, or their interest in said property.

"DANIEL LAWRENCE." [Seal.]

[U. S. Rev. stamp.]

They claimed that, since their covenants in the articles were joint covenants, therefore this agreement and receipt to Bigelow was a satisfaction, in law and in fact, of all the moneys due Lawrence. They prayed the relief prayed in their original bill, and further, that their covenants in the articles be decreed to be discharged, and that they might be decreed discharged from all claims of Lawrence for money upon the articles, and that Lawrence reconvey and discharge all lien of record.

They also filed an additional answer to the cross-bill, setting up this release. Lawrence answered the supplemental bill,

setting up that he had been induced to execute the release by the fraudulent representations of Bigelow. Replications were filed to the various answers and proofs taken, and on the final hearing the Superior Court held that the release obtained by Bigelow did not discharge his co-obligors, and decreed the payment of the amount due Lawrence, allowing him to retain the twelve per cent interest paid, but giving him only six per cent from the date of the last payment. Parmelee, Johnson and Gage appealed to this court.

It is at once apparent, that this case turns upon the effect to be given to the release. The pretext upon which the original bill was based — that Lawrence had sold and covenanted to convey to the complainants a perfect title in fee simple, which he was not able to do — vanishes the moment the true character of the transaction is brought to light. As has been often decided by this and other courts, the deed from the appellants to Lawrence, and the contemporaneous agreement by which they covenanted to repay a certain sum of money at that time borrowed, and Lawrence covenanted upon such payment to reconvey to them the premises, constituted but a mortgage. The covenant of Lawrence that he would reconvey the premises free from incumbrances, and by good and sufficient deed, must of course be understood as referring to the same title that he had received from them. That title he was bound to give back to them free from any incumbrance done or suffered by him. They had themselves, in their own deed to him, covenanted that the premises were free from incumbrances and for quiet enjoyment, and that they would themselves pay the rent of the leasehold property, and the unpaid purchase money upon that portion of the premises held under a contract of sale. In the face of these covenants, and in view of the fact that Lawrence merely held these premises as security for the repayment of a loan, to construe his contract to reconvey as binding him to convert the imperfect title he had received into an estate in fee simple is impossible. Such a construction would utterly pervert the intention of the parties.

The difficult question in this case relates to the effect to be

given to the instrument executed by Lawrence to Bigelow. If it is to be regarded as an absolute and unconditional release of Bigelow, it must also operate as a discharge of his co-obligors, and the mere fact that, when a release is executed, the parties are ignorant that such will be its legal effect, will not prevent its so operating, if executed and delivered unconditionally and without reference to its bearing upon other parties. But a release, like every other written instrument, must be so construed as to carry out the intention of the parties. This intention is to be sought in the language of the instrument itself when read in the light of the circumstances which surrounded the transaction. The court which interprets must place itself as nearly as possible in the position of the parties when they acted. There is also another rule of construction which applies in the present case. If A receives a contract or other instrument from B, knowing that it was designed by B to bear a particular interpretation and to be used only for a specific purpose, then A has no right to give it a different interpretion, or to use it for a different purpose, though such new purpose may be consistent with the language of the instrument. To permit A to pervert the instrument from the purpose for which he knew it was intended by B, would be to permit him to commit a fraud. This rule is founded upon the plainest dictates of natural justice.

Now, for what purpose, and with what limitations, did Bigelow know this instrument to be executed by Lawrence and delivered to himself? The answer admits of no doubt, when we recur to the language of the instrument and to the circumstances attending its execution as detailed in the evidence. Bigelow was in Boston for the purpose of procuring a release, and there was with him his attorney from Chicago with whom he was in consultation during his negotiations with Lawrence, though the attorney and Lawrence seem to have been studiously kept apart. The attorney first drew what he terms a straight release. When Bigelow presented this to Lawrence, the latter refused to sign it, from the apprehension that it might jeopardize his claim against the co-obligors. The attorney drew a

second release somewhat modified in form. This, also, Lawrence refused to sign, insisting that the instrument to be signed must contain an express reservation of all his rights against the co-obligors. Finally, the instrument was drawn as we now find it, and this Lawrence was willing to execute, containing as it does an express provision that the instrument should in no wise affect his rights or demands against Parmelee, Gage and Johnson. What then was the purpose for which Lawrence executed this instrument, and for which, and for which only, Bigelow *knew* he executed it? The answer admits of no hesitation or doubt. It was executed for the purpose of saving Bigelow from further legal liability so far, and only so far, as this could be done without affecting the claim of Lawrence against the co-obligors. A release which it was thought would impair those claims, he had steadily refused to sign. This was prepared with the special reservation of all his rights, and for the purpose of removing the objection taken to the others. Bigelow must have presented this final instrument to him as one which, by its express language, would remove all the difficulties which made Lawrence refuse to sign the others. Would it not then be a fraud upon Lawrence, and a most palpable perversion of the purpose for which Lawrence executed, and Bigelow professed to receive, this instrument, if we should now permit Bigelow to turn about and say, the instrument was an absolute release, by which his co-obligors are also discharged? On the contrary, common honesty requires that he shall claim for this instrument only such effect as it was designed to have, and that it shall be treated merely as a covenant not to sue. In this way its objects will be carried out. Bigelow will be protected from a legal enforcement of the claim on the part of Lawrence, but will be left liable to contribution at the suit of his co-obligors if they are compelled to pay more than their *pro rata* share of the claim. To this contingent liability, however, he assented when he inserted in the instrument a reservation of the rights of Lawrence against them. Indeed we regard this instrument as if it had provided upon its face that Bigelow should still be subject to the right of contribution in favor of his co-obligors.

If it had done so in terms, there could be no controversy about this case, since the reason why a release of one of several obligors discharges all, is, that by such release the right of contribution is cut off. Of course if that right is reserved, the release should be construed as a simple covenant not to sue, leaving the liability of the co-obligors unimpaired. The reason of the rule failing, the rule itself should cease, the more especially when its application would work injustice.

The position which Parmelee, Gage & Bigelow occupy through this entire record, is not one which entitles them to favorable consideration in solving whatever doubts there may be as to the manner in which this instrument is to be interpreted. They filed their original bill for the purpose of evading, upon pretexts that were simply frivolous, the payment of a perfectly honest debt contracted for money borrowed. They obtain an injunction by utterly misrepresenting in their sworn bill the true character of the transaction, claiming to occupy the position of purchasers, when in fact there had been not one element of a purchase. When the answer and cross-bill bring the actual state of facts before the court, they cast about for another mode of evading payment of an honest debt. Bigelow, a kinsman of Lawrence, and as such the better able to deal with him at advantage, goes to Boston to make an arrangement. The attorney of the appellants also goes east, and by appointment meets Bigelow in New York. The plan of procuring a release for Bigelow had been already under consideration in Chicago, as declared by the evidence of Gregory. Bigelow and his attorney proceed together to Boston. The attorney is at hand for consultation, but is not brought in contact with Lawrence. As we have before stated, several releases are drawn, which Lawrence suspects may impair his claim against the co-obligors, and which he, therefore, refuses to sign. Finally one is prepared with the proper reservations, which he is led to suppose he may sign with safety, and he signs it. Bigelow immediately delivers it to the attorney for the purpose, as the attorney testifies, of taking it to Chicago to be recorded. On the next day, the 13th of August, the attor-

ney starts for Chicago, and on arriving at the railway station in that city he is met with the intelligence of the illness of an acquaintance who desires to see him at his house. He goes at once to see him, but before going sends the so-called release to the recorder's office, and on the 16th it is reduced to record. A new answer and a supplemental bill setting up the release are at once filed, and the parties repose upon the belief that they have finally succeeded in evading the payment of a goodly portion of the borrowed money. It is impossible to read the evidence in this case, disclosing the above facts, without a conviction that this whole scheme of procuring a separate release to Bigelow was a plan contrived in Chicago for the purpose of escaping the full payment of the debt. It was a dishonest scheme, and it is our duty so to pronounce it.

In view of all these facts, we have no hesitation whatever in holding, that neither Bigelow nor his co-obligors can pervert this instrument to a use for which it was never intended, or that it can be made to have any other effect than to protect Bigelow from further legal pursuit on the part of Lawrence, but leaving the other co-obligors liable, and Bigelow liable for contribution, if the circumstances of the case should require it.

On the question as to the effect of this release, counsel for appellants have cited the cases of *Benjamin* v. *McCormick*, 4 Gilm. 536, and *Rice* v. *Webster*, 18 Ill. 331. It will be observed from what we have already said that there are facts in this case which widely distinguish it from either of those. We would further add that the weight of the modern authorities is against these cases, and in favor of the more reasonable rule, that where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue. Parsons, in his work on contracts, volume 1, page 24, uses the following language: "But though the word 'release' be used, even under seal, yet if the parties (the instrument being considered as a whole, and

in connection with all the circumstances of the case and the relations of the parties) cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release; for a general covenant not to sue is not of itself a release of the covenantee, but is so construed by the law to avoid circuity of action; and a covenant not to sue one of many who are jointly indebted does not discharge one who is a joint debtor to the covenantor, nor in any way affect his obligation." This rule is substantially so laid down in the following cases: *North* v. *Wakefield*, 66 Eng. C. L. 536; *Willis* v. *DeCastro*, 93 id. 215; *Sully* v. *Forbes*, 2 B. & B. 46; *Kirby* v. *Taylor*, 6 Johns. Ch. 242; *Clagett* v. *Salmon*, 5 Gill & Johns. 351; *Lysaght* v. *Phillips*, 5 Duer, 116; *Wiggin* v. *Tudor*, 23 Pick. 444; R. M. Charlton (Geo.) 267.

There remains to be considered only the rate of interest to be allowed Lawrence. We have decided, in several cases not yet reported, that, although, after a transaction has been closed, usurious interest cannot be recovered back, yet, while the transaction is yet open and the debt unpaid, a court of chancery, in stating the account, will allow as a credit upon the principal whatever usurious interest may have been paid. The Superior Court should, therefore, have allowed the appellants credit, as a payment upon the principal, for the usurious two per cent paid by them during several years after the money was borrowed.

Counsel for the appellee have insisted that the law passed at the last session of the legislature to be found under the head of "contracts," page 81, Laws of 1867, must control this case in that respect. That law provides, that, in all suits on written contracts made while the interest law of 1849 was in force, and before that of 1857 was passed, in which category this contract belongs, no portion of the interest which the debtor may have voluntarily paid shall be deducted from the principal. This provision of that act can have only a prospective operation. Usurious interest paid before its passage was, under the

decisions of this court, a payment *pro tanto* upon the principal, and the debtor could insist on having the payment so applied at any time before the final settlement. This was a right which the legislature cannot take away. It can direct how future payments are to be applied, but the effect of past payments must depend on the laws in force when they were made. We can understand the legislature as intending to apply this portion of the act only to payments thereafter to be made.

There is another portion of this act, however, which will apply to the present case when it is again heard in the Superior Court. We refer to the provision, that, in suits on contracts of the character described, the creditor shall forfeit only the excess of interest above ten per cent where a higher rate than that has been reserved. When this contract was made, ten per cent interest on money loaned was lawful by the law of 1849. That law, however, did not take away the penalty of a three-fold forfeiture given by the law of 1845, as decided in *Kinsey* v. *Nisley*, 23 Ill. 505. The effect of the law of 1857 upon such a contract was not considered in that case, because, although not heard in this court until the January Term, 1860, it had been tried in the court below before the act of 1857 went into effect, and this court merely affirmed the judgment. That case, therefore, furnishes no precedent for the present. Now, although the appellee, when this contract was made, was subject to this forfeiture by way of penalty, yet there is no principle of law better settled than that the legislature can at any time take away the right of action for a penalty. The law recognizes no vested right in a penalty. See *Butler* v *Palmer*, 1 Hill, 330, and cases there cited. It follows, therefore, that the legislature, in directing by its act of 1867 that ten per cent interest should be allowed on contracts of this character, impaired no vested right. Ten per cent was a legal rate when the contract was made, and a forfeiture of threefold all the interest reserved, on account of the usurious two per cent, was not a vested right on the part of the debtor, which the legislature could not take away. They expressly took it away by the act of the last session.

This act of the legislature renders it unnecessary to consider what would be the proper rate of interest in this case if the act had not been passed. We must reverse the decree because the Superior Court did not apply the usurious two per cent to the payment of the principal. At another hearing the two per cent will be so applied, and the court will allow Lawrence interest at the rate of ten per cent from the beginning.

It is suggested that the passage of this act of the legislature was procured by counsel in order to meet this particular case, then pending before us. We have no right to assume this, but, even if it were so, that fact would not render the law less obligatory upon us.

The reversal of this decree is not likely to be a benefit to the appellants, and we might for that reason affirm it, but for the fact there is undoubted error in the decree in regard to the usurious two per cent, and it is the right of the appellants and of their securities in the appeal bond to have it reversed.

Judgment reversed.

SOLON CUMINS *et al.*
v.
WILLIAM WOOD.

BURDEN OF PROOF — *in action by a bailor against a bailee.* In case of a bailment for hire, as well as when the bailment is gratuitous, where it appears the goods, when placed in the hands of the bailee, were in good condition, and they were returned in a damaged state, or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose on him the burden of showing he exercised such care as was required by the nature of the bailment.

APPEAL from 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 William Wood against Cumins & King, to recover the value of certain articles of household furniture, stored with

the defendants by the plaintiff, and alleged to have been lost or broken while in the care of the defendants.

The court found the issue for the plaintiff, and assessed his damages at $250, and judgment was entered accordingly.

The defendants bring the cause to this court by appeal.

The only question arising under the assignment of errors is, upon whom lies the burden of proof as to the fact of negligence in respect to the loss and injury of the goods.

Messrs. WILLIAMS & THOMPSON, for the appellants.

The authorities in England are believed to be uniform and to this effect: that in cases of bailment, whether the action be assumpsit or case, the plaintiff must prove that the loss or damage to the article bailed occurred through the negligence of the bailee. *Finacune* v. *Small*, 1 Esp. 315; *Cooper* v. *Barton*, 3 Camp. 5; *Gilbert* v. *Dale*, 5 Ad. & E. 543; *Harris* v. *Parkwood*, 3 Taunt. 564; Story on Bailments, § 454.

We find no English case where an action against a bailee was maintained for the loss or injury of articles bailed, unless the plaintiff proved the negligence, and that the loss was in consequence of it, or unless the defendants were common carriers and insurers.

In this country the decisions have not been uniform to that extent, and in some cases, when the action was assumpsit, the plaintiff has been allowed to recover, unless the defendant returned the goods or gave an account of the manner of the loss; but, where the action has been case, the plaintiff has been required to prove the negligence of the defendant. *Platt* v. *Hibbard*, 7 Cow. 500.

This case has been referred to in all subsequent cases, but is in reality of no authority. The judge charged the jury that the burden of proving diligence and care was upon the defendant, the bailee. The point, however, was not decided by the court, and the reporter states the rule to be otherwise.

The following cases show the rule in New York to be the same as in England. *Harrington* v. *Snyder*, 3 Barb. 380; *Bush*

v. *Miller*, 13 id. 481; *Foote* v. *Storrs*, 2 id. 326; *Schmidt* v. *Blood*, 9 Wend. 268; *Beardslee* v. *Richardson*, 11 id. 25.

The case of *Foote* v. *Storrs*, *supra*, expressly overrules the charge of the judge as given in *Platt* v. *Hibbard*.

In *Runyan* v. *Caldwell*, 7 Humph. 154, the defendant hired a negro boy of the plaintiff for a year, and during the year the boy disappeared; whether he escaped or died was unknown. The court held, that the burden of proving negligence rested upon the plaintiff, and the defendant was not bound in the first instance to prove that he exercised due diligence and care.

In Pennsylvania the authorities have not been uniform. *Clarke* v. *Spence*, 10 Watts, 335; *Buchanan* v. *Shouse*, 5 Rawle, 179; *Logan* v. *Matthews*, 6 Penn. St. 419.

In the last case, which was assumpsit, the defendants had hired a horse and buggy of the plaintiff and returned them in an injured condition. The court held, that the defendant must either return the property hired in proper condition or must satisfactorily account for the injury.

In *Bennett* v. *O'Brien*, 37 Ill. 250, which was a case where the greatest diligence was required, a strong intimation is made that in cases like the present, the burden of proof would be upon the plaintiff.

Professor Parsons holds, that the proper rule is that stated in *Logan* v. *Matthews*, while Judge Story and Chancellor Kent, in their commentaries, state that the English rule is the proper one. 1 Parsons on Contracts, 686 (bottom paging); Story on Bailments, § 410; 2 Kent Com. 587 (side paging).

The cases of *C. & A. R. R.* v. *Howard*, 38 Ill. 414, and *L. P. & B. R. R.* v. *Caldwell*, id. 280, are in point.

The first expressly states that the party who alleges negligence must prove it; the second goes further, and decides that the plaintiff must not only show negligence, but must show that the loss or injury took place by means of such negligence.

These are the cases that have been discovered on both sides of this question, and we are confident that it will be found, that, although there is some conflict as to the party upon whom

the burden of proof rests, when the form of action is not known or is overlooked, yet not a single case will be found which decides that, when negligence must be shown by the plaintiff, it is sufficiently proven by showing merely a failure to deliver the property.

It will not be denied, it being alleged in the declaration that the loss occurred through the negligence of the defendant, that it is incumbent upon the plaintiff to offer some proof of such negligence.

In actions against attorneys for negligence, the plaintiff must show, not only that loss occurred, but that the loss occurred by the fault of the attorney.

In actions against railway companies for injuries to passengers, the plaintiff must prove, not only that the defendant was negligent, and that the injury was in consequence of such negligence, but he must also prove that the plaintiff exercised due care. *Chicago, Burlington and Quincy R. R.* v. *Dewey*, 26 Ill. 255; *Same* v. *Hazzard*, id. 373.

In actions against railroads for killing stock, the burden of proof is upon the plaintiff, and is not met by showing the bare killing of the stock by the train. *Illinois Central R. R.* v. *Reedy*, 17 Ill. 580; *G. & C. R. R.* v. *Crawford*, 25 id. 529.

To the general rule, that the plaintiff must prove his case affirmatively, there are but few exceptions, and none of them can relieve the plaintiff in this case of the necessity of showing negligence, as that is the foundation of his action. It cannot be said that the proof required in this case is peculiarly within the knowledge of the defendant, for his neglect of duty may be easily shown, and the cases above cited in this State expressly negative such an assumption. And neglect of duty or lack of care is not a negative averment, which requires roof from the opposite party to rebut the presumption of its truth. 1 Greenl. Ev. §§ 79, 81.

This action should have been in assumpsit, on the express promise contained in the receipt, to redeliver the property. In *Spangler* v. *Eicholtz*, 25 Ill. 297, this court says there is an implied promise to take reasonable care of goods deposited,

and to redeliver them on request. That was an action before a justice, and therefore not an action on the case.

In this case there was an express promise to redeliver, and for a breach of that promise assumpsit will lie, and the defendant would then be compelled to excuse himself by affirmatively showing reasonable care and diligence. If the defendant has been guilty of neglect, he can also be sued in case, but the neglect must be shown. The plaintiff cannot elect, however, to sue for the tort and only show a breach of an express promise, and that is precisely what he has done in this case. *Clayburgh* v. *Chicago*, 25 Ill. 535.

This is not a case against a common carrier. Upon them the law imposes greater liability, and it is probable that a proof of loss by them is *prima facie* proof of negligence. It is so stated in *Porter* v. *C. & R. I. R. R.* 20 Ill. 412, which, however, was in assumpsit, and the court rely upon the authority of Story on Bailments, section 529. It has been shown to be Judge Story's opinion, that when only ordinary care is required, positive proof of negligence must be adduced.

In this case the defendants were not shown to be public warehousemen. They were commission merchants, and made a contract for the storage of the plaintiff's property. The law imposes upon them the duty of ordinary and reasonable care, and makes them responsible for ordinary negligence. The law presumes that every person does his duty until the contrary is shown; and in cases like this, the presumption is, that the property was lost by accident, or without the fault of the defendants. Story on Bailments, § 213.

Mr. HIRAM M. CHASE, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only question of law in this record is, as to where lies the burden of proof as to the fact of negligence in an action brought by a bailor against a bailee, in whose hands the goods have suffered injury. The counsel for appellants, while admitting the authorities to be in conflict, insist that the weight of

authority would throw the burden on the bailor. We held the opposite rule to be the more reasonable one in the case of *Bennett* v. *O'Brien*, 37 Ill. 250, and we are not inclined to depart from that decision. That, it is true, was a case of gratuitous bailment, but the reason of the rule applies as well to a bailment for hire. That was a case of a borrowed horse injured while in the possession of the borrower. The present suit is brought by a person who had stored furniture with the defendants at such rates of storage as the defendants asked, and which rates were paid by the plaintiff, and when the latter demanded his goods, a part of them were restored to him in a damaged condition, and the carpets were not returned at all. Now, in cases of this sort, it would be very difficult for the plaintiff to show in what way the injury and loss had occurred, or that they had occurred by the actual negligence of the defendants, or their employees. The plaintiff would not know what persons had been engaged in the defendants' warehouse, nor where to find the testimony necessary to support his action. On the other hand, the defendants would know, or ought to know, what persons had had access to the goods, and could easily show that proper care had been exercised in regard to them, if such was the fact. For this reason we hold it the more reasonable rule, when the bailor has shown he stored the goods in good condition, and they were returned to him in a damaged state, or not returned at all, that the law should presume negligence on the part of the bailee, and impose on him the burden of showing he has exercised such care as was required by the nature of the bailment.

In the present case, perhaps the presumption of negligence was sufficiently rebutted by the evidence in regard to the fire as to all the goods except the carpets. But no explanation is made in regard to these. The defendants themselves prove that the firemen took away none of the goods, and that they were in the fourth story, where no person but the employees of the defendants had access to them. The fire only burnt a hole in the floor, and no attempt is made to prove that the carpets were destroyed by the fire. The presumption from

the proof is, if the carpets were not taken away by an employee of the defendants, that they were taken by some person to whom the defendants improperly permitted access to the place where the goods were kept. The verdict did not exceed the value of the carpets, and we see no reason for reversing the judgment.

Judgment affirmed.

PERRY A. ARMSTRONG, Administrator,

v.

SARAH A. BARTRAM.

1. PLEADING — *of the declaration — where the consideration of a contract is executed, and where it is executory.* Where a party promises to pay a sum of money in consideration that the promisee releases all claims he holds against the promisor, although it does not appear what claims were released, yet, if the consideration of the promise to pay, in that regard, was treated by the parties as executed by the mere execution of the contract, the instrument furnishes a *prima facie* cause of action, in a suit for the money, so far as depends on that portion of it.

2. But, where a part of the consideration of the promise to pay the money was executory, being an agreement on the part of the promisee to deliver the possession of land to the promisor, the contract describing no particular land,— in an action to recover the money, it is not enough, in averring performance by the promisee, to allege that "the land mentioned in the contract was given up," but the facts in regard to the transaction should be set forth in the declaration with such particularity, that it could be seen what land was in the contemplation of the parties, and that the surrender of the possession was such as the parties intended in the agreement.

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

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

Mr. T. LYLE DICKEY, for the plaintiff in error.

Messrs. GOODSPEED & SNAPP, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This is an action of debt brought by Sarah A. Bartram against Perry A. Armstrong, administrator of Jared Bartram, deceased, upon the following instrument:

"SARATOGA, December 9, 1864.

"This instrument shall bear witness, that on this day, the 9th, I have pledged myself to my son, Samuel P. Bartram, as he is sick and there are fears of his death, that in case he should die of his illness, that Sarah, his wife, and Emma Adelia and Charles K. Bartram, that Samuel P. Bartram, now in his sane mind, agrees for them in this their minorship, and Sarah, in her own person, to and with the said J. Bartram, to relinquish all claims either in equity or law against J. Bartram and his estate forever, for the consideration of fifteen hundred dollars, which is to be paid as follows: Five hundred to Sarah on the first day of April, A. D. 1865, and five hundred dollars to each of the children on the first day of April, 1866; the last payments to the children to bear interest for the last year at eight per cent, and the possession of the land is to be given up to J. Bartram by the first day of March, all in peace and good faith, and, further, the personal effects belonging to Samuel P. is not taken into this account.

"P. S. — In case that the said Samuel shall recover from his present illness, in that case the agreement is rendered all void and of no effect.

"In witness whereof we, the parties, do set our hands and affix our seals, on this, the tenth day, A. D. 1864.

"J. BARTRAM, [L. S.]
S. P. BARTRAM, [L. S.]
SARAH BARTRAM. [L. S.]

"Witness:
"MARGARET SAVAGE,
MARY WHITING."

The declaration avers the death of Samuel P. Bartram, and that the possession of the land referred to in the agreement

had been given up to Jared Bartram. The defendant demurred to the declaration. The demurrer was overruled, and, the defendant abiding, the court rendered judgment for the plaintiff for $500 debt, and $29 damages.

This instrument is very inartificially drawn, but the only difficulty in sustaining this judgment arises out of the clause in regard to the possession of the land. So far as relates to the surrender of Samuel P. Bartram, and Sarah, his wife, for themselves and their children, of all claims against Jared, the father of Samuel P., and his estate, while it does not appear what those claims were, yet the execution of the instrument by Samuel and his wife was accepted by Jared as a sufficient relinquishment. So far as such relinquishment formed a part of the consideration of his promise to pay, the consideration was treated by the parties as executed by the mere execution of the agreement. The instrument furnishes a *prima facie* cause of action so far as depends on that portion of it.

The consideration of the instrument, however, was executory so far as related to the surrender of possession of the land, and on this point it was necessary to aver performance in the declaration. The pleader seeks to do this by averring that the land mentioned in the contract was given up to Jared Bartram. The contract, however, describes no particular land. Hence the facts in regard to the transaction should have been set forth in the declaration with sufficient particularity to enable the court to see what land was in the contemplation of the parties, and that the surrender of the possession was such as the parties intended in the agreement. If the defendant had wished to traverse the averment of delivery of possession as made in this declaration, the issue formed would have been altogether vague and uncertain. While the agreement cannot be added to or varied by parol testimony of any additional terms, yet the circumstances in which the parties stood in relation to each other, and the subject matter of the contract, should have been averred in order to enable the court, if it could, properly to apply the terms of the contract, and to enable a specific issue of fact to be submitted to a jury. If, for

example, Jared Bartram was claiming land in the adverse occupancy of Samuel P. Bartram, or if Samuel P. was in possession, under a lease from Jared, of land which Jared desired to take back, these facts should have been averred, so that the court could see on the face of the declaration, that this portion of the contract had been executed in the manner contemplated by the parties.

The judgment will be reversed and the cause remanded with leave to the plaintiff to amend her declaration.

Judgment reversed.

SARAH D. WINCHESTER
v.
MARY E. GROSVENOR.

1. NEW TRIAL—*of excessive damages.* Where the jury, finding for the plaintiff, assess the damages at an amount in excess of what the evidence proves the plaintiff is entitled to, a new trial will be granted, unless on remanding the cause, a remittitur is entered for the damages so claimed to be excessive.

2. EVIDENCE—*to explain a receipt.* A written receipt is evidence of the highest and most satisfactory character, and, to do away with its force, the testimony should be convincing, and not resting on mere impressions, and the burden of proof rests on the party attempting the explanation.

APPEAL from the Superior Court of Chicago.

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

Mr. GEORGE F. HARDING and Mr. F. H. GUION, for the appellant.

Messrs. BARKER & TULEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It appears by the record in this cause, that, in the autumn of 1865, Uri Winchester and T. W. Grosvenor were carrying on the Garden City Brewery in Chicago. Winchester was to furnish the money and buy all the materials, and Grosvenor was to attend to the management of the business and make sale of the beer. The capital Grosvenor had in the business was about $2,500, which was the separate and sole property of his wife, Mary, appellee here, it having been left to her by a deceased relative. In the same autumn, Grosvenor sold out to Mrs. Sarah Winchester, the appellant, and made out a bill of the articles comprised in the sale, which footed up $3,231, for which Grosvenor signed a receipt. The bill of sale was left with H. N. Eldridge, who thinks it was not to be given to Mrs. Winchester until the sum of $300 was paid, which $300 formed a part of the gross sum for which the receipt was given. This gross sum was paid in part by the sale of a saloon which the appellee had accepted in part payment, valued at $1,574.47, and some notes and money paid by appellant, leaving a balance on the bill of sale of four hundred and one dollars and thirty-six cents ($401.36). This balance of $401.36 was to remain unadjusted until the accounts between Uri Winchester and T. W. Grosvenor could be settled, and was to cover any balance due the firm from T. W. Grosvenor, if it should appear on settlement of the partnership concern that T. W. Grosvenor was indebted to the firm, but Grosvenor claimed there was a balance due him on partnership matters. Eldridge, the principal witness, thinks $300 of this receipt was not paid by appellant at the time the receipt was executed and delivered, but was to be paid soon thereafter, or in a few days.

It appears from the testimony of Mr. Leuter, the book-keeper of this brewery, that, at the time of the sale above mentioned, there were some 200 ale barrels and half barrels out in different parts of the city which had been delivered to customers filled, and to be returned when emptied. Those were also sold to appellant at $3.50 each, to be paid for when they were

returned to appellant at the brewery, of which she was to keep an account. They would all come in in two months, in the usual course of business. They were not included in the bill of sale.

This suit was brought to recover the value of these ale barrels, and this $300 Eldridge thought was not then paid, but was to be paid in a few days, although it was then receipted for as paid.

The jury found for the plaintiff, and assessed her damages at $1,100, $100 of which the plaintiff remitted, and took judgment for $1,000, the court having refused a new trial.

The only point necessary to be considered is the amount of this finding. Analyzing the verdict, it will be apparent the jury allowed for the beer barrels, and the $401 which by agreement was not to be paid until the partnership concern was settled, and they refused to allow the deferred $300, as against the receipt of Grosvenor.

The counsel for appellee admit she was not entitled to recover this $401, and we do not think the evidence of Eldridge about the $300, is sufficient to overcome the receipt given for that amount, as having been actually paid at the time.

That a receipt may be explained by parol, is conceded, but the proof by which it is done must be clear and unmistakable. A written receipt is evidence of the highest and most satisfactory character, and to do away with its force the testimony should be convincing, and not resting in mere impressions, and the burden of proof rests on the party attempting the explanation.

The verdict for the value of the barrels was correct, but for all over them, as the proof stands, it is erroneous, and should have been set aside, and a new trial granted. Should appellee, on the remanding of this cause, desire to enter a *remittitur* for the $300, and take judgment for the balance, he is at liberty so to do.

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

Judgment reversed.

Syllabus.

SAMUEL A. STRANG *et al.*
v.
WILLIAM ALLEN.

1. REDEMPTION — *by a junior incumbrancer or his assignee.* A junior incumbrancer, not being a party to the bill to foreclose a prior mortgage, retains his right to redeem from such prior mortgage, unaffected by a decree of foreclosure thereof, and such right of redemption will pass to a purchaser under such junior incumbrancer.

2. SAME — *redemption from assignee of prior mortgage.* The purchaser under a junior incumbrancer having a right to redeem from a prior mortgage, notwithstanding its foreclosure, has the right to redeem from the assignee of such mortgage.

3. So, where a judgment creditor of a mortgagor redeems, as such, from the sale under the foreclosure of a prior mortgage, a junior mortgagee, who holds an intervening lien, between the elder mortgage and the judgment, may maintain a bill to redeem from such judgment creditor, he holding the relation of assignee of the prior mortgage.

4. SAME — *statement of account on bill to redeem.* The party having such right to redeem must pay the assignee of the prior mortgage the amount paid by him to redeem from the prior mortgage, with six per cent interest and the decree should be taken as the basis of the account, and not the original debt upon which the decree was rendered.

5. SAME — *rents and profits.* A mortgagee in possession must account to the mortgagor for the rents and profits, less the amount paid for taxes and necessary repairs, and the same rights and liabilities in regard to the rents and profits attach as between their respective assigns.

6. So, in stating the account between such parties, having the right of redemption, and the redeeming judgment creditor, as the assignee of the prior mortgage, there should be deducted from the amount to be charged to the party redeeming, the rents and profits received by such assignee of the prior mortgage while in possession of the mortgaged premises, less the taxes and necessary repairs; because a mortgagee in possession is always liable to account for the rents and profits received over and above the necessary repairs and taxes.

7. SAME — *where junior incumbrancer was not a party to the foreclosure.* It is proper, in stating the account, to charge the party seeking to redeem, with the amount paid to redeem from the prior mortgage — notwithstanding the junior incumbrancer, under whom the party seeking to redeem claims, was not a party to the proceeding to foreclose the prior mortgage; the decree of foreclosure of such prior mortgage must be taken as *prima facie* correct,

subject, however, to be attacked in that regard by the party seeking to redeem, by proper allegations in his bill, which he must sustain on the hearing.

8. NOTICE — *of taking proof before a master.* Where the cause is referred to the master to state the account, it is not sufficient to mail a letter to his attorney about three days prior to the time fixed for the hearing, thus allowing, had no delay occurred in the mail, barely time to reach the office of the master at the appointed time — such notice is not sufficient.

9. MASTER'S REPORT — *whether exceptions thereto necessary.* Where it appears from the record, that an improper decree has been rendered, it will be reversed, although objections may not have been interposed on the coming in of the master's report.

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

This was a suit in chancery, brought in the court below, by William Allen against Samuel A. Strang, and others, in which the complainant sought to redeem from a mortgage.

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

Mr. E. S. SMITH, for the plaintiffs in error.

Mr. CHARLES M. OSBORN, for the defendant in error.

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

It appears, from the record in this case, that Lathrop and wife conveyed the property in controversy, on the 19th day of July, 1856, to George E. Hoyt and Amos Avery, by deed, with covenants of warranty.

Three days afterward, they conveyed, by way of mortgage, to Jeremiah Chamberlain, to secure the payment of $698.50, with interest, due one year after date.

On the 15th of April following, Hoyt and Avery executed a trust-deed on the same land, to Charles M. Osborn, to secure a debt they owed to one Richardson. This deed, by its terms, was subject to the mortgage to Chamberlain, and provided, that, in case of default of the payment of the debt to Rich-

ardson, Osborn should make sale of Hoyt and Avery's equity of redemption, as attorney of grantors, and should execute a deed to the purchaser, in the name of the grantors, or in his own name, rendering the surplus money, if any, to the grantors.

Chamberlain, on the 24th of June, 1858, filed his bill in the Rock Island Circuit Court to foreclose his mortgage. He only made Hoyt and Avery and their wives parties to the bill; and in September following a decree of foreclosure was rendered against Hoyt and Avery for the sum of $789.90, the amount of his debt, and the decree ordered the payment thereof with interest and costs within thirty days, and awarding a special execution to the sheriff of the county for a sale of the mortgaged premises. An execution issued on the decree, on the 5th of November, 1858, directed to the sheriff. On the 27th of that month the property was sold by him for the sum of $832.69, and a certificate of purchase was given Chamberlain who had become the purchaser, which was duly recorded.

Afterward, on the 13th day of December, 1858, Osborn made sale of the property under the trust-deed, to Allen, and executed to him a deed at his bid of $1,200. It was executed in the name of Osborn, and by its terms it was subject to the Chamberlain mortgage, and all legal claims thereunder.

On the 22d of February, 1859, Chamberlain assigned his certificate of purchase to Howard and he to Lee.

On the 22d of February, 1860, plaintiffs in error redeemed from the sale to Chamberlain as judgment creditors of Hoyt and Avery. The judgments under which the redemption was made bear date, respectively, June and September, 1857.

On the 24th of March, 1860, the sheriff executed a deed to plaintiffs in error under the sale on their redemption.

Allen, on the 12th of July, 1864, filed his bill in the Rock Island Circuit Court to redeem from the mortgage of Chamberlain, and Hoyt and Avery, their wives, and plaintiffs in error, were made defendants to the bill.

Plaintiffs in error answered, but the bill was taken as confessed as to the other defendants. On the 23d of May, 1866, on a hearing of the cause, the court below entered a decree

allowing Allen to redeem from the Chamberlain mortgage, and that plaintiffs in error, who had taken possession under their sheriff's deed, account for rents and profits, and that they be applied on the redemption money paid in redeeming from the sale under the foreclosure of Chamberlain's mortgage, and that Allen pay the balance ($105.90) into court, and plaintiffs in error to release all claims to the land under the sheriff's deed.

To reverse this decree, the cause is brought to this court on a writ of error. The mortgage to Chamberlain, being the first incumbrance, and duly recorded, was entitled to preference over all other liens. But the deed of trust executed to Osborn to secure Richardson's debt, became a lien subject to Chamberlain's mortgage. It was so both by priority and by the terms of the deed of trust itself. It conveyed the equity of redemption retained by Hoyt and Avery when they executed the mortgage to Chamberlain, and Osborn had power to sell and convey that equity to any person becoming a purchaser at a sale to satisfy Richardson's debt. And this deed of trust was prior in date to the judgments under which plaintiffs in error redeemed from the sale on Chamberlain's foreclosure, and was consequently next in the order of liens upon the premises. This, then, left those jugments the last in the series of liens.

When Chamberlain foreclosed his mortgage the deed of trust to Osborn was a valid subsisting lien, junior to the mortgage, and the parties holding that lien, to have been affected by the decree, should have been made parties to the proceeding to foreclose, and, having failed to make them such, their lien was unaffected by that decree and the sale by the sheriff. Their right of redemption still continued unaffected by that proceeding. No principle of law is better settled or more fully recognized than parties holding liens on, or interest in, property, are not affected in their rights by judicial proceedings unless they are either parties or privies. It is equally well settled, that the purchaser at such a sale takes the property subject to all liens of record, and of which he is chargeable with notice, unless their rights are cut off by the judicial proceeding under which

he purchased. It then follows, that, as Richardson's lien was unaffected by the foreclosure of Chamberlain's mortgage and sale of the premises, the assignees of the certificate of purchase, and those redeeming from that sale, could claim no higher or better right than Chamberlain had by his purchase, and, the deed of trust to Osborn being on record when the foreclosure, sheriff's sale and redemption took place, the purchaser and the judgment creditors redeeming from the sale took it subject to be redeemed by those holding under the Osborn deed of trust; and, when Osborn sold, his grantee became invested with the same right of redemption that Osborn or Richardson had.

When Hoyt and Avery executed the deed of trust to Osborn, they transferred to him, as the trustee of Richardson, the equity of redemption. The latter, not being parties to the foreclosure suit, that equity of redemption was not foreclosed by the decree. It only foreclosed Hoyt and Avery's right to redeem, leaving other liens and rights in the property unaffected.

It is insisted that Osborn passed no title to defendant in error, by the conveyance to him, on the sale under the deed of trust, because he conveyed in his own name. The deed of trust conveyed express power to execute the deed in his own name, or that of his grantors. He, in the deed to defendant in error, refers to and recites a portion of the deed of trust, and explicitly states that he is acting under the power conferred by the deed of trust. We can, therefore, see no objection to the mode of executing the deed. The power was conferred upon him and he has followed it strictly, even if such power was necessary to be expressly given.

It is no answer to say that Osborn, Richardson and Allen had notice *lis pendens*, as they were not made parties.

This was their right at common law, and has not been altered by the statute.

Under the English practice, the person holding the equity of redemption was an indispensable party, to foreclose it.

If not made a party to the bill he had the right at any time to file a bill to redeem. Until he was in court and a decree

was rendered barring his equity of redemption, he was wholly unaffected by the decree.

It then follows that plaintiffs in error redeemed and received a deed for these premises subject to the right of defendant in error to redeem from the Chamberlain mortgage, whoever might be its owner. They, however, having succeeded to his rights, were entitled to receive the money then due on the Chamberlain mortgage which they had paid to become the purchasers of his right. They, however, obtained possession of the premises and received rents and profits from the use of the property; and only being in possession as assignees of Chamberlain's mortgage, they were in precisely as if the mortgagee had entered under his mortgage. And a mortgagee in possession is always liable to account for the rents and profits received over and above necessary repairs and taxes.

Plaintiffs in error, representing the mortgagee while in possession, were liable to thus account for the rents and profits.

Before plaintiffs in error could be required to surrender the premises, they should be fully reimbursed all the money they were compelled to pay to redeem under the decree to foreclose Chamberlain's mortgage, with interest. The amount thus paid is the basis upon which the master should have proceeded to state the account. On it he should have computed interest at the rate of six per cent. This they are entitled to as a credit in stating the account. On the other hand, they should be charged with the rents and profits of the property received by them, after deducting all reasonable charges for repairs and for taxes and assessments paid on the property. Whatever there remains of the principal sum paid to redeem from the sale under Chamberlain's decree and the accrued interst, would be the sum which defendant in error would be required to pay for the purpose of redeeming. When let in to redeem it must be on equitable terms, and it is equitable that the sum paid to redeem should be taken, rather than the original note given to Chamberlain. The master therefore erred in adopting the sum named in the note as the basis in stating the account. It is urged that this objection comes too late, as it was not inter-

posed before the master, or upon the coming in of the report in the court below. As it regards the first of these objections, it is only necessary to say, that the notice of the time fixed for the hearing before the master was not sufficient. It was only by mailing a letter to the attorney of plaintiffs in error about three days previous to the time fixed for the hearing, when he resided in a distant city. He could not have more than reached the master's office by the day, had there been no delay in the mail or otherwise, and the attorney had been at home, and had left at once to attend. Such a notice cannot be held sufficient. The object in requiring it to be given, is, that parties may be heard in defense of their rights and not as a mere form.

It may have been the duty of plaintiffs in error, having appeared at the next term of the court, to object to the master's report. But when the report on its face shows, that it is based on a wrong principle—is erroneous, a neglect to do so does not preclude them from having the report, and the decree rendered upon it, reviewed in an appellate court, any more than would a default preclude them on a decree *pro confesso*. A party taking a decree on default, whether on the original bill or on a master's report, is bound to see that it is just and legal. The default of the defendant does not authorize him to take and insist upon an inequitable decree. When it appears from the record that an improper decree has been rendered, it will be reversed, although objections may not have been interposed on the coming in of the master's report.

For the error in stating the account, the decree of the court below must be reversed and the cause remanded.

Decree reversed.

The foregoing opinion was delivered at the April Term, 1867; at the September Term following, Allen, the defendant in error, presented his petition for a rehearing, insisting therein, that the basis of computation which requires him to reimburse the assignees under the Chamberlain mortgage with the sum paid by them to redeem, with interest, rather than

with the amount due upon the original note given to Chamberlain, is erroneous, because, without default on his part, he was deprived of all opportunity to contest the decree in that regard, by reason of which, Chamberlain may have obtained a decree for a larger sum than he was entitled to, and bid that sum with interest and costs on his purchase; and, furthermore, that the assignees under the Chamberlain mortgage purchased the judgments subsequent to the trust deed, voluntarily, with full knowledge of his rights under it, and therefore that the costs which have accrued by their voluntary act should not be charged against him.

In denying this application the court delivered the following additional opinion:

PER CURIAM: It is urged that taking the amount paid by plaintiffs in error to redeem from the decree of foreclosure, might work great injustice, as defendant in error was not a party to the proceeding to foreclose the elder mortgage, and the decree may have been for too large a sum. We must presume that the decree is correct, unless it is shown to be erroneous. Plaintiffs in error had the undeniable right to redeem under their judgment, and could not under the law, without paying the full amount for which the premises were sold under the decree, with ten per cent interest. And having done so, they should be permitted to receive their money back with interest, unless it is shown that the decree was for too large an amount. And as the decree is *prima facie* correct, it devolves on the party seeking to redeem from the decree, to show that it was for more than was due on the mortgage.

In such cases, if the junior mortgagee conceives that the decree foreclosing the elder mortgage is too large, he should allege the fact in his bill, filed to redeem, and sustain it on the hearing. In this mode all wrong and injustice may be avoided. If mistake has occurred in rendering the decree foreclosing the senior mortgage, it can be thus corrected; and then the loss would fall on the person redeeming under his judgment from the decree.

It is true that the sum has been enhanced by the costs of the first foreclosure suit, but defendant in error and those under whom he claims might have redeemed, before the foreclosure suit was brought, and thus have prevented the accumulation of costs incurred for that purpose, as well as the increased interest; but they failed to do so, and failing to impeach the decree, it is but equitable that he should refund the amount paid by plaintiffs in error to redeem from the decree of foreclosure. Had he redeemed, plaintiffs in error would not have been induced to redeem, or become thereby the assignee of the first mortgage. The petition for a rehearing must be denied.

Rehearing denied.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

FIRST GRAND DIVISION.

JUNE TERM, 1867.*

JOHN MAXEY *et al.*

v.

HENRY HECKETHORN.

1. EVIDENCE — *authority to act as the agent of another — cannot be proven by the testimony of the party claiming it — uncorroborated.* A party claiming that he had authority to act as the agent of another in a particular transaction, cannot establish such agency by his own uncorroborated testimony.

2. SAME — *of agency — concerning acts of recognition by the principal in former cases — must have been known to the vendor at time of sale.* Proof of the fact, that a person had on former occasions recognized another as has agent in making purchases for him, is not sufficient to charge him for a purchase afterward made by such person, claiming to act as his agent, without proof that at the time of such subsequent purchase the vendor was cognizant of such former acts of recognition.

APPEAL from the Circuit Court of Fayette county.

The opinion states the case.

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* The term for which Mr. Chief Justice WALKER had been elected having expired, Mr. Justice BREESE, as the senior justice, took his seat as chief justice at this term.

Messrs. MULKEY, WALL & WHEELER, for the appellants.

Messrs. J. P. VAN DORSTON and A. J. GALLAGHER, for the appellee.

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

This was an action of assumpsit in the Fayette Circuit Court brought by Henry Heckethorn against John Maxey and Philip K. Howard, trading and doing business under the firm name of Maxey and Howard. The plaintiff obtained a verdict which the court refused to set aside on motion and reasons filed, and rendered a judgment thereon, to reverse which the defendants bring the case here by appeal.

It appears from the bill of exceptions, that the property purchased of the plaintiff, some cattle and sheep, were purchased by one James Hewitt, representing himself as the agent of Maxey, Howard's name not being used by any of the witnesses, to make the purchase, and, paying $350 on the purchase, he stated that Maxey would pay the balance, and gave directions to ship the cattle to Cairo, as he had done previously with another lot. It was proved John Maxey was in company on one or more occasions when Hewitt purchased cattle, and that Maxey paid for them, and that he paid for the use of a horse hired by Hewitt to go to plaintiff's to buy cattle. The first lot of cattle bought by Hewitt of plaintiff had been shipped to John Maxey. It was proved Hewitt said he was the agent of Maxey. The defendant proved by witness Gillern, that Hewitt was not the agent of appellants at the time of this purchase.

We think the evidence was very slight, indeed, to establish the agency, and that Hewitt could not prove it by his own uncorroborated testimony. *Rawson* v. *Curtis,* 19 Ill. 456. The fact that John Maxey had recognized acts of purchase by Hewitt, is not sufficient to charge Maxey and Howard, in the absence of any evidence going to show that the plaintiff, before he sold to Hewitt, was cognizant of the facts.

The appellee relies upon the testimony of Lee, Sprinkler, Rives and Tankersley, who speak of purchases by Hewitt which Maxey recognized, and for which he paid, and they insist that such recognition can be availed of by the appellee, and of that opinion was the court, in refusing to give this instruction asked for by the defendants below: "Unless you believe, from the evidence, that the transactions proved to have taken place between the witness Lee, and Sprinkler and Maxey and Hewitt, were in some way brought to the knowledge of the plaintiff, he cannot claim that he sold the stock to Hewitt, as the agent of Maxey, because of said transactions."

On the authority of *Rawson* v. *Curtis et al.,* 19 Ill. 475, above cited, this instruction should have been given. In that case, it was said, the principle is well settled that an authority to draw, accept or indorse bills may be presumed from acts of recognition in former instances, but those acts must be known to the party setting them up. In all such cases it must appear that the bill or note was taken and discounted on the faith of prior similar transactions, and, therefore, the holder of a bill purporting to be, but not in fact, accepted by the person to whom it was addressed, cannot recover against the apparent acceptor by proving a fact subsequently discovered, that on a former occasion, the defendant had given a general authority to the person who accepted in his name to accept bills for him; to make such authority available, the holder must show, either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority. Chitty on Bills, 31.

As was said in that case, these prior transactions, being unknown to plaintiff below, when he sold the cattle to Hewitt, cannot avail him to charge the defendants.

For refusing to give this instruction, the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

Syllabus. Statement of the case.

GEORGE W. WHITAKER
v.
DANIEL WHEELER.

1. EVIDENCE — *record of another suit.* It is a fatal error to allow the plaintiff to introduce in evidence, against the objection of the defendant, the record of a suit to which the defendant was not a party.

2. SAME — *declarations.* In an action of trover against a sheriff to recover damages for selling the property of the plaintiff under an attachment against another person, the declarations of the defendant in the attachment, while in the apparent possession of the property, as explanatory of his posession, and in disparagement of any claim in himself, are admissible in evidence in behalf of the plaintiff; and he may also prove the fact, that while in possession of the property he claimed it as his own.

3. MEASURE OF DAMAGES — *where goods are wrongfully levied upon.* If the goods of one person are wrongfully levied on under an attachment against another, the statute does not contemplate that the rightful owner is to be permitted to recover only such a sum in damages as his property may have brought under a forced sale.

4. IDENTITY — *of commissioners to take depositions.* Where depositions were taken by William Rifenburg, under a commission addressed to William Roffenburg, and cross interrogatories were duly propounded and answered, and no objection was taken except to the variance in the spelling of the name, the court might well presume that the commission was executed by the proper person.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

In July, 1865, George W. Whitaker, then sheriff of Lawrence county, levied an attachment on one hundred and sixteen head of cattle, and some other stock and personal property. The attachment was in favor of Mark Sunthimer, and against Charles Wheeler and Robert Potter. At the time of the levy, Daniel Wheeler claimed to own all the property, and was then herding the stock, and was in possession of the other property as the owner. On the 24th of that month, Daniel Wheeler gave a notice in writing, and demanded a trial of the right of property; the jury found the property to be owned by Daniel Wheeler. Whitaker, claiming to act under section 23 of the attachment law, sold the property as perishable.

At the September Term, 1865, of the Lawrence Circuit Court, Daniel Wheeler brought an action of trover against Whitaker, alleging the unlawful taking of the property levied upon, and the conversion thereof to his own use. The defendant pleaded the general issue. The venue was changed to Marion county. On the trial, the plaintiff was permitted to offer in evidence to the jury the record of the proceedings had on the trial of the right of property. The jury found a verdict for the plaintiff for $3,000, and the court rendered judgment accordingly. To reverse that judgment this appeal is prosecuted.

Messrs. BOWMAN & O'MELVENY, and WILLARD & GOODNOW, for the appellant.

Messrs. DENNY, STOKER & SMITH, for the appellee.

1. The measure of damages in trover against the sheriff for wrongful levy of attachment, is the value of the property at the time of the levy. Hilliard on Torts, 139.

2. A verdict will not be set aside when the evidence is conflicting, even thought it may be against the weight of evidence. *Morgan* v. *Ryerson,* 20 Ill. 343; *Martin* v. *Ehrenfels,* 24 id. 189; *Pulliam* v. *Ogle,* 27 id. 184.

3. Where substantial justice has been done, a judgment will not be disturbed. *Higgins* v. *Lee,* 16 Ill. 495; *Schwarz* v. *Schwarz,* 26 id. 81.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trover, brought by Daniel Wheeler against Whitaker, to recover the value of certain cattle and other personal property levied on by Whitaker, as sheriff, under a writ of attachment issued against one Charles Wheeler. Prior to the trial of this case, there had been a trial of the right of property, and a verdict found for the plaintiff. The plaintiff offered the record of that suit in evidence in this case, and it was admitted against the objection of the defendant. Its admission was error, since the sheriff was not a party to

that proceeding, in any sense that would make it evidence against him, and as it would be apt to have some weight upon the minds of the jury, the error is one for which we must reverse the judgment.

It is also assigned for error, that certain depositions taken under a commission addressed to one William Roffenburg, as special commissioner, and executed by one William Rifenburg, were admitted in evidence. The cross-interrogatories were duly propounded and answered, and no objection is taken, except to the variance in the spelling of the name. We think the court might well presume that the commission was executed by the proper person.

Objections were also taken to the admission in evidence of the declarations of Charles Wheeler, as to the ownership of the cattle. But they were made while he was in apparent possession, before the levy, as explanatory of his possession, and in disparagment of any claim in himself. They were, therefore, admissible. The fact that Daniel, while in possession, claimed the cattle as his own, was also admissible.

It also appears that the sheriff sold the property as perishable property, under the 23d section of the attachment law, and it is claimed that the plaintiff can only recover the proceeds of such sale. It does not appear that there was a compliance with the requirements of the statute in making that sale; but even if there had been, the sale would have been immaterial. The statute does not contemplate, if the goods of one person are wrongfully levied on under an execution against another, that the rightful owner is to be permitted to recover only such sum in damages as his property may have brought under a forced sale. Such a sale would very seriously impair that protection which the law is intended to furnish to rights of property.

But for the error above named, the judgment must be reversed and the cause remanded.

Judgment reversed.

JAMES M. MILLER
v.
JOHN S. JENKINS.

1. BILL OF EXCEPTIONS — *not sealed.* Where there appears to be no seal to the bill of exceptions as transcribed into the record, and no suggestion of a diminution of the record is made by appellant, it will be presumed that there was none to the original bill.

2. SAME — *must be sealed.* The statute 13 Edward I, chapter 31, required that a seal should be attached to the bill of exceptions, and since that time the British courts have regarded it essential. And the 21st section of our practice act requires a bill of exceptions to be signed and sealed by the judge trying the case, and thereupon the exception becomes a part of the record. If it is wanting in either of these requirements it fails to become a part of the record.

3. SAME. Where there is no seal to a bill of exceptions this court will not look into it to see if there is error.

APPEAL from the Circuit Court of Bond county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was an action of assumpsit, brought by John S. Jenkins, against James M. Miller. The declaration contained the common courts for work and labor. Defendant filed the general issue with a notice of set-off.

At the return term a trial was had before the court and a jury. After hearing the evidence and instructions of the court, the jury found a verdict for the plaintiff for $182.25, and thereupon the defendant entered a motion for a new trial. The grounds for a new trial were, that the court refused proper instructions for the defendant; because the jury disobeyed the instructions of the court; because the officer having the jury in charge conversed with the jury as to what verdict they should find. In support of the last ground affidavits were filed.

What purports to be a bill of exceptions is without a seal; and it contains the grounds for the new trial. The motion

was overruled by the court and judgment was rendered on the verdict. Defendant prosecutes this appeal to reverse the judgment, and relies upon the overruling of the motion for a new trial as error.

Messrs. PHELPS & MOORE, for the appellant.

Mr. WM. H. UNDERWOOD, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee in the County Court of Bond county, against appellant. The venue of the cause was afterward changed to the Bond Circuit Court. A trial was had resulting in a verdict in favor of appellee. A motion for a new trial was entered, which was overruled by the court, and a judgment was rendered on the verdict; the case is now brought to this court by appeal, and various errors are assigned, all of which arise on the overruling of the motion for a new trial.

Appellee insists, that the questions sought to be raised do not arise on the record, inasmuch as what was designed for a bill of exceptions is not sealed. An inspection of the transcript brought to this court shows that it is not sealed, nor does it purport to be. And as appellant's counsel made no suggestion of a diminution of the record, we must infer that there is no seal to the original bill, of which this is a transcript. If incorrectly copied, the inaccuracy could have been readily corrected by a writ of *certiorari*.

Having no seal annexed, is this such a bill of exceptions as we can regard in determining the case? As early as 1285, the 13 Edward I, chapter 31, was enacted. It declared that "when one that is impleaded before any of the justices doth allege an exception, praying that the justices will allow it; which if they will not allow, if he who alleged the exception, do write the same exception, and require that the justices will put their seals for a witness, the justices shall do so; and if one will not, another of the company shall." Since the adoption of this

statute in Great Britian, the courts have regarded a seal as essential to the validity of a bill of exceptions.

The 21st section of our "practice act," R. S. 416, declares, that, "if, during the progress of any trial, in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow the exception, and to sign and seal the same; and thereupon the exception shall become a part of the record of such cause. This section has prescribed the mode by which a bill of exceptions may be made; and to become a part of the record the exception must be reduced to writing, and signed and sealed by the judge. If, wanting in any one of these requirements, it fails to become a part of the record, and this court can only inspect the record of the court below,— we cannot look outside of or beyond the record as made by that court, to see what transpired in the case.

In the case of *James* v. *Sprague,* 2 Scam. 55, it was held, that, if the paper purporting to be a bill of exceptions, did not purport, as copied into the transcript, to have been signed and sealed, this court would not regard it as a part of the record and held the objection as fatal, and this too when the objection was taken on the hearing, and not by motion to strike it out of the record. While no very satisfactory reason can be assigned why a bill of exceptions should be sealed as well as signed, still the general assembly has required it, and its will thus expressed must be obeyed. That body have the right to impose such terms and conditions as it seems to them the administration of justice requires, before a matter not a part of a record shall become such. It is not for the judicial department of the government, to pass upon the wisdom or the necessity of the requirement. The courts must carry out the legislative will. If found to be harsh or productive of great inconvenience, or to obstruct or even delay the administration of justice, the legislature would no doubt remedy the evil. The statute requires that the bill shall be sealed, as imperatively as the law requires a deed conveying real estate to have a seal attached.

We are therefore unable to look into this paper to see what was excepted to by appellant on the trial below; and as no other errors are relied upon, the judgment of the court below must be affirmed.

Judgment affirmed.

ALFRED TOWNSEND *et al.*
v.
WILLIAM J. RADCLIFFE.

1. ESTATE — *administration and distribution of.* Under our statute, a husband has the right to become administrator of his wife's estate, but, like all other administrators, he must distribute the estate according to the statute of distribution. The statute of the 29th Car. 2d was never in force in this State.

2. HUSBAND AND WIFE — *neither next of kin to the other.* Neither the husband or the wife is in any sense next of kin to the other.

3. JURISDICTION IN CHANCERY — *distribution of estates.* A court of equity has a paramount jurisdiction in cases of administration and the settlement of estates, and may control courts of law in their action in that regard.

4. So where a court of probate has ordered an administrator to pay money in his hands to the persons legally entitled to receive it, without determining who are entitled to the distribution, it is proper to resort to a court of chancery for the purpose of ascertaining that fact.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The facts fully appear in the opinion.

Mr. W. H. UNDERWOOD, for the appellants.

Mr. CHARLES W. THOMAS, for the appellee.

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

This was a bill in chancery in the St. Clair Circuit Court, brought by Alfred Townsend and others, claiming to be the legal representatives of Nancy Radcliffe, deceased, against her

surviving husband, William J. Radcliffe, for a discovery of all the personal property belonging to deceased as her separate property at the time of her death, and to decree the same to complainants as the heirs at law and distributees of deceased. The bill also prayed that defendant, who had administered upon the estate of the deceased, would account to them for all moneys he had received belonging to her as administrator, and that the court would adjudge who is the rightful owner of her effects after paying her debts, and make an order for the distribution of the same. The defendant, as administrator, had made a final settlement of the estate before the County Court after the expiration of two years from the time of taking out letters of administration, and had charged himself with a balance in his hands of $1,134.86, all of which he claimed to be his, as husband of the deceased.

The County Court ordered the administrator to pay over this balance to the persons legally entitled to receive it, without determining who were the proper distributees thereof.

A demurrer was filed to the bill, on the ground, first, that complainants had a remedy at law by taking an appeal from the order of the probate court, and, second, that defendant was entitled to all of the personal property of the deceased.

The court sustained the demurrer and dismissed the bill, to reverse which the record is brought here by appeal, and the decision of the court upon the demurrer is the error assigned.

It is admitted the marriage of the deceased intestate was subsequent to the passage of the act of 1861 to protect married women in their separate property, and that the property had been devised to her by her father under his last will.

The defendant, appellee here, contends that by the *jus mariti,* or as administrator of his wife, he is entitled to all the property and money in his hands; and that the remedy of complainants was at law, by appeal from the order of the County Court.

In support of this proposition reference is made to section 90, chapter 110, title "wills." That section we do not think has any application. The object of that section is to get at

property which may be concealed or embezzled, or be in the possession of a party not entitled to it, in order that it may be delivered up to be administered upon.

We do not perceive how the complainants could have appealed, or from what they should have appealed, as the County Court failed to determine who was entitled to the surplus of the wife's estate. The order, so far as it went, was well enough, that the administrator should pay it to the persons legally entitled to receive it, and this bill was filed for the purpose of ascertaining that fact. We know no tribunal more competent to settle such a question than a court of equity, which has a paramount jurisdiction in cases of administration and the settlement of estates, and may control courts of law in their action in their settlement and distribution. *Grattan* v. *Grattan,* 18 Ill. 171.

The other and most important question must be determined by reference to our statute. Our statute of wills, by section 46, declares, after all debts and claims against an estate shall be paid, the remainder of the estate shall descend to and be distributed to the children of the intestate, and their descendants in equal parts; if there be no children of the intestate or descendants of such children, and no parents, brothers or sisters, or descendants of brothers and sisters, and no widow, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree, computing by the rules of the civil law. Scates' Comp. 1199.

By section 55, administration on the estate of the wife is the right of the husband.

The property of the intestate consisted, for the most part, in promissory notes on different persons made payable to her while sole, which never came into the possession of her husband, nor had he any control over them in her life-time. He had not reduced them into his own possession.

While marriage was, prior to the act of 1861, considered as an absolute gift to the husband of the goods, personal chattels and estate of which the wife was actually and beneficially possessed at the time of marriage in her own right, and of such

other goods and chattels as came to her during the marriage, with regard to *choses in action,* the marriage was only a qualified gift, upon the condition that the husband reduced them into possession during the continuance of the marriage. Failing to this, on the death of the wife they survived to her next of kin.

The act of 1861 continued the separate property of the wife in her during coverture, and placed it beyond the control of her husband. The appellee contends that by the terms of the act her property was so placed only "during coverture," and that at her death it passed to the husband in that right, or to him as administrator on becoming such.

This is not a proper inference from the language of the act taken in connection with the sections of the statute of wills above cited. The property being the absolute property of the wife "during coverture," it would seem to follow, on her death, it went to her next of kin, or to her devisees as she might nominate by her last will. It is hers absolutely, and, dying intestate, it becomes subject to the provisions of our statute in relation to intestate estates. The cases cited by appellee are based upon the statute of 29 Car. 2, which never was in force in this State, as it was passed subsequent to the fourth year of the reign of James I. The rule as contended for by appellee is the law in England, New York and Kentucky, as appears from the authorities cited. *Stewart* v. *Stewart,* 7 Johns. Ch. 229; 2 Bright's Husband and Wife, 224; *Brown et al.* v. *Alden et al.,* 14 B. Mon. 143, and perhaps in other States.

In those States having statutes of distribution like our own, the surplus property of the wife, on intestacy, has always been held to go to her next of kin, and not to her husband in either right as claimed. *Holmes* v. *Holmes,* 28 Verm. 765; *Curey* v. *Falkington,* 14 Ohio, 106; *Dixon* v. *Dixon,* 18 id. 113; *Baldwin* v. *Carter,* 17 Conn. 201. In *Cox* v. *Morrow,* 14 Ark. 617, and *Carter* v. *Cantrill,* 16 id. 155, it was held that the personal property of the wife, not reduced to possession by the husband during her life-time, descends, upon her death, to her heirs or representatives, and not to her husband.

This was the rule of the common law, though the administrator could not be compelled to make distribution until the act of 22 Car. 2 was passed, compelling him, and under that act the distribution was to next of kin of the wife. Reeve's Don. Rel. 16. Before this statute, all the children of a deceased person were equally entitled to their several shares of the personal estate of their father, yet if one of them procured administration on the estate, he would take the whole to himself, as did the clergy when to their care estates were committed. In the same manner, when the wife died, the husband was considered as having a legal right to the administration on her estate, and, having obtained the appointment, he could not be compelled to distribute to her representatives. But this statute made it the duty of all administrators to distribute the estates of deceased persons. Id. By the statute 29 Car. 2, husbands were permitted, after having paid the debts due from their wives, to hold exclusively all their wives' *choses in action,* without any liability to account for them to any person. This altered the common law, giving that to the husband which before belonged to the representatives of the wife.

This statute was never in force in this State, consequently the husband here is in no different situation from other administrators, and must distribute the estate according to our statute of distribution. The husband becomes administrator by virtue of our statute, and is in no different condition than any other administrator, and must distribute the surplus according to the law under which he acts. He cannot claim to be next of kin to his wife, for in no sense is he such, nor is the wife next of kin to the husband. *Watt* v. *Watt,* 3 Vesey, Jr. 247; *Garrick* v. *Lord Camden,* 14 id. 386 (side paging); *Bailey* v. *Wright,* 18 id. 49; 2 Kent's Com. 136 (5th ed.).

An inference may be drawn, that it was not the intention of the legislature to vest the husband with the personal estate of his wife, after her decease, from section 47, chapter "wills," wherein it is provided the husband shall have one-half of the real estate of the wife forever, is she dies without issue.

We are of opinion the next of kin of the intestate are entitled

to the surplus of her estate, and the demurrer to the bill should have been overruled, and a discovery compelled.

The decree of the Circuit Court must be reversed, and the cause remanded.

Decree reversed.

PATRICK CONROY
v.
MARY A. SULLIVAN *et al.*

HOMESTEAD EXEMPTION — *a protection against all judgments, whether ex contractu or ex delicto.* By the amendatory act of 1857, the homestead is exempt from sale under an execution issued on a judgment against the husband, whether such judgment is obtained for the violation of a contract, or his torts.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was a bill for an injunction, exhibited in the court below by the appellant, against the appellees, Mary A. Sullivan, Henry Moore and Joel K. Finley, charging that complainant was the owner of lot 9, in block 13, in the Illinois Central railroad addition to Centralia; that the property was purchased by him from one Luke Conroy, on the 6th of April, 1865, who then occupied the premises as a homestead; that the defendant, Mary A. Sullivan, at the March Term, 1865, of the Marion Circuit Court, obtained a judgment against the said Luke, in an action for slander, and had had execution issued and levied on the premises, and would sell the same, if not restrained by injunction of the court; that the same were occupied by him as a homestead, at the time of the rendition of said judgment. On the hearing in the court below, a decree was rendered for the defendants, dismissing the bill, to reverse which the case is brought to this court by writ of error.

Mr. B. B. SMITH, for the plaintiff in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Syllabus.

The single question presented by this record is, whether the homestead is exempt from sale under an execution issued on a judgment obtained against the husband in an action for slander. It is true, this case does not fall within the actual terms of the homestead act of 1851. That exempted the homestead "from levy and forced sale, under any process or order from any court of law or equity in this State, for debts contracted from and after the 4th day of July, 1851." The judgment in this case was not strictly a "debt contracted." But the law of 1857 declared it to be the object of the legislature to prevent the alienation of the homestead in any case, except by the consent of the wife. In the light of both these laws, this court has constantly held, that it was the evident intent of the legislature to protect the homestead as a shelter for the wife and children, independently of any acts of the husband. He cannot deprive them of their right to it without the consent of the wife, either by his contracts or his torts. There is no more reason, so far as the wife is concerned, for permitting it to be sold for the husband's tort, than for his violation of a contract, and it is the evident policy of the law to forbid its being sold under a judgment and execution in either case. The decree of the court below must be reversed.

Decree reversed.

GEORGE LEWIS
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

1. JURY — *in charge of an unsworn officer.* The 189th section of the Criminal Code requires, that the officer having charge of a jury, when they retire to consider of their verdict, shall be sworn to attend them to some private place, and to the best of his ability to keep them together without meat or drink, water excepted, unless by leave of the court, until they shall have agreed upon their verdict, nor suffer other persons to speak with them, and when they agree, to bring them into court. *Held*, that it is error, in a case of felony, to omit to so swear the officer into whose charge the jury are placed.

2. OFFICER — *contempt of court.* The 190th section declares, that, if any such officer shall knowingly violate his oath, he shall be punished for a contempt of court by fine or imprisonment. These provisions were adopted to secure a fair and impartial trial to the accused, as he not unfrequently is in prison at the time, and is unable to guard his rights. It is the duty of courts to strictly guard human life and liberty from being sacrificed by public prejudice or excitement. Outside influences should be kept from the jury trying such causes. These provisions of the statute are clear, explicit and peremptory, and cannot be omitted, and when refused it is error.

WRIT OF ERROR to the Circuit Court of Clay county; the Hon. AARON SHAW, Judge, presiding.

At the October Term, 1865, of the Clay Circuit Court, the grand jury presented an indictment against George Lewis and others, for stealing one mare of the value of $150, and one colt of the value of $50. A capais was issued, and defendant was arrested.

The cause was tried at the May Term, 1867. After hearing the evidence, the jury returned a verdict of guilty, and found the property stolen to be of the value of $200, and fixed the term of defendant's confinement at four years in the penitentiary.

Defendant entered a motion for a new trial, for the reason, among others, that the officer taking charge of the jury was not sworn as required by the statute. This ground was supported by affidavit of its truth.

The court overruled the motion and rendered judgment on the verdict, and sentenced defendant to be confined in the penitentiary for the term found in the verdict, to reverse which defendant prosecutes this writ of error, and relies upon the overruling of his motion for a new trial for a reversal.

Mr. SILAS L. BRYAN, for the plaintiff in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In this case plaintiff was indicted for stealing a mare and colt. A trial was subsequently had in the Circuit Court, resulting in a verdict of "guilty," and that he be confined in

the penitentiary for the term of four years. A motion was entered for a new trial, upon the ground, among others, that the jury, when trying the case, after hearing the evidence, retired to consider of their verdict, in charge of an officer who was not sworn in the mode prescribed by the statute. The motion was overruled and a judgment rendered on the verdict. The record discloses the fact, that the officer in whose charge the jury were placed while deliberating on their verdict was not sworn, and this is the only error relied upon for a reversal.

The 189th section of the Criminal Code, R. S. 186, declares, that, "When the jury shall retire to consider of their verdict, in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and, to the best of his ability, keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court."

But it declares, that, in any cases of misdemeanor only, if the prosecutor for the people and the accused shall by himself or counsel agree, which agreement shall be entered upon the minutes of the court, they may dispense with the attendance of an officer upon the jury.

The next section declares, that, if any officer sworn to attend upon a jury shall knowingly violate his oath or affirmation, or shall so negligently perform his duties that the jury shall separate without leave of the court, or obtain food or drink (except water), or if any person not belonging to the jury shall hold conversation with any of the jury, every person and officer so offending shall be punished for a contempt of court by fine or imprisonment, or both, in the discretion of the court.

These provisions show the great care and solicitude of the general assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned, and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and

liberty against being sacrificed by public prejudice or excitement.

The jury should be entirely free from all outside influences from the time they are impaneled until they return their verdict, and it is accepted and they discharged; and the legislature have determined that the provisions of this statute are necessary to accomplish the object. It is a provision easily complied with, and one member of the court, at least, has never in practice seen it dispensed with, except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power short of its repeal, to dispense with this requirement. In the case of *McIntyre* v. *The People,* 38 Ill. 514, it was held to be error in a case of felony to omit to swear the officer having charge of the jury.

For this error the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Elizabeth McFarland *et al.*

v.

Emily J. Conlee *et al.*

1. Trust and trustees — *resulting trust.* A *cestui que trust* has no preferable equity above any others in premises purchased by a trustee, where it appears that no part of the trust funds were invested in such purchase.

2. Same. A invested trust funds in the purchase of certain premises, but only acquired an equitable title thereto, and afterward his widow, with her own funds, acquired the legal title to the same, and exchanged them for other premises. *Held,* in a suit brought by the *cestui que trust,* to subject these premises to the payment of her claim, that the equities of the parties were equal. That the one holding the legal title could pay off the claim of the other, which, if she refused to do, and the premises were not susceptible of division, they should be sold, and the party holding the legal title be first satisfied.

Writ of Error to the Circuit Court of Washington county; the Hon. Silas L. Bryan, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. J. M. Durham, for the plaintiffs in error.

Messrs. Hay & Hosmer, for the defendants in error.

Mr. Chief Justice Breese delivered the opinion of the Court:

This was a bill in chancery in the Washington Circuit Court, exhibited by Emily J. Conlee, and Andrew J. Conlee, her husband, against Elizabeth McFarland and William McFarland, her husband, to subject certain real estate in the town of Richview, in that county, held in the name of William McFarland, to the claim of complainants, on the allegation that the same was purchased and improved in part with moneys belonging to the complainant, which defendant Elizabeth's first husband, Gilbert S. Hinds, while guardian of complainant Emily, invested in such real estate.

The defendants answered, denying the most material allegations of the bill, and, on replication filed and proofs taken, the court granted the prayer of the bill, and found $316 had been received by Gilbert S. Hinds, while guardian of complainant Emily, and declared, if the same was not paid in ninety days, the premises should be sold at public vendue, to raise the money.

The cause is brought here by writ of error, and various errors are assigned.

In the first place, it nowhere appears from the decree, that this money received by Hinds was invested by Hinds in these premises, and, if not, the complainant Emily had no equitable rights therein. The decree shows simply, that Hinds, as her guardian, had received of complainant's money the amount found due, which is far from sufficient to clothe her with a preferable equity, to the exclusion of all others, in the premises in question. The testimony goes to show most clearly, that, although Hinds in his life-time contracted for these premises, or for other premises for which these were received in exchange, and erect a dwelling house thereon before his death, yet he had made no payment on the lots, and his widow, now Elizabeth McFarland, paid the purchase money therefor out of her

own funds, and took the deed therefor in her own name, he, Hinds, having only a title bond for the premises, which had become forfeited, and Lowe, the holder, was offering to sell the lots to any one who would pay the purchase money, being $200, which was paid by his widow, who afterward intermarried with William McFarland, having before that exchanged the premises bought of Lowe with one Shepley, for other premises which this bill seeks to subject to the payment of this claim, and which complainant had conveyed by a proper deed to her husband, William McFarland, on the 14th of August, 1865.

But, admitting this money was invested by Hinds in these premises, it is very apparent from the testimony the money of defendant Elizabeth was also, and she has the legal title. Her equity is equal to that of complainant, and she has the legal title; therefore, it seems just that defendants should have the preference, and right to relieve the premises from this claim of complainants by paying the amount due to Emily. Should defendants decline so to do, then, if the property is not susceptible of division, it should be ordered to be sold, and the money advanced by defendant Elizabeth, to procure the legal title, with interest, be first paid to her. The claim of defendant Emily should then be paid with interest, and the overplus, if any, paid over to Elizabeth McFarland, the defendant. A reference ought to be had to the master, to ascertain the amount of interest due on each claim, stating that of Elizabeth McFarland at $200 as paid to Lowe, and when paid receive proof, as the record fails to show it. The claim of defendant Emily will be stated at $316, and interest computed from the date of the decree.

The finding of the court of the amount due Emily was doubtless based on the testimony of Fingal Hinds, the brother of Gilbert Hinds, the guardian, and we have become much impressed by that testimony. He states, his brother told him in his sickness, and when he did not expect to live, that there was about $300 of Emily's money invested in the house in which he was then living. He said, as soon as he got well he would

have another guardian appointed and pay the money over to him; he claimed nothing for the support of Emily, but said she should have every dollar with interest.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

WILLIAM L. HAMBLETON
v.
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* LEVI YOUNG.

1. QUO WARRANTO — *in a proceeding by — when jurisdiction over defendant not acquired.* Leave was granted a party to file an information in the nature of a *quo warranto,* notice of which was given the defendant, but without *further process.* A rule was entered requiring the defendant to plead, which he failed to do; and, proof of the service of the copy of the same upon him being made, his default was taken, and the court pronounced judgment of ouster against him. *Held,* that the court acquired no jurisdiction to enter the rule and render the judgment.

2. SAME — *jurisdiction — how acquired.* After leave given to a party to file an information in the nature of a *quo warranto,* the court can only acquire jurisdiction by service of a writ, under seal of the court, and running in the name of the people of the State of Illinois, or by voluntary appearance of the defendant. This was the practice under the statute of Anne, from which ours does not substantially differ.

APPEAL from the Circuit Court of Pulaski county; the Hon. JOHN OLNEY, Judge, presiding.

The opinion states the case.

Messrs. MULKEY, WALL & WHEELER, and D. F. LINEGAR, for the appellant.

Mr. D. W. MUNN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an information in the nature of a *quo warranto* against the appellant, in which the Circuit Court rendered judgment of ouster on default, and the question made upon the record is, whether the court had jurisdiction. Notice of the intended application for leave to file the information was given to the defendant by the attorneys of the relator, but he did not appear to such notice. The leave was given, and, at the same time, without further process, a rule was entered requiring the defendant to plead. This rule was not served, but at a subsequent term another rule to plead was entered, and, upon the affidavit of the relator that he had served a copy of that rule, as certified by the clerk, upon the defendant, the judgment of ouster was pronounced.

It is very clear the court had no jurisdiction to enter the rule to plead and pronounce judgment for non-compliance therewith. At the time this rule was entered, the defendant had never been brought into court, nor even had an informal notice that a suit was pending against him. He had merely received a notice, signed by the attorneys of a private person, of the intention of that person to ask leave of the court to commence legal proceedings against him in the name of the people. Whether such intention had been carried into effect, or whether the court had granted the leave, the defendant had no knowledge. But even if he had been notified, informally, of the pendency of the suit, as he was after the entry of the rule, and before the rendition of final judgment, the court would have still been without jurisdiction. That could have been acquired only by service of a writ under the seal of the court, and running in the name of the people of the State of Illinois, or by the voluntary appearance of the defendant; and, when the information was filed, such a writ should have issued returnable on some day of that term. This was the practice under the statute of Anne, from which ours does not substantially differ. Cole on Informations, 200; *Commonwealth* v. *Springer,* 5 Binn. 353.

Judgment reversed.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY
v.
WILLIAM SCHIEBE.

1. RAILROAD — *negligence.* Where a passenger on a railroad attempts to pass from a train in motion, and not at a station, and is warned not to get off at that place, and the conductor takes hold of him to prevent him from passing from the car,— *held,* that the passenger is guilty of negligence if he passes from the train, and receives injury thereby.

2. SAME. It is not negligence to run a passenger train on the side track, where it is necessary to permit a freight train too long to run into the side track, to pass, when the evidence shows that such a course was not unusual.

3. VERDICT — *against the weight of evidence.* Where a verdict is manifestly against the weight of evidence, the court should on motion set it aside and grant a new trial, and failing to do so, this court will reverse for error.

WRIT OF ERROR to the Cirsuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

William Schiebe brought an action on the case in the St. Clair Circuit Court, against the Ohio and Mississippi Railroad company, to the March Term, 1867.

The declaration contains three counts. The first avers that plaintiff became a passenger on a train of defendant, to be carried from Illinoistown to Lebanon; that, in alighting from the cars with due care, defendant's servants negligently caused the train to be suddenly moved backward, whereby plaintiff was violently thrown to the ground, and his right arm broken.

The second is substantially the same as the first, except it avers that the plaintiff was thrown in the same manner from the train, and its wheels ran over and crushed his right arm.

The third count avers, that defendants ran their passenger train into a side track at the Lebanon station, and, while plaintiff, with due care, was attempting to alight therefrom, defendant's servants carelessly drove the train violently and suddenly backward, whereby plaintiff was thrown to the ground and his right arm cut off. Defendant filed the plea of the general issue.

A trial was had at the return term before the court and a jury; evidence was introduced by both parties, so much of which as is necessary to a proper understanding of the case appears in the opinion of the court. The jury returned a verdict in favor of the plaintiff, for $3,000.

Defendant entered a motion for a new trial, because the verdict was against the weight of evidence, which the court overruled, and rendered judgment on the verdict. Defendant thereupon prosecuted this writ of error, and urges a reversal, because the court overruled the motion for a new trial.

Mr. H. P. BUXTON, for the appellant.

Mr. JOSEPH B. UNDERWOOD, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case brought by appellee, in the St. Clair Circuit Court, against appellants, for negligence in operating their trains, whereby he was injured. It appears that appellee became a passenger at Illinoistown for Lebanon, on a passenger train of appellants. That, on arriving at Lebanon, a freight train, being too long for the side-track, had stopped on the main track, and the passenger train, having slackened up, moved upon the side-track to permit the freight train to pass. As the passenger train started, appellee attempted to get off, and in doing so, fell, and one of his arms was crushed, and was afterward amputated. He insists that the injury was produced by the carelessness of the employees of the company, while they contend that it arose from his own want of care and prudence.

Appellee swears, that, after the train had stopped and was starting again, some one said the train was going to Summerfield, which was the next station. That he thereupon took his baggage and went out upon the platform, and just at that time "the locomotive gave a push backward, and I fell down by the wheels, and the locomotive then went backward and the wheel went over my right arm," and the doctor amputated it. "The

locomotive came back with great force." "I think a man and his wife got out before me safely; it was forty or fifty yards from the station where I was hurt; I cannot tell whether Lebanon was announced or not; I did not hear it; I did not see any thing of the conductor, or any brakeman when I went to the door of the car, and no one told me not to get out." He says the night was very dark, and in this he is supported by other testimony.

Two witnesses, besides the conductor, testified that the conductor told him not to get off there; that it was not the station. They say they heard the warning. They were just behind him and had started to pass from the car. They say this occurred at the door of the car, and as the conductor met appellee on the platform in coming from the next car. Another passenger in the same car testifies, that, as the crowd started to go out, he heard some one at the door say, "We have not got to the station yet;" that it was about the time appellee was hurt. He says he does not know who it was that gave the warning; that he was about the middle of the car.

The conductor testified, that, as he came out of one car to the platform, appellee was coming out of the opposite car with some bundles in his hands; that witness said to him, "Do not get off here; we are not at the station;" but appellee walked along and stepped down on the steps of the car, and that he (witness) took hold of his shoulder and said, "Don't get off here;" but appellee was too heavy for him to hold, in the position which witness then occupied, and he fell. There seems to be no other witness than appellee who testified that there was a violent jerking by the train at the time the accident occurred. Some of the witnesses gave it as their opinion that appellee was under the influence of liquor at the time; but this he denied, and said he had only drunk one glass of beer that day, and that was in the morning.

If the testimony given by appellee was alone considered, the jury might have been warranted in the conclusion at which they arrived; but his testimony is overcome by the testimony of at least four witnesses as to the warning given, "That they

had not reached the station;" and three or them state positively that he was directed by the conductor, not to pass from the cars at that place. These witnesses, so far as we can see from this record, stand unimpeached, and are entitled to credit. This evidence may, no doubt, be reconciled. Appellee may have been so fully possessed with the idea of getting from the cars, and thus avoid being taken to the next station, that he failed to give ordinary attention to what was said and done at the time. If his mind was greatly preoccupied with such an apprehension, and he was not giving his attention to what others were doing, he might and probably would not hear the warning or directions given by the conductor. The others, however, seem to have been giving proper attention, and state positively that the warning was given, and that they heard it distinctly.

Appellee states that the conductor did not take hold of him, while the latter states that he did, and is fully supported in the statement of Ellen Macken. We are wholly unable to comprehend how so many witnesses could be mistaken as to what they saw and heard. On the other hand, appellee may have been, and no doubt was, badly stunned by the fall, and would be less likely to recall the circumstances, than others not subjected to such a peril. It is more than probable that the conductor took hold of him while he was in the act of falling, and if so, it was natural for appellee to have been entirely occupied with his situation, and the apprehension of its results; under such circumstances it would be remarkable if his attention was attracted to the fact that the conductor had hold of him, or, if noticed at the instant, that he could recall it to memory. The evidence, we think, preponderates largely in favor of the occurrence as detailed by appellants' witnesses.

This case proceeds upon the ground of negligence on the part of appellants. But, when we consider the circumstances, we are unable to see that they have been derelict in any duty. Appellee says he did not hear the name of the station announced, and it was, we presume, not done, as the train had not reached the station. He either failed for want of attention to hear the

emphatic warning of the conductor, or he failed to regard it. Nor was there any negligence shown in running the train on the side track, to permit the freight train to pass on the main track. The evidence shows that such a course was not unusual, and in this instance it was necessary. And the weight of evidence is, that there was no violent jerking of the train; but if there had been, it was not negligence, as the train had not reached the platform where passengers were expected to get off. Appellee was attempting to pass from the train while in motion, and at an unusual place. If there was negligence it was on the part of appellee.

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

Judgment reversed.

SAMUEL LESTER *et al.*

v.

THE HEIRS OF WILLIAM WHITE.

1. WITNESS — *a grantor in a deed — having an interest in suit — incompetent.* A grantor in a deed, who has made general covenants of warranty, and that he had power to sell, and that the land was free from incumbrances, is an incompetent witness, without a release, for his grantee, in a suit where the plaintiff claims title through another channel.

2. PRE-EMPTION — *right to — not a mere chattel interest.* The interest acquired by a pre-emption right is not a mere chattel interest which can be transferred by parol, but requires a written instrument to pass such right or title.

3. SAME — *may be taken on execution — or on death of owner, descends to the heir.* It is a right which may be taken on execution; or upon the death of the owner, it descends to the heir, and will not go to the executor or administrator.

4. SAME — *conveyance of — may be compelled in certain cases.* One of a number of heirs to such pre-emption right can maintain a bill to compel a conveyance of his interest from one who has received a deed from the other heirs of their interest and the deed of a commissioner appointed by a decree conveying the interest of such heir, he not having sold any interest in such pre-emption right.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. H. K. S. O'MELVENY, Judge, presiding.

The opinion states the case.

Mr. B. B. SMITH, for the plaintiffs in error.

Mr. SILAS L. BRYAN, for the defendant in error.

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

This was a bill in chancery in the Circuit Court of Marion county, exhibited by Samuel Lester, and Ann Lester, his wife, against William White, to compel him to convey to Ann the one-fifth interest in the east part of the north-west quarter of section 22, in township two (2), north, range two (2), east, in Marion county. During the pendency of the suit, the defendant died intestate, and the suit progressed against his heirs at law, and such proceedings were had that the bill was dismissed.

To reverse this decision, the complainants bring this cause here, and assign this decision of the court as error, and also that the court admitted the testimony of Abraham Wimberly and Mary Ray, on behalf of the defendants, and against the objections of complainant, to maintain the title of White.

The objection to their testimony was well taken, for the reason given on the hearing, that they had executed a deed for this land to White, with covenants of general warranty, and that they had power to sell it, and that it was free from incumbrances. The exhibits in the cause show the fact, that they had executed such a deed, and it was the foundation of defendant's title. Of course they had such an interest as to render them incompetent, without a release.

It appears this tract of land was claimed by John Morgan in his life-time, under the pre-emption clause of the act incorporating the Illinois Central Railroad company, and proved in his name, but it was discovered, after the company had executed a deed, that the wrong tract had been conveyed, and the proof made for a tract not the one Morgan improved and lived

upon. Accordingly, new proofs were made as to the true tract, and a proper deed was executed by the company to John Morgan, dated before his death, White paying the purchase money, he having a title bond from all the heirs at law of Morgan, except Ann, the complainant. White, having received a deed from all the heirs of Morgan except the complainant Ann, filed a bill in chancery against complainants, to compel them to execute a deed for her interest in the land, setting forth, in the bill, that Azraham Wimberly, before Morgan's death, had purchased the improvement of Morgan, and had conveyed the same to him, White; and to this bill the trustees of the Central railroad were, at a subsequent term, made defendants, and such proceedings were had that complainant, White, dismissed the bill as to these complainants, Samuel and Ann Lester; and, the trustees defaulting, White took a decree, declaring the deed to John Morgan void, and requiring the trustees to make a deed to him, or, in default thereof, that a commissioner should be appointed for that purpose, which was done, and a deed made to White by a commissioner. Soon after which, complainants tendered to White fifty dollars, and demanded a deed from him for Ann's share, which he refused, and this bill was filed for a conveyance.

The defendant in his life-time answered the bill in full, avowing therein that Abraham Wimberly was the real owner of the pre-emption, and that he had purchased it of Wimberly and paid him for it, and alleges he was advised by his counsel to take the deed from Morgan's heirs for the land.

The question is presented by these pleadings, was this pre-emption right a chattel interest merely, which would pass by parol, or such an interest in land as to require a writing to prove a transfer? The court below held it was a chattel interest merely, and dismissed the bill.

We are of opinion this right is not a mere chattel interest. The pre-eminent laws grant to the pre-emptor an estate in land upon conditions which become absolute upon the performance of those conditions. *McConnell* v. *Wilcox,* 1 Scam. 344; *Isaacs* v. *Steel,* 3 id. 97; *Bruner* v. *Manlove,* id. 339. It has been

said by this court in subsequent cases, that the interest acquired by a pre-emption right is not an estate within any definition known to the common law. It is not an interest in the legal title, but merely a right of occupancy for the time being, with the privilege of purchasing at some future period, at the stipulated price; such interests, however, are regarded by the courts of this State as property, which may pass by deed or other transfer (*Delauney* v. *Burnett,* 4 Gilm. 454; *May* v. *Symms,* 20 Ill. 95), and is liable to be taken and sold on execution, and of passing to an assignee under a decree of bankruptcy. *Turney* v. *Saunders,* 4 Scam. 527; *French* v. *Carr,* 2 Gilm. 664.

The interest in the land acquired by the pre-emption is such an interest as descends to the heir at law, and does not go to the executor or administrator, and so it appears the defendant, White, treated it, by taking first a bond from all the heirs except this complainant Ann, and afterward a deed for the land from all of them with the exception named. Had Morgan lived to take the deed executed by the railroad company to him, there could be no doubt of Ann Lester's right to one-fifth as one of his five heirs at law.

The defendant, White, holding under a deed executed by a commissioner under an order of court, the effect of which it is insisted divested the title out of the railroad company and vested it in White, it could only be to the extent of his conveyance from the heirs; and, as Ann Lester did not convey her interest, and White's deed includes that interest, justice and equity would require that it should be released and conveyed to her, on payment of her proportionate share of the purchase money with interest thereon.

The decree of the court below dismissing the bill is reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

CHARLES D. ARTER
v.
JOEL S. BYINGTON.

CONTRACTS — *parties to illegal contracts — must abide the consequences.* During the late civil war, one B. engaged in illicit trade with the enemy, was detected by A., and, to prevent his exposure to the authorities, he paid A. $1,000. *Held,* that B. could not recover it back. The law affords no relief to joint actors in an unlawful scheme.

APPEAL from the Circuit Court of Alexander county; the Hon. WILLIAM H. GREEN, Judge, presiding.

This was an action of assumpsit instituted in the court below, by the appellee against the appellant, to recover back the sum of $1,000, alleged to have been paid by him to the appellant as a bribe. It appears that, during the late civil war, appellee was engaged in unlawful commerce with the public enemy, in which he was discovered by appellant, and, to prevent his exposure to the authorities of the government, he paid appellant the sum of $1,000. The case was tried before a jury, who found a verdict for the plaintiff for the amount claimed, to reverse which the case is brought to this court by appeal.

Messrs. MULKEY, WALL & WHEELER, for the appellant.

Messrs. O'MELVENY & HOUCK, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The plaintiff in this case was a merchant in Cairo, and in 1865 sold a quantity of powder and shot under circumstances which excited the suspicion of the defendant, that the articles were designed for the use of the rebel States. The defendant seized the goods, as they were being loaded at night into a skiff, and attempted to arrest the persons loading them, but they escaped. He then saw the plaintiff, and threatened he would close his store and report him to the United States marshal,

unless the plaintiff would pay him a thousand dollars. The plaintiff paid the money, and now brings this action to recover it back. In the Circuit Court, verdict and judgment went for the plaintiff.

The defendant in the Circuit Court asked an instruction to the effect, that, if the plaintiff was selling military goods under circumstances tending to show he knew they were designed for the use of the public enemy, and if he bribed the defendant by the payment of a thousand dollars, not to report him to the authorities, and the defendant did not report him, he can not now recover back the money. This instruction should have been given. It is a very clear case for the application of the maxim, "*ex turpi causa non oritur actio.*" If the plaintiff was engaged in unlawful commerce with the public enemy, supplying them clandestinely with the means of prosecuting their war against the government, it was the duty of the defendant to apprise the proper authorities with a view to the stoppage of such illicit trade; and, if the plaintiff paid the defendant money to secure his complicity in these proceedings, he must abide by his own act. The law leaves such parties where it finds them. Joint actors in a wrongful scheme, the law will not stoop to inquire whether one party has gained an advantage over the other in its prosecution.

The instructions asked for defendant should have been given, and those given for plaintiff should have been refused.

Judgment reversed.

THOMAS S. HOY
v.
BARTHOLOMEW HOY.

1. PLEADING — *averments.* Where an agreement under seal contains a number of covenants to be performed by one party, and the other party, in consideration of such covenants, agrees to perform an act, the first are precedent covenants, and their performance must be averred and proved to warrant a recovery on the latter and dependent covenant.

Opinion of the Court.

2. ACTION — *debt or covenant.* Where a party covenants to pay a specified sum of money, annually, for ten years, on a specific day in each year, debt is the proper remedy, notwithstanding the agreement contains other covenants, the performance of which are precedent to the payment of the money.

3. DEBT — *lies where.* The action of debt lies on a lease for the recovery of rent in arrear, on an annuity deed for the recovery of the annuity, and on a mortgage to recover the mortgage debt.

4. DEBT — *when it will not lie.* The action of debt will not lie to recover on a bond for the payment of a sum of money payable by installments, until the last is due; but it will lie to recover money payable at different times, for a specified period of time.

APPEAL from the Circuit Court of Randolph county; the Hon. S. L. BRYAN, Judge, presiding.

This was an action of debt, instituted by Bartholomew Hoy, in the Randolph Circuit Court, to the September Term, 1866, against Thomas S. Hoy. The declaration contained but one count, on articles of agreement under seal. Defendant craved oyer of the instrument sued on, and demurred to the declaration.

The court overruled the demurrer, and, defendant electing to abide by his demurrer, the court rendered judgment for the plaintiff, for $600 debt, and $54 damages. Defendant brings the case to this court by appeal, and assigns for error the overruling his demurrer, and the rendition of the judgment.

Mr. THOMAS G. ALLEN and Mr. WILLIAM H. BARNUM, for the appellant.

Messrs. W. STOKER, and JOHNSON & HARTZELL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of debt brought by appellee in the Randolph Circuit Court against appellant. The declaration avers that, "by a certain indenture then and there made between the said plaintiff of the one part and the said defendant of the other part, he, the said defendant, for the consideration therein mentioned, did promise and agree to pay, or cause to be paid, for and during the term of ten (10) years, provided the said

plaintiff should so long live, otherwise during his life, the sum of $300 each and every year, punctually on or before the 25th day of April of each and every year." It is further averred that, after the making the indenture, and within ten years of its date, the sum of $600 of the annuity or yearly charge became due and owing from the defendant to plaintiff, and is still due and owing, whereby an action had accrued.

Appellant craved oyer of the instrument sued on, and demurred to the declaration. It appeared, when the instrument was set out on oyer, that it contained several covenants binding upon each party. Appellee had bound himself that he would not intermeddle with the farm or authorize others to do so, but would withdraw therefrom save as a visitor, and would leave appellant in peaceable possession of the farm and proceeds thereof; that he would make no charges for the services of his wife or minor children; that he would sell and deliver to appellant within thirty days, and as soon as the price should be determined, in the manner therein specified, all of his farm implements pertaining to the premises, including teams, wagons, harness, etc., and all of the goods and chattels on the farm, except one horse, his books, papers and personal wardrobe, but the household and kitchen furniture, which is reserved for the free use of the family, and still others that are obligatory on appellee.

When it is remembered that this covenant to pay the money, and upon which this action is based, is expressly upon the consideration of the covenants entered into by appellee, it will be seen that appellant's liability to pay depended upon a performance of appellee's precedent and dependent covenants. A performance should, therefore, have been averred and proved. Every averment in the declaration might be admitted to be true, and still appellant not be liable under his covenant. Suppose he had failed to deliver possession of the personal property, or had controlled the farm to the exclusion of appellant, would any one suppose that he would be liable to pay this money? A party must show from the whole instrument, and the averments of his declaration, that he has a right to

recover. Appellant's liability did not grow out of this covenant alone, but upon the performance of the covenants entered into by appellee, and upon which this covenant depended. For the want of an averment of proper performance by appellee, the declaration was substantially defective, and the demurrer should have been sustained.

It is likewise insisted, that the action is misconceived, and that covenant alone could be maintained if there has been a breach. It is a fundamental rule that debt may be maintained wherever a sum certain, or such as may be reduced to a certainty by computation, is due. But where an act is to be performed, and the damages sustained by its breach can only be ascertained by proof, then covenant or assumpsit must be brought, depending upon the nature of the contract. In the case under consideration, the sum is specified, certain, depending neither on computation nor proof. It provides for the payment of a specified sum, annually for ten years, and on a particular day in each year. And the practice is long and uniformly established that debt will lie for the recovery of installments of rent due on a lease, and it seldom happens that there are not numerous covenants, precedent or mutual and dependent, embraced in a lease. The same is true of annuity deeds, and the action will lie for the recovery of annuities. An action of debt also lies to recover a sum of money due on a mortgage.

It has, however, been held that debt will not lie where a gross sum is payable by installments until the last falls due. 2 Saund. 306, note 6. But in this case the obligation is only for the payment of a certain sum annually. The several payments do not constitute a part of a gross sum. Each payment is separate and distinct. We must, therefore, hold that the action will lie. But, for the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus.

E. WESLEY MYATT
v.
MURPHY MYATT, Administratrix, etc., *et al.*

1. EVIDENCE — *proof of former marriage — what insufficient to establish.* In a proceeding to revoke letters of administration which had issued to the widow of M. deceased, upon the ground, that, at the time of her intermarriage with deceased, she had another husband, one W., then living,— *held*, that the proof of such former marriage, consisting simply of general report to that effect, and of the fact of cohabitation together as husband and wife, with one or more children born to them, is not sufficient to establish it.

2. MARRIAGE — *presumption that parties living together are married — may be rebutted.* While the presumption of law is always in favor of a marriage between parties cohabiting together as man and wife, yet such presumption may be rebutted.

3. EVIDENCE — *admissions — when insufficient to prove marriage.* Nor, in such case, will proof of her admissions that she was married to such other person, coupled with the fact of cohabitation as man and wife, establish such former marriage.

4. MARRIAGE — *issue of a void marriage, have no right to administer on the estate of the deceased parent.* And in such case, if the marriage with deceased were void, the issue are illegitimate, and do not stand in a position to apply for a revocation of the letters of administration, they having no right to administer upon the estate.

5. SAME — *legality of — should not be determined in a collateral proceeding.* The legality of the marriage ought not to be determined in a collateral proceeding to revoke letters of administration granted to the widow; other proceedings should be instituted, whereby the whole merits of the case can be fully investigated.

WRIT OF ERROR to the Circuit Court of Bond county; the Hon. J. GILLESPIE, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. H. K. S. O'MELVENEY, for the plaintiffs in error.

Mr. S. P. MOORE, for the defendants in error

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

This was an application to the County Court of Bond county, to revoke certain letters of administration, which had been granted by that court to Mrs. Murphy Myatt and Williamson Plant, on the estate of Alexander Myatt, deceased. The court decided against the application, and an appeal was taken to the Circuit Court with the same result, that court finding that Murphy Myatt was the widow of Alexander Myatt, deceased. The application to revoke the letters was made by one E. Wesley Myatt, who states, in his affidavit in support of the application, that Murphy, when she married Alexander Myatt, had a husband named William Wilmarth then living, and that her subsequent marriage with Alexander Myatt was, for that reason, void. Affiant states that the children of Myatt are entitled to the administration, and that he is one, and that Williamson Plant is not one of the next of kin to the deceased intestate.

The proof shows that William Wilmarth and Murphy Sugg, now Murphy Myatt, lived together as man and wife and had two children born to them, and that she said she was married to Wilmarth, though it is not proved he ever said so; but, on the contrary, it was proved, without objection, by appellant, that Wilmarth admitted, when he was living with Murphy, he had a wife living in East Tennessee and a son by her. Wilmarth and Murphy Sugg lived together from about 1827 to about 1829, one or two years; when he went off and came back, and then left to get his boy. In 1832 Murphy, under her maiden name of Murphy Sugg, was regularly married by a license duly issued to Alexander Myatt, and has a family of six children by him, most of them grown.

The proof of her marriage with Wilmarth is that of general report, and of their cohabiting together as man and wife and having one or more children born to them. The presumptions of law, undoubtedly, are always in favor of a marriage between parties who are living together as husband and wife, but it is only a presumption and may be rebutted.

At the time of their cohabitation, the statute on the subject of marriage was substantially the same as it is now, and

required a license from the clerk of the County Court, who was to keep a record of the issuing of it, and make a registry of it, with the return of the magistrate or minister of the gospel before whom the marriage was declared, in a book to be kept for that purpose. Publication in church was allowed instead of a license, but not one marriage, so far as our knowledge or information extends, took place in that mode, at that early day, in any Protestant church in this State.

It appears from the record, that an attempt was made by search, to produce the license under which Wilmarth and Murphy Sugg were married, but it was fruitless. This fact, and the fact that she did, as Murphy Sugg, in 1832, soon after Wilmarth left her, obtain a regular license from the proper authority, to be joined in marriage with Alexander Myatt, which, if she had a lawful husband living at the time, would have subjected her to a prosecution for bigamy, to be followed by confinement in the penitentiary, and to a fine of one thousand dollars, goes far to show that she and Wilmarth were not really married, but were living in a state of concubinage, she knowing at the time that Wilmarth had a wife living.

It is difficult to believe, though bigamists are not in this age of the world rare,— in the purer days of the republic, five and thirty years ago, they were,— that she would have incurred such peril, the proof to convict her being so attainable. It is more rational to suppose Wilmarth had communicated the fact to her that he had a wife living, and, when the final separation took place, she was free to enter into the engagement she did with Alexander Myatt, deceased. This view of the case saves a large and respectable family from the odium of bastardy, and does no violence to any of the facts apparent in the case or any principle of law. If her marriage with Wilmarth could be proved by her own admission, and cohabitation established by them or from witnesses, then his repeated admissions that he had another wife living at the time, ought also to be considered. She, herself, may have believed she was the wife of Wilmarth, and it is not difficult to perceive the reasons which would induce her so to declare, but the fact of marriage is not proved, and

the presumption from cohabitation is rebutted by the facts of the case.

On the whole, we are satisfied the County Court and the Circuit Court decided properly in refusing the revocation of the letters, not only for the reasons we have given, but for the further reason, it is not shown what right the appellant here had to make the application to revoke them, when, if he is a son of Alexander Myatt, we must presume — for there is nothing to the contrary stated in his affidavit — that Murphy is his mother, and if she was not the wife of his father, Alexander, he himself, being her son, is illegitimate, and not entitled to make application for a revocation, he having no right to administer on the estate. His affidavit does not show he is a son of Alexander Myatt, deceased, by a former wife, and there is no allegation or proof that the deceased had, at any time, any other wife. The inference therefore is, that appellant is the son by Murphy Myatt. There is no proof in the record that he is next of kin, or entitled to any rights in the estate of Alexander Myatt.

We are, moreover, of the opinion that in this collateral way this marriage ought not to be declared void and a respectable family of children bastardized. Some other proceeding should be instituted for such purpose, wherein the whole merits could be fully investigated.

We perceive no grounds of error in the record sufficient to reverse the judgment, and accordingly affirm the same.

Judgment affirmed.

HENRY KOESTER

v.

HENRY ESSLINGER.

NEW TRIAL — *verdict against the evidence.* A sued B for work and labor performed for him. Both parties were sworn, and the defendant testified that he had paid plaintiff in full, and was corroborated in this by other witnesses, who worked for defendant, in the same shop with plaintiff, and

who testified that defendant paid his workmen every week, and never delayed longer than two weeks, and that they had seen plaintiff paid nearly every week. *Held*, that a verdict of the jury in favor of the plaintiff was unwarranted.

APPEAL from the Circuit Court of St. Clair county; the Hon. J. GILLESPIE, Judge, presiding.

This was an action of assumpsit, originally brought by the appellee against the appellant, in the City Court of East St. Louis, where a trial was had, and judgment rendered for $71 and costs of suit. Appellant appealed from this judgment to the Circuit Court of St. Clair county, and judgment was there rendered in favor of appellee for $300; whereupon, the defendant below brings the cause to this court by appeal.

Mr. WM. H. UNDERWOOD, for the appellant.

Mr. J. B. UNDERWOOD and Mr. S. P. DAVIS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

It was proved in this case that the plaintiff worked for the defendant, in his wagon shop, from September, 1864, to April, 1866, with the exception of about three months. The only controversy was, whether he had been paid. The parties were both sworn. The plaintiff testified he had been paid in all only $235. The defendant testified he had paid him in full. The jury gave the plaintiff a verdict for $300, which was far too small if they believed the testimony of the plaintiff. But the testimony of the defendant is strongly corroborated by that of other witnesses. Other workmen in the same shop swore, that defendant paid his men generally every week, and never delayed longer than two weeks, and that they had seen the plaintiff paid nearly every week. These statements, considered in connection with the great improbability that the plaintiff would continue at work until, according to his own statement, his wages unpaid amounted to nearly $1,000, while the other workmen were paid in full every week or fortnight, compel us to regard the verdict as clearly against the evidence. We think there should be another trial.

Judgment reversed.

Syllabus. Statement of the case.

GEORGE WILLIAMS *etal,*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. JURY — *when discharged, their powers terminate.* Where, by agreement, on the trial of a party charged with larceny, the jury found their verdict, sealed it, left it with the clerk and separated; and it, when opened next day, was found to be defective in not finding the value of the property stolen, — it is error, three days after they agreed to their verdict, to get them together and have them supply the defect.

2. SAME — *when discharged, the court has no power to impanel.* Where a jury is discharged, they cannot be again impaneled in the case, without the consent of the parties.

3. VERDICT — *amendment of.* Where the parties agree that a jury may, seal their verdict and separate, and if the verdict is defective it should be amended unless otherwise expressed, this could only be held to apply to matter of form, and not to substance, — and the value of the property stolen is substance, as upon it depends the grade of the offense and the punishment.

4. JURY — *separation.* To permit a jury to mingle three days after hearing the evidence, with the community, and then to come together and find an essential fact in the case, would be attended with danger to liberty, and in disregard of all of the safeguards thrown around the accused to secure a fair and impartial trial.

5. SAME. When a jury is thus discharged, the further consideration of the case is as clearly out of their power as if they had come into court and their verdict received, and they discharged. This seems to be supported by reason as well as authority.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

At the March Term, 1865, of the Marion Circuit Court, the grand jury presented an indictment against A. Monroe and George Williams, for stealing several hundred dollars' worth of United States treasury notes. They were apprehended, arranged, and pleaded not guilty.

On the 25th of March, at same term, a trial was had before the court and a jury. After hearing the evidence and the arguments of counsel, and being instructed by the court, it was agreed by the parties, that, when the jury agreed upon their

verdict, they might seal it, place it in the hands of the officer having them in charge, and then they might disperse. They retired, found a verdict, placed it in the hands of the officer, and separated.

On the next day, when the verdict was read, it was found to be defective in not finding the value of the property. The court thereupon directed the sheriff to require the jury to again come into court. And, on the 29th of March, 1865, the jury, having come together, on being called answered to their names, when the case was again given to them for further consideration, when, after retiring, they returned another verdict, which also being found to be defective, they again retired and returned into court a verdict in form, and fixing the time of the confinement of the defendants at five years in the penitentiary.

Defendants thereupon entered a motion for a new trial, upon the ground, that the jury after they were discharged from the further consideration of the case were convened, and the case again submitted to them to amend their verdict by finding a material fact. The facts were shown by affidavits. The court overruled the motion, and rendered judgment on the verdict, and sentenced defendants to the penitentiary.

They bring the case to this court on error, and ask a reversal because the court below overruled the motion for a new trial.

Mr. B. B. SMITH, for the plaintiff in error.

Mr. R. G. INGERSOLL, Attorney General, for the people.

Mr. JUSTICE WALKER delivered the opinion of the Court:

After the evidence was heard, counsel had argued the case, and the court had instructed the jury, they retired to consider of their verdict, under an agreement of the counsels in the case, that they might seal their verdict, place it in the hands of the officer having them in charge, and separate. On the next day the parties appeared. The clerk, having received the sealed verdict, read it, but, being defective in not finding the value of

the property stolen, it was not received by the court. The court thereupon directed the sheriff to recall the jury, and require them to come into court and amend the verdict; and subsequently, three days after they found and delivered their verdict sealed up, the jury came into court, and under the direction of the court they retired to further consider of their verdict. They again returned a verdict, which being defective, they retired, and subsequently brought in the verdict upon which this judgment is rendered. Plaintiffs in error entered a motion for a new trial, which the court overruled, and rendered judgment on the verdict.

The action of the court in recalling the jury, and permitting them to find a new verdict, or to amend the one already returned, it is urged was such an irregularity as required the Circuit Court to grant a new trial. It is insisted, that, when the jury found their verdict and separated, under the agreement of the parties, they were thereby discharged from further consideration of the case, and, having been discharged, the court had no power to again impanel them, without the consent of the accused, to find a further verdict. It seems that counsel in the case, at the time the jury first retired, agreed to the amendment of the verdict, if, when it was opened, it was found to be defective; but, when it was read, the attorneys differed as to the terms of the agreement; but the court understood it to be that it might be amended, so as to put it in form. If, then, this was the agreement, it did not extend to substance; and, as the finding of the value of the property determines the character of the crime whether it is grand or petit larceny, that part of the verdict is essential and of its substance. There can be no pretense that this amendment was only putting the verdict in form. Without such a finding the judgment could not be sustained.

Our system of jurisprudence has always been marked for the studious care that it observes, in all of its forms, to guard the accused against an unfair trial. This is a fundamental requirement, which is secured by the Constitution. The law requires that the jury shall be impartial, shall be sworn, and

shall hear the evidence, and shall separate from others, and privately, unaided, and free from all improper influences, find their verdict on the law and the evidence. It requires the officer to be sworn, that he will take them to a private place; will keep them together; that he will not permit others to converse with them, and the law prohibits him from doing so, except to ask them if they have agreed upon a verdict. It is designed that the jury shall be placed beyond all outside or improper influences; that they shall not know what others think of the case, or that opportunities should be had for tampering with them. To permit a jury to disperse, and mingle with the community at large, for three days, without being under a charge from the court not to converse themselves, nor permit others to converse with them, or in their presence, about the case, would be to afford every facility for operating on the minds of the jury, and might be highly prejudicial to the fair administration of justice.

Again, it is not probable, that the parties would have consented to the separation of the jury, without being charged by the court as to their duties, if they had supposed they were to be again convened to find a further verdict. From the statement of the agreement, as understood by the court, it must have been intended, that the jury were to be discharged from the further consideration of that cause, when they had sealed their verdict and placed it in the hands of the officer. The jury must have so understood it, as they did not meet the court the next morning, and only came together again when required by the court.

It must have been so regarded by the court, as the jury were not required to meet the court when it next convened. We are clearly of the opinion, that it was intended to, and did, discharge the jury by permitting them to separate, as much so as if they had come into court, their verdict had been read, and the court had said to them that they were discharged from any further consideration of the case, and they had dispersed. And we apprehend, that in such a case no one would contend, that they could be brought together to find

another verdict, or to amend the one already found in any material part.

If they may be called together three days after finding their verdict and being discharged, how long might the power be exercised? Would it end with the term, or might it be exercised at the next, or until prevented by the death of a portion of the jurors? If the jury might, under such circumstances, be permitted to be called together, and make an amendment of this character, why not any other, even extending the time of the confinement in the penitentiary to a much greater period? Such a practice is certainly too loose to be sanctioned. If allowed in one class of felonies it must be in others, even where life is at stake. After a jury has been discharged the case is beyond their control. *Sargent* v. *The State*, 11 Ohio, 477; 1 Bishop's Crim. Law, 830. The rule is supported by reason as well as by authority.

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

Judgment reversed.

MARION COUNTY
v.
WILLIAM HARPER.

APPEALS — *will not lie from decision of Circuit Court in proceedings to locate highways.* Under the 38th section of the statute relative to public roads, and the authority of the case of the *County of Sangamon* v. *Brown*, 13 Ill. 210, the decision of a Circuit Court, in proceedings brought to that court for locating a public highway, is final, and cannot be appealed from.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was an appeal from the County Court to the Circuit Court of Marion county, to review the decision of that court, providing for the opening and establishing of a certain highway. In the court below, judgment was rendered for the appellee, whereupon the appellant brings the case to this court by appeal.

Mr. D. C. JONES, for the appellant.

Mr. H. K. S. O'MELVENY, for the appellee.

The decision of the Circuit Court is final, and cannot be appealed from. *Sangamon Co.* v. *Brown*, 13 Ill. 210; R. S. 1845, p. 488, § 38.

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

The appellee makes the point that an appeal does not lie from the decision of the Circuit Court, in proceedings brought to that court for locating a public highway.

The statute in relation to public roads, by the thirty-eighth section, provides that the corporation, company, owner or owners of the land, shall have the right to appeal from the decision of the commissioner's court to the Circuit Court, and the case shall be acted upon in such manner as the court may determine, with a view to justice and the establishment of the road, who shall make such order therein as may seem right and just, which decision shall be final. Scates Comp. 569; *Sangamon Co.* v. *Brown*, 13 Ill. 210.

This appeal was taken from the County Court, by the owner of the land, to the Circuit Court, and in that court he had judgment. Under the above statute, and the decision of this court in 13 Illinois, the case can go no farther.

The appeal will be dismissed.

Appeal dismissed.

CALVIN M. GIBSON
v.
ANDERSON WEBSTER.

1. NEW TRIAL—*improper instructions.* Instructions not based upon the evidence in the case, and which were calculated to mislead the jury, constitute good grounds upon which to award a new trial.

2. SAME—*verdict against the evidence.* A new trial will be granted where the verdict of the jury shows a wanton disregard of the evidence.

WRIT OF ERROR to the Circuit Court of Clay county; the Hon. AARON SHAW, Judge, presiding.

The facts in this case are stated in the opinion.

Mr. W. B. COOPER, for the plaintiff in error.

Mr. W. STOKER, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Gibson against Webster for an assault and battery. The first three instructions given for the defendant should have been refused. They are based on the hypothesis that the first assault was made by Webster upon Gibson, that this assault was terminated, and that then Gibson made a new and independent assault upon Webster, in which he received these injuries. There is no evidence to sustain this theory, and the instructions were calculated to mislead the jury. The verdict was extraordinary. The evidence shows a wholly unprovoked assault of the most brutal character, in which Webster, having thrown Gibson to the floor, continued to strike him after he was down, and in the assault dislocated Gibson's ankle, and broke the small bone of his leg. Gibson was confined to his house from four to six weeks, obliged to go on crutches and a staff for several months, during which time he was unable to work, and he is left with a stiff and enlarged ankle for life. For these unprovoked and wanton injuries the jury gave the plaintiff a verdict of twenty-five dollars. Such verdicts are a disgrace to the administration of justice. The jury that found this one must have thought that to wantonly assault and brutally beat a man, is little more than an innocent pastime. We trust that upon another trial the case will be passed upon by a jury that has a juster appreciation of its duties.

Judgment reversed.

EDWARD W MYATT *et al.*
v.
SARAH S. WALKER *et al.*

1. INSANITY — *question of, tried by a jury.* In all proceedings in chancery involving questions of insanity, it is the duty of the court to direct that an issue be formed and tried by a jury.

2. *It seems*, that, in cases involving questions of insanity, sanity is the rule and insanity the exception; and, where there is only a balance of evidence, or evidence merely sufficient to raise a doubt, the presumption in favor of sanity must prevail. An instrument, therefore, made by a person of competent age, and under no legal disabilities, will, as a rule, be taken and held to be binding until incompetency is established; and the proof of that fact devolves upon the party contesting its binding force.

APPEAL from the Circuit Court of Bond county; the Hon JOSEPH GILLESPIE, Judge, presiding.

This case is sufficiently stated in the opinion of the court.

Messrs. O'MELVENY & HOUCK, for the appellants.

Mr. S. P. MOORE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in chancery, filed by a portion of the heirs of Alexander Myatt against his other heirs, to set aside and vacate several deeds of conveyance executed by him in his lifetime. The bill alleges, that he was the owner of a large amount of real estate, which is described in the bill; that he was demented and of unsound mind previous to his death; and, while in that condition, Murphy Myatt, conspiring with others for the purpose of defrauding complainants of their interest as heirs in the estate of Alexander Myatt, induced him to execute and acknowledge a pretended, false and fraudulent deed, on the 3d of April, 1861, to Sarah S. Walker and Murphy Louisa Myatt, daughters of Murphy Myatt, in which the consideration expressed is $2,000, for a quarter section and a forty

acre tract of land; and, by a similar deed of the same date, to Nancy E. Barcroft, another daughter of Murphy Myatt, for the expressed consideration of $1,000, for an eighty acre tract of land.

The bill charges that no consideration was ever paid or intended to be paid, and the deeds were not intended to be absolute conveyances; that the grantor, in the unsoundness of his mind, was made to believe that these lands would be taken from him to pay several pretended debts, which he was induced to believe he was owing, unless he placed them temporarily in the hands of the grantees; that he was perfectly solvent; that the deeds were not delivered in his life-time, but were caused to be recorded by Murphy Myatt after his death; that he was of unsound mind at the time he made these deeds. The bill prays that the deeds may be set aside and vacated.

The answer admits, that Alexander Myatt died as alleged in the bill; that respondents are his heirs; that he had a large amount of real estate and personal property; that he was legally married to Murphy; but denies that on the 3d of April, 1861, he was of unsound mind; denies that any advantage was taken of him to procure the deeds. They allege that he was of sound mind at the time the deeds were executed; that they were made of his free choice and delivered by his request; that a good and valuable consideration was paid for the lands; that they were executed in good faith, and not to place the property temporarily in their hands. They deny the use of any false representations to procure the deeds. The bill waived the oath to the answer.

A replication was filed, and a hearing was had on the bill, answer, replication and proofs, and the court below dismissed the bill. The case is brought to this court by appeal to reverse that decree.

In cases of this character, sanity is the rule and insanity the exception. Observation teaches that but a small percentage of the human family are of unsound mind. It is perhaps equally true, that, while nearly all men are sane, there are but few who do not have their peculiarities, amounting in many cases to

eccentricities. In many cases they are marked, and attract attention, but yet it does not amount to insanity. An instrument, therefore, made by a person of competent age, and under no legal disability, as a rule, is always taken to be binding until incompetency is established. And the proof of that fact devolves upon the person contesting its binding force.

When unsoundness of mind is alleged as a ground for setting aside a deed, the fact must be established with reasonable certainty. If there is only a balance of evidence, or a mere doubt of the sanity of the maker of the deed, the presumption in favor of sanity must turn the scale in favor of its validity. To destroy the binding effect of the deed, the evidence must decidedly preponderate. This question is usually raised at a period more or less remote from the time when the instrument was executed, frequently many years afterward, and seldom near the time; and, however honest and truthful the witnesses may be, subsequent events, more or less proximate, enter largely into the formation of opinions entertained by them at the trial. Acts of the grantor occurring months after the execution of the instrument will necessarily be connected with peculiarities which, at the time, attracted no attention or suspicion of derangement, but, when coupled together, are regarded as strong, if not convincing, evidence that the mind was disordered at the time the deed was made, when it may be the party was perfectly sane.

Again, it not unfrequently occurs, that insanity develops itself so gradually, that no one can with certainty fix the period when the party had become insane. It not unfrequently happens that there is a considerable period of time when it is almost impossible to know whether the mind is acting naturally, or has become disordered to such an extent as to absolve the person from accountability as a responsible being. This question is one of great difficulty in most cases where the disease advances slowly and is not marked and decided in its approaches. Courts and juries should therefore be admonished, by this uncertainty and doubt, to exercise care, and to weigh carefully all of the circumstances connected with the fact in

arriving at a conclusion. The question is usually greatly embarrassed by contradictory evidence, which is always to be expected in cases depending on the opinions of witnesses.

In this case we have carefully examined the testimony in the record. We find it voluminous, doubtful in some respects, and largely conflicting. When, however, taken all together, we think it fails to sustain the decree. In the absence of all knowledge of the manner of the witnesses in giving their testimony, we feel some doubt as to where the true weight of evidence really lies. In all such cases, it is eminently proper that an issue should be formed and tried by a jury. Such a practice has always been fully sanctioned, and we think it more satisfactory, and better calculated to promote justice, and the practice should be adopted by the court below in all cases involving questions of insanity. The decree of the court below is reversed and the cause remanded, with instructions to have an issue formed, whether the grantor was insane at the time the deed was executed, and to have the issue thus made submitted to a jury and tried by them, and to proceed with the case to a final hearing.

Decree reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, for the use of BULIA A. JENNINGS,

v.

CHARLES H. JENNINGS.

1. WILLS — *interpretation of — intention of testator controls.* The principle is well established, that, in construing a will, the intention of the testator, to be ascertained from its language, must govern.

2. SAME — *construction of in a particular case.* Where, by the terms of a will, the testator directed the executor to sell all of his real estate, and, after the payment of his debts, to divide the remainder of the proceeds of such sale equally among his four children, and, in event any of them died, the deceased's portion to go to his child or children equally, — *held,* that the interests of the several children did not vest until the real estate had been converted into money as directed by the will; and that, one of them having died intestate before such conversion, leaving issue, his portion should be paid over to his administrator to be held in trust for his children.

Statement of the case.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

Israel Jennings, Sr., died, leaving a will, which, after declaring some specific legacies, contained the following clauses:

"It is also my will, that my lands remaining undisposed of by this will shall be sold by my executors, at public sale, after giving such notice as my executors shall think necessary, upon the following terms, to wit: The purchaser paying one-fourth of the purchase money at the time of sale, and the residue in three equal installments of twelve, eighteen and twenty-four months; the purchaser also giving bond and approved security and mortgage on the premises to secure the payment of the purchase money. Said lands to be sold in such quantities and subdivisions as my executors may think best for the interest of my estate. The sale of my lands to take place as soon after my death as convenient, except the said lands of which my said wife is hereby possessed. * * * *

"It is further my will, that should there be anything remaining after paying my just debts, funeral expenses, bequests and the necessary expenses of the settlement of my estate, that the same may be equally divided between my following named children, to wit: Charles W. Jennings, *Israel* Jennings, Mary White and Richard Ann McElwain, and in case of the death of either or all of my last named children, then to be divided among their children, the child or children of each one taking their deceased parent's portion among them. I do hereby constitute and appoint Charles W. Jennings, Rufus McElwain of Marion county, and John Watson of Mount Vernon, Illinois, my true and lawful executors, to execute and carry into effect this my last will and testament, fully and in all respects."

Certain facts were agreed upon by the parties, as follows:

1. The testator died on the 7th of August, 1860.

2. Charles Jennings and Rufus P. McElwain qualified as executors under the will; Israel Jennings, Jr., was the son of the testator and one of his legal heirs and devisees in said will, and

he died 19th of September, 1861, leaving Bulia Jennings, his widow, with several children by a former wife, and several by her; and further, that said Israel, Jr., died intestate.

3. The executors paid off the debts of Israel, Sr., and the specified legacies that were to be paid in money. The executors under the will, afterward made sale of lands belonging to the estate of Israel Jennings, Sr., on the 25th day of May, 1863, for the sum of $3,451, and after payment of expenses, there was subject to administrations to the devisees under the will the sum of $ to each of said devisees, to wit: Charles W., Israel, Jr., R. N. McElwain and Mary White.

4. The said executors in September, 1865, paid over to the administrator of Israel Jennings, Jr., to wit: The said Charles H. Jennings, the sum of $345, which accrued from the sale of the lands of said Israel, Sr., as aforesaid; the administrator of the estate of Israel Jennings, Jr., never accounted for that money, which was paid to him from the executors of the will of Israel, Sr., but claims that as this was paid to him from the sale of the lands under the will of Israel Jennings, Sr., the same shall be wholly paid to the heirs at law of Israel, Jr., and that no part of it has been, or by law is, distributable to the widow of the said Israel Jennings, Jr., to wit, the said Bulia Jennings. It is further admitted that defendant, Charles H. Jennings, the administrator of Israel Jennings, Jr., never reported as assets the said sum of $354, and without so doing paid the whole amount to the children of Israel, Jr., repelling the claims and demands of said Bulia although she has often requested him to pay the same.

This suit was brought in the name of the people, for the use of the widow of Israel Jennings, Jr., the said Bulia, upon the bond of the administrator of her husband, and it was agreed the question for decision was, whether the said Bulia was entitled to share in the distribution of the money arising from the sale of the lands of Israel Jennings, Sr., under his will.

The court below found the issue for the defendant, and rendered judgment against the plaintiffs for costs.

The plaintiffs bring the cause to this court by appeal.

Mr. H. K. S. O'MELVENY, for the appellant.

Mr. M. SCHAEFFER, for the appellee.

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

The well established principle in the construction of wills is, that the intention of the testator, to be gathered from the words of the will, must prevail. This is a settled canon of interpretation. We are satisfied no present interest passed to Israel Jennings, Jr., as the land was not converted into money until after his death, and by the express terms of the will, in case of the death of any one of testator's children, his share was to go to such children as he might leave. *Marsh* v. *Wheeler*, 2 Edw. Ch. 156; 1 Jarman on Wills, 760 (side paging).

The court decided correctly in adjudging that the amount paid over to the administrator of Israel Jennings, Jr., by the executors, was properly paid to him, and that he holds the same as trustee for the heirs at law of said Israel, Jr., according to the agreement of the parties. The decision of this court being against the plaintiff, the suit is dismissed at her costs.

Suit dismissed.

DANIEL L. GOLD, Administrator, etc., *et al.*,

v.

THOMAS BAILEY.

1. CHANCERY—*where there are laches in not defending at law.* Where it appears that a full and complete defense might have been interposed at law, a court of equity will not relieve.

2. SAME. So, when a judgment is obtained against an administrator, equity will not interfere to relieve against it at the suit of an heir of the deceased, it appearing by the bill, that the grounds upon which impeachment of the judgment was sought constituted a good defense, and might have been interposed in the suit at law, and no fraud or collusion in obtaining it was alleged against the administrator.

3. ADMINISTRATOR—*judgment against binds the personal estate.* In such case, in the absence of fraud, the judgment binds the personal estate.

4. SAME — *neglect of — sureties liable.* And, if the administrator has been guilty of *laches* in not defending the suit at law, the remedy is on his bond. It will not be required of persons holding claims against an estate, to litigate them first with the representative of the deceased, and afterward with the heirs in like manner, without alleging fraud or collusion on the part of the administrator.

5. SAME — *administrator sole representative of personal estate.* An administrator or an executor, so long as he retains his office, is the sole representative of the personal estate of the deceased.

WRIT OF ERROR to the Circuit Court of Lawrence county; the Hon. JUSTIN HARLAN, Judge, presiding.

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

Messrs. MCCLERNARD, BROADWELL & SPRINGER, for the plaintiffs in error.

Mr. J. G. BOWMAN, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery filed by one of the heirs of Thomas Bailey, deceased, against the administrator and heirs of J. C. Riley, deceased, to enjoin the collection of a judgment obtained in the Circuit Court by the administrator of Riley against the administrator of Bailey, and directed to be paid in due course of administration. The sole ground upon which relief is sought is, that in February, 1848, some years before the commencement of the proceedings in which the judgment was recovered, and while Bailey was still living, the heirs of Riley executed to him a release of all claims, including those upon which the judgment in controversy was recovered. There is a further averment that the heirs of Riley have the sole interest in the judgment as distributees, the proceeds not being required to pay debts.

The case was heard on bill, answer, replication and proofs, and the court made the injunction perpetual.

The proof tends to show that the release of the 14th of February, which is the only one which covers all claims against

Bailey, was fraudulently obtained. But we waive that question, as there is another objection to this decree that is clearly fatal. There is no attempt to show, either by bill or proofs, why this release was not interposed as a defense on the trial of the suit at law. It is not claimed that the administrator of Bailey had no knowledge of the release during the pendency of that suit, and there is no explanation of any kind offered for this *laches*. If parties have a defense available at law, as in this instance, they cannot invoke the aid of a court of chancery in order to secure its benefit. They have already had their day in court. Against such *laches* the courts will give no relief. This is so familiar a principle of chancery as hardly to need the citation of authorities. *Armstrong* v. *Caldwell*, 2 Scam. 419; *Elston* v. *Blanchard*, id. 421.

This bill, it is true, is filed by one of the heirs of Bailey, and not by his administrator. But the judgment was duly obtained against the administrator, who was the legal representative of the deceased, and it is not alleged that he acted fraudulently or collusively. That judgment binds the personal estate, in the absence of fraud. If the administrator has been delinquent in his duties, the heirs have their remedy on his bond, but the practice can not be tolerated of compelling persons holding claims against estates to litigate them, first with the administrator, and then with the heirs, upon the same point or points which might have been investigated in the first case. This would lead to endless confusion. The administrator is the sole representative of the personal estate, and relief is not sought here on the ground that he is seeking to subject the real estate to the payment of debts, or that it will be necessary to do so. Should he file a bill for that purpose, the heirs, as decided in *Hopkins* v. *McCann*, 19 Ill. 113, and *Stone* v. *Wood*, 16 id. 177, can contest this judgment and set up the release. But there is nothing whatever in this bill to justify this application to the court by the complainant as one of the heirs. It does not appear that the part of the estate which descended to him is, or will be, affected by this judgment. If we were to sanction this proceeding, it would follow, that, whenever a claim is

allowed against an estate, an heir would have the right at once to file a bill for the purpose of relitigating it, though not averring fraud or collusion on the part of the administrator. So long as an executor or administrator retains his office, he must be recognized as the sole representative of the deceased, both as to debts and assets.

It is said Bailey and Riley were partners, and the County Court where the suit was commenced, in which the judgment was obtained, had no jurisdiction in matters of partnership. It was not, perhaps, the most appropriate tribunal for adjusting partnership accounts; but the mere fact that a partnership had once existed, does not render void a judgment obtained by the administrator of one partner against the administrator of the other. If the defendant chose to submit to the jurisdiction, we can not deny the power of the court to pronounce a judgment for the balance it might find due. But on this point it is sufficient to say, the bill does not seek relief on this ground, but solely on account of the release. The decree must be reversed and the cause remanded.

Decree reversed.

MARY J. HALL *et al.*
v.
WILLIAM H. DAVIS.

1. PROCESS — *of the summons — what sufficient.* When the venue of a writ is, "State of Illinois, Jackson county," and the process was directed to "the sheriff of Jasper county," commanding him to summon the defendants "to appear before said Circuit Court, on the first day of the next term thereof, to be holden at the court house, in Murphysboro," etc.,—*held*, that in this no ambiguity existed; the place where the court was to be held, and where the defendants were summoned to appear, being certain.

2. FORMER DECISIONS. The cases of *Orendorff* v. *Stanberry*, 20 Ill. 90, and *Gill* v. *Hoblitt*, 23 id. 473, are not in conflict with this rule.

3. INFANTS — *decree against — without a guardian — or an appearance — will be set aside.* Where a decree has been rendered against a minor, without a guardian, or appearance by attorney or otherwise, it will be set aside on proper motion made, and the party will be allowed to make any defense to which he is entitled.

4. DECREE — *cannot be set aside on motion of a person not made a party to the suit.* A decree rendered in a suit will not be set aside on the motion of a person who was not made a party to the proceeding. But, where the decree has been set aside on motion of a party entitled to it, such person may then file his cross-bill and have his rights in the case determined.

WRIT OF ERROR to the Circuit Court of Jackson county; the Hon. JOHN H. MULKEY, Judge, presiding.

The facts in this case fully appear in the opinion.

Mr. THOMAS G. ALLEN, for the plaintiffs in error.

Mr. W. J. ALLEN, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a petition for partition of about seven hundred acres of land, in the Jackson Circuit Court, filed by William H. Davis against James H. and Mary J. Hall. A summons was issued on the 10th day of July, 1856, directed to the sheriff of Jasper county, who returns that he had served it on Mary J. Hall, and that James H. was not found. A notice of the pendency of the suit was published in the "De Soto Farmer," a newspaper printed in Jackson county, for four successive weeks, ending the 7th day of August, 1856. The certificate of publication was made by "John A. Hull, editor," and was filed on the 6th of December, 1856. At the September Term the defendants below were defaulted, and a judgment of partition was rendered, and commissioners were appointed to divide the lands described in the petition. The court found that the ancestor died seized of the lands described in the petition, leaving five children, each of whom inherited one-fifth thereof; that petitioner had purchased the interest of three of the heirs, and that he was then the owner of three-fifths, and the defendants each one-fifth, as heirs of Samuel B. Hall. At the April Term, 1857, the cause was continued; and, at the following December Term, leave was given to amend the petition, and the commissioners reported that they were unable to make partition of the lands without manifest injury to the parties.

Their report bears date on the 22d day of June, 1857, and the oath taken by them bears date the 21st of September, 1857.

At the December Term, 1857, the report of the commissioners was approved, and a decree was rendered ordering the sale of the property on six and twelve months credit, after giving four weeks' notice in four of the most public places in the county where the land was situated, and by a publication thereof in the "Carbondale Transcript." The purchaser was required to give good personal security and a mortgage on the premises to secure the purchase money. A special commissioner was appointed to execute the decree.

Afterward, at the April Term, 1858, the special commissioner reported, that he had sold the property, after giving the notices required by the decree, and that petitioner became the purchaser, at the sum of $1,491, and that he had given the security required by the decree upon receiving a deed. The report was approved. The cause was continued from term to term until the July Special Term, 1859, when a further order of approval of the sale was entered, and the special commissioner was ordered to pay one-fifth of the purchase money to Mary J. Hall, or her guardian, after paying the costs and charges of the sale.

At the May Term, 1865, Mary J Hall and Harriet B. Hall entered a motion to reinstate the cause on the docket, and to vacate and set aside all of the former proceedings in the case, and for a trial of the cause. This motion was based on their petition, which alleged that they were interested in the lands described in the petition. It alleges that Harriet B. Hall is the widow, and Mary J. Hall is one of the children, of Samuel B. Hall, deceased, who died seized of the lands in question; that he, at the time of his death, left surviving him a daughter named Juliet W. Hall, who inherited one-sixth part of the lands; that she died after her father, intestate, without children, or descendants of children, leaving her mother and brothers and sisters her legal heirs; that the mother inherited two-sevenths of her one-sixth, and Mary J. Hall one-seventh of her one-sixth, of these lands; that Juliet W. Hall was not named

in the previous proceedings in the case, and that the interest which she held had not been found, and her heirs had not been protected in their rights; that Harriet B. owns two-sevenths of a sixth part of the land, and dower of one-third in all of these lands during her natural life; and that Mary J. owns one-sixth and one-seventh of a sixth part thereof; that they were, when the original petition was filed, residing in Jasper county, in this State, and have continued to so reside; that Harriet B. was never made a party to the proceeding; and that Mary J. was, when the suit was commenced, a minor, under eighteen years of age, residing with her mother, and that she never was legally or otherwise notified of the proceeding; that she had not appeared in the case, in person, by attorney, or by guardian. The petition concludes with a prayer for relief, the assignment of the dower of Harriet B., and the partition of the land according to their respective interests therein. It appears that a written notice of the intended application was served on William H. Davis. The motion was heard at the term at which it was entered, and overruled; and Mary J. Hall brings the case to this court, and asks a reversal of the decree of partition, and the order overruling the motion to vacate all of the orders and proceedings in the case.

It is urged that the court below had no jurisdiction of the persons of the defendants. The venue of the writ is Jackson county, and process was directed to the sheriff of Jasper county, and commands him to summon the defendant therein named, "to be and appear before our said Circuit Court, on the first day of the next term thereof, to be holden at the court house in Murphysboro, on the fifth Monday in the month of September next." The venue named in the writ is Jackson county, and no county is named in the body thereof. But defendants are commanded to appear before the Circuit Court to be held at Murphysboro. In this there is no ambiguity, and no person could doubt as to the place where the court was to be held. It is manifest that it was in Jackson county. Had the command been to appear at the court-house in said county, it then would have left it doubtful which of the two counties

previously named was intended. And a strict construction would have, in such a case, referred to the latter of the two. In the cases of *Orendorff* v. *Stanberry*, 20 Ill. 90, and *Gill* v. *Hoblitt*, 23 id. 473, two counties were named as in this case, and the defendants were summoned to appear at the court house in said county, without designating which, and the summons was held to be insufficient. But this case does not fall within the rule there announced, and is, therefore, not governed by it. This summons and service gave the Circuit Court jurisdiction of defendants below.

In the case of *Peak* v. *Shasted*, 21 Ill. 137, it was held, that a minor could only appear to defend a suit by guardian, and that the plaintiff should, in case a minor defendant failed to so appear, have a guardian *ad litem* appointed to make defense. It was also held, that, if a minor defendant should appear in person, or by attorney, it would be error in fact, which may be assigned in the court rendering the judgment. Also, that a judgment or decree against a minor without a guardian, may be set aside, on motion, in the court rendering it, and let such defendant in to plead. In that case, the application was made to the court on motion, and we said that such practice was regular. In this case, it appears by the petition, that no appearance was entered by Mary J. Davis, either in person, by guardian, attorney or otherwise, nor does any such appearance appear from the record in the cause. It appears from the petition, verified by the oath of petitioner, that she was a minor when all of these proceedings were had, and that her rights were not protected in the decree of the court. This, then, brings this case within Peak's case. The court below should have allowed the petition, and let Mary J. Hall in to defend the suit, and, on a final hearing, have rendered such a decree as should be required by the case made by the parties.

So far as relates to the application of Mrs. Hall, it however depends upon other principles. She was then of age, under no disability, and was free to defend her application and to assert her rights. She was not a party to the suit, and we know of no rule of practice which would authorize the court to set aside

the decree on her motion. Her remedy is complete by a petition for partition, and to assign her dower in the premises. But, inasmuch as Mary J. Hall has shown error in fact in the decree, requiring its reversal, and that it should be set aside, no reason is perceived why the widow should not then be allowed to come in and file her cross-bill, and assert her rights and have them determined on the new hearing of the case. If it is true that one of the children died after the father, and before the partition was made, then the interests of the several parties was not properly presented to or found by the court, and these parties, on a new hearing, should be allowed to assert them.

In other respects this proceeding was exceedingly loose, and it may be erroneous; but, plaintiff in error having shown *prima facie* that she has the right to have the decree opened and to make defense, we deem it unnecessary to discuss other questions. The order of the court below, refusing to set aside the decree for partition, is reversed and the cause remanded.

Decree reversed.

THE GOVERNOR OF ILLINOIS, for the use of WILLIAM THOMAS, Trustee,

v.

JOSEPH G. BOWMAN.

FORMER DECISIONS. The case of *The Governor of Illinois, for the use of Thomas*, v. *Lagow*, 43 Ill. 134, must be considered decisive of this, the same points arising in each case.

APPEAL from the Circuit Court of Richland county; the Hon. AARON SHAW, Judge, presiding.

This was an action of debt, instituted in the court below, by the appellant, against the appellee, Joseph G. Bowman, to recover the amount of a certain decree, rendered against one Ebenezer Z. Ryan, in the Circuit Court of the United States for the northern district of Illinois, for the sum of $45,467.27, and in favor of the bank of the State of Missouri. Ryan and

certain other persons had been appointed assignees of the Bank of Illinois; and the decree above required him to pay over that amount to William Thomas, as trustee; which sum had been found to be due from said Ryan, as such assignee, on account of assets which had come into his hands. The suit is brought against Bowman, upon the decree against Ryan, as one of his sureties on the bond given for a faithful discharge of his duties as such assignee.

Mr. WILLIAM THOMAS, for the appellant.

Mr. W. H. UNDERWOOD, for the appellee.

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

Most of the questions presented by this record were considered and decided in the case of *The Governor, for the use of Thomas*, v. *Lagow*, 43 Ill. 134, which was an action against one of the sureties on this same bond. No points are made here that were not made in that case.

As we held in that case, so we hold in this, that the sureties in this bond are responsible for all defalcations of Ryan which occurred prior to the act of 1849, and that act did not suspend the right of action on the bond. Suit might have been brought upon it at any time, notwithstanding the extension of time after Ryan failed to burn and cancel the notes in his hands and report to the governor. For this breach the liability of the sureties had attached, and it was in no degree enlarged by that act. For breaches occurring after the extension of time the sureties are not liable.

The defendant had judgment on demurrer in bar of the action, while it appears the first breach in the declaration was not answered. The fifth and sixth pleas only purported to answer the second and third breaches. The first breach that the notes and certificates were not burned and canceled, and a report thereof made to the Governor, and of the moneys in Ryan's hands, not having been answered by plea, the plaintiff was entitled to a judgment on that breach, and to

have his damages assessed, for that breach is alleged to have occurred prior to the act of 1849. Those damages would be the value of those notes and certificates, and such damage as was occasioned by the neglect to report, and the failure to pay over the moneys in Ryan's possession.

Without going over the ground traversed in the case referred to, the judgment in this case must be reversed and the cause remanded, with leave to either party to amend their pleadings, and for further proceedings consistent with this opinion.

Judgment reversed.

GEORGE S. PIDGEON
v.
THE TRUSTEES OF SCHOOLS.

1. ESTOPPEL. M. and wife executed a mortgage upon their homestead without the statutory waiver, and afterward conveyed it to P. subject to the mortgage lien, and which lien formed a part of the purchase price. *Held*, in a suit to foreclose by the mortgagee, that, P. having obtained the premises by admitting the lien and assuming its payment, he was estopped from setting up as a defense the omission of M. and wife to release their homestead right in the mortgage.

2. PRACTICE — *decree too large — this court will not fix amount.* Where in a case it is admitted that the decree rendered by the court below is too large, this court will not fix the amount, but will reverse the case, that the inferior court may enter the proper decree.

WRIT OF ERROR to the Circuit Court of Pulaski county; the Hon. WESLEY SLOAN, Judge, presiding.

This was a bill in chancery, filed by the defendants in error in the court below, against the plaintiff in error, to foreclose a certain mortgage executed to them by one Thomas J. Mansfield and wife, upon certain premises described in the bill as the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 16, T. 15, S. R. 1, east, containing forty acres, and situated in the county of Pulaski,

State of Illinois. The further facts of the case appear in the opinion of the court.

Messrs. W. H. GREEN and G. S. PIDGEON, for the plaintiff in error.

Mr. J. M. DAVIDGE, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Mansfield and wife executed to the school trustees a mortgage upon their homestead without the statutory waiver, and subsequently sold and conveyed it to Pidgeon. The trustees filed a bill to foreclose, making Pidgeon a party. He defends on the ground that Mansfield and wife had not released their homestead in executing the mortgage. But their deed to him provided, that, as a part of the consideration money, he was to pay the debt to the school trustees. By the terms of his deed, he assumed the payment of that debt as a condition of taking the title. The parties recognized the debt as a lien on the land, since the deed to Pidgeon described the debt as secured by a mortgage upon the premises. Having obtained the land by recognizing the mortgage as an existing lien, and assuming its payment, he is estopped from defeating it by setting up Mansfield's homestead rights. To permit him to do this, would be to permit him to practice a fraud both on Mansfield and the school trustees.

It is admitted, however, that the decree was for too large a sum. Counsel ask that a decree be entered here for the proper amount, but, having found this practice to lead to inconvenience, we remand the case, that the proper decree may be entered in the Circuit Court.

Judgment reversed.

SARAH ANN QUIGLEY, impleaded, etc., *et al.*, *v.* OBADIAH ROBERTS.

1. INFANTS — *must defend by guardian.* A guardian *ad litem* must be appointed for infant defendants, or the proceedings against them will be erroneous.

2. SAME — *in suits against — strict proof required.* The rule of practice is well settled, that, in proceedings against minors, even where there is a guardian, strict proof is required. Nothing can be admitted, but every thing must be proved, against them, the same as if every material allegation had been denied by answer.

3. SAME — *cannot be defaulted.* Neither can a default or a decree *pro confesso* be entered against an infant.

4. CHANCERY PRACTICE — *evidence in chancery suits should be preserved in the record.* Under our practice, the evidence in chancery proceedings should be preserved in the record.

WRIT OF ERROR to the Circuit Court of Union county; the Hon. WALTER B. SCATES, Judge, presiding.

This was a bill in chancery, filed in the Circuit Court of Union county by the defendant in error, Obadiah Roberts, against the plaintiff in error, impleaded with others, for a decree for the sale of certain lands, wherewith to pay a certain debt due and owing to the complainant from Thomas L. Quigley, deceased, and secured by his note and a deed of trust on the lands in question, in which deed one James Littleton, also deceased, was named as trustee.

The questions presented by the record are fully stated in the opinion.

Mr. J. DOUGHERTY, for the plaintiff in error.

1. A bill cannot be taken for confessed against an infant under any circumstances. *Sconce* v. *Whitney*, 12 Ill. 150.

2. Nothing can be admitted, but every thing must be proved, against an infant. Neither can a default or a decree *pro con-*

fesso be taken against an infant. *Hitt* v. *Orsmbee*, 12 Ill. 166.

3. A decree cannot be entered against infants without proof to sustain the allegations of the bill.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the seventh day of March, 1843, Obadiah Roberts filed a bill in chancery in the Union Circuit Court against Margaret Quigley, Elizabeth Quigley, Sarah Ann Quigley and Austin Quigley; the first, the widow, and the others the minor heirs of Thomas L. Quigley, deceased, and the heirs at law of James Littleton, deceased; the bill alleged that Thomas L. Quigley died seized of a number of tracts of land, which are described in the bill; that he was indebted to complainant, in the sum of $1,000, in his life-time, to secure which he had executed his note, and also a deed of trust on these lands, to James Littleton, as a trustee, with power to sell the same, on default of payment of the debt; that both Quigley and Littleton had departed this life; that the debt remained due and unpaid: and he prayed a decree for the sale of the lands to pay the debt.

A summons was issued, and served by reading, on all of the defendants but Austin Quigley. Margaret Quigley appeared and filed a demurrer, which was afterward withdrawn, upon an agreement that her right to dower in the premises should not be affected by the proceeding. A default was entered against the defendants, and the lands were decreed to be sold, subject to the widow's dower, to satisfy the debt.

Subsequently, complainant filed a supplemental bill, reciting the matters contained in the original bill and the proceedings previously had in the case, and alleging that there were a number of parties in interest who were not known or made parties when the original bill was filed. It prayed that they be made parties, and that the defendants to the original bill be made parties, for process, and that the former decree be carried into effect. Service was had by summons and publication. Sarah Ann Quigley was not named as a defendant in this bill. A guardian *ad litem* was appointed for Elizabeth

and Austin Quigley and the infant heirs of Littleton. He answered that he knew of no reason why the relief prayed should not be granted. The other defendants failing to answer, the bill was taken as confessed, and a decree was passed appointing a commissioner to execute the former decree by making sale of the land, and that he report his proceedings to the court. He made a sale which was reported to and approved by the court.

Plaintiff in error brings the case to this court on error, and insists that, being a minor at the time the original bill was filed, the decree *pro confesso* against her was erroneous, and, not having been made a party to the supplemental bill, her rights were not affected by that proceeding. The original bill alleges that she was a minor, and it was taken as confessed against her, as well as the other defendants, and the relief sought was granted. No guardian *ad litem* was appointed under the former bill, and she was not made a party to the supplemental bill. There is no rule of practice better settled, than that a minor must defend by a guardian. In this case no guardian of any kind appeared for plaintiff in error. It does not appear by the bill that she had a guardian, or that a guardian *ad litem* was appointed by the court.

The practice is equally well settled, even if there had been a guardian, that a decree cannot be rendered against a minor unless it be on proof of the allegations of the bill. It cannot be taken as confessed, nor can the guardian admit the bill so as to bind minor defendants. It is the duty of the court to protect the interests of minors, and refuse to render a decree depriving them of their rights, except on the same proof that would be required if every material allegation of the bill had been denied by an answer, and it is error to render a decree on any less proof. Again, the evidence in a chancery case, under our practice, should always be preserved in the record by some appropriate mode. These rules have been so often announced by the court, that it is unnecessary to cite the cases, or to refer to works on practice. They must be regarded as settled, and must be familiar to the entire profession. Plaintiff was not

defended by guardian, and was defaulted, and the bill taken as confessed, which was error. The execution of the deed of trust by her father does appear in the record, but the other material allegations of the bill are not established by any evidence preserved in the record. For these errors the decree of the court below must be reversed and the cause remanded.

Decree reversed.

CHARLES M. SMITH *et al.*

v.

JOHN M. ROTAN *et al.*

1. PARTIES — *in chancery — who should be made — and when persons in interest may be omitted.* In chancery, all the parties in interest, and whose rights may be affected, ought to be made parties to the bill, except where the parties are very numerous, and so scattered that their names and residences cannot be ascertained without great difficulty.

2. SAME — *in what cases — the rule rigidly enforced.* This rule is enforced most generally in cases where titles may be divested.

3. SAME — *exception to the rule — in a particular case.* In a bill for an accounting filed against the administrators of the deceased obligors in a guardian's bond, objection was made, that the heirs of the deceased had not been made parties to the suit: *Held*, that this was unnecessary; that it was sufficient to make the administrators parties, and if they were compelled to pay, recourse to the heirs might be had by them, in the event they took any thing by descent.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was a bill in chancery filed in the court below, by the appellees against the appellants, surviving sureties of Willis Smith, deceased, guardian of the appellees, on their guardian bond, to compel an accounting for the funds of appellees. But a single question is presented by the record, which is stated in the opinion.

Mr. B. B. SMITH, for the appellants.

1. In this case the bill should not only have made the admin

istrators of the deceased obligors parties, but also the heirs of such deceased obligors.

2. They were necessary parties, for the reason that they were liable for their proportionate amount of the damages which might be decreed.

3. That all persons who have any substantial or beneficial interest in the question litigated, or who may be materially affected by the decree rendered, are necessary parties. *Preston* v. *Kimball*, 19 Ill. 320.

Messrs. O'MELVENY and MERRITT, for the appellees.

1. The heirs of the deceased obligors were not necessary parties to this bill. They were numerous and scattered, and their residences unknown, and in such case the court will not require them to be made parties. *Harrington* v. *Hubbard*, 1 Scam. 573.

2. The administrators represent the deceased estates on this debt.

3. The rights of these heirs cannot be affected by any decree rendered in a suit to which they were not made parties.

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

The question made on this record is this: Complainants having made the administrators of the deceased obligors, in a guardian's bond, defendants, and called upon them to account, was it necessary to make the heirs of these deceased obligors parties?

As a general rule, in equity, all persons who have any substantial, legal, or beneficial interest in the question litigated, or who may be materially affected by the decree to be rendered, must be made parties; the only exception is, where the parties are very numerous and so widely scattered that their names and residences cannot be ascertained without great difficulty. *Prentice* v. *Kimball*, 19 Ill. 320; *Herrington* v. *Hubbard*, 1 Scam. 573; *The People* v. *Lott*, 27 Ill. 215.

This rule is enforced most generally in cases where titles may be divested. In this case the administrators represented the

estates of the respective obligors, and, on a bill to account, it was sufficient to make them the parties, regardless of the heirs. If the administrators have the decree to pay, they may be able to coerce the heirs to refund if they had any thing by descent. The names of the heirs were disclosed, but their places of residence were not, and could not be ascertained without such difficulty as these wards should not be required to encounter.

The decree of the Circuit Court is affirmed, this being the only point made.

Decree affirmed.

EUGENE RUSSELL *et al.*
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

TRIAL — *separation of the jury.* If a jury, in a capital case, during the progress of the trial, separate without the authority of the court, their verdict will be set aside, where it appears, that, in consequence of such separation, they were exposed to improper influences, which might have operated to the prejudice of the accused in such manner as to affect their verdict.

WRIT OF ERROR to the Circuit Court of Effingham county; the Hon. HIRAM B. DECIUS, Judge, presiding.

This case is sufficiently stated in the opinion.

Messrs. COOPER & WOOD, for the plaintiffs in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an indictment for murder, on the trial of which the plaintiffs in error were found guilty and sentenced to be hung. There was a motion for a new trial, which was overruled. On the hearing of this motion, it was clearly shown, that, during the progress of the trial, one of the jurors separated from the other jurymen, and went about the streets and railroad station in the company of other persons without being

in charge of an officer; that another went to his residence unattended by an officer, and remained there more than an hour in the company of other persons; that another went unattended to a public debate; that another went to the house of an acquaintance, and conversed with him about the case and the evidence, no officer being present. It is difficult to understand how the officer in charge of the jury can have been so remiss in his duties. It is not claimed that this separation was by authority of the court. The affidavits of the jurors were taken to show that while thus separated they neither heard nor saw any thing that influenced their verdict, but one of them admits he had conversed about the case and the evidence with the person whose affidavit had been taken. He thinks he heard nothing prejudicial to the prisoners. The rule laid down in *McKinney* v. *The People*, 2 Gilm. 553, and *Jumpertz* v. *The People*, 21 Ill. 411, is, that the court must grant a new trial if the jury separate, "unless such separation was the result of misapprehension, accident or mistake on the part of the jury, and under circumstances to show that such separation could by no possibility have resulted to the prejudice of the prisoner." This is not shown in the present instance, and the case is a far stronger one for a new trial than was that of Jumpertz. The jurors may have honestly believed they heard nothing outside of the jury-box which influenced their verdict, yet they were greatly exposed to external influences, and these influences might have operated insensibly to themselves, especially in regard to the juror who had the conversation with a third person.

Under the authority of the cases above quoted we must reverse the judgment and remand the case for a new trial.

Judgment reversed.

JOEL S. BYINGTON
v.
GAFF, COCHRAN & Co.

DELIVERY *to one member of a firm — effect of.* Where a firm composed of two members entered into an agreement to purchase a steamboat, and a third party guaranteed the payment of the notes given therefor, and the boat was afterward transferred by bill of sale and delivered to only one member of the firm, and on the trial the evidence tended to show that the transfer and delivery was in accordance with, and in fulfillment of, the original contract of purchase, it was *held*, that this was a transfer and delivery to the firm and not to the individual, and the guarantor was liable.

WRIT OF ERROR to the Court of Common Pleas of the city of Cairo; the Hon. JOHN H. MULKEY, Judge, presiding.

This was an action of assumpsit brought in the Court of Common Pleas of the city of Cairo, at the January Term, 1867, by Thomas Gaff, James W. Gaff and George W. Cochran, composing the firm of Gaff, Cochran & Co., and against Joel S. Byington, upon the following note, given in part payment for the steamboat "Ella" by the firm of Musson and Culley and guaranteed by Byington:

"$2,500. CAIRO, June 23, 1865.

Seven months after date, for value received, we or either of us promise to pay Messrs. Gaff, Cochran & Co., or order, the sum of twenty-five hundred dollars, payable at the First National bank at Cairo, with interest at six per cent until due, and if not paid at maturity ten per cent to be paid thereafter.

{Two 50 cent and one 25 cent U. S. Int. Rev. Stamps duly canceled.}

R. C. CULLEY,
J. W. MUSSON."

Indorsed:

"For value received, I guaranty the payment of the sum of money and interest in the within note specified, and agree to pay the same according to the tenor and effect of said note if the same is not paid by the said Rodney C. Culley and James W. Musson. J. S. BYINGTON."

Defendant's second amended plea is similar to the third amended plea, except that it alleges that the transfer of the boat to Rodney C. Culley was without defendant's knowledge or consent, and in fraud of his rights as guarantor, by reason of which he was released and wholly discharged.

In his third amended plea defendant alleges *actio non*, because he says that the note and guaranty sued on in plaintiffs' declaration were given for part of the consideration of the purchase money of the steamboat "Ella," her fixtures and furniture, an American vessel of over twenty tons burden, to wit, to the amount of $2,500, to be sold and delivered as hereinafter mentioned, and for no other or different consideration or purpose whatever; and that the said defendant only as guarantor and exclusively for the accommodation of the firm of Musson & Culley (a firm composed of J. W. Musson and R. C. Culley) hereinafter mentioned, and without any interest in the consideration of said note whatever, he, the said defendant, executed and delivered the same as guarantor, of all which the said plaintiffs then and there had notice. And the said defendant avers, that, although the said note is signed by the individual names of the said Musson and Culley, yet, in fact, the said note sued on was, at the time it was made and guaranteed as aforesaid, the partnership note of the said firm of Musson & Culley, and was made and delivered to said plaintiffs as one of the notes for the purchase of the aforesaid steamboat, her fixtures and furniture, on the 23d day of June, A. D. 1865, at, etc., aforesaid, then and there bargained to be sold by the said plaintiffs to the said firm of Musson & Culley, by their contract in writing of that date, to wit:

"For and in consideration hereinafter mentioned, we have this day bargained and sold to J. W. Musson and R. C. Culley, the steamboat 'Ella,' her fixtures and furniture, now lying at this port; price of said boat, fixtures, etc., is seven thousand dollars, to be paid as follows:

"Two thousand dollars in three months; twenty-five hundred dollars in five months, and the balance of twenty-five

hundred dollars in seven months from this date. Notes for the above amounts to be given bearing six per cent interest with approved security, and payable at the First National bank at Cairo.

"The said J. W. Musson and R. C. Culley, *party* of the first part, hereby bind themselves to execute the above named notes as herein set forth.

[Int. Rev. Stamp, 25 cents.] Witness our hands and seals, this 23d day of June, 1865, at the city of Cairo.

"[Signed] GAFF, COCHRAN & CO., [SEAL.]
Per GREEN.

MUSSON & CULLEY, [SEAL.]
By R. C. CULLEY."

And the said defendant further avers, that, relying upon the said contract for a sale of said boat, her fixtures and furniture, to the said firm of Musson & Culley, and that in pursuance thereof the said boat, her fixtures and furniture, would be transferred and conveyed, as an American vessel, to the said firm of Musson & Culley, and that when so conveyed and transferred would become the partnership property of the said firm of Musson & Culley, he, the said defendant, was induced, relying upon the good faith and execution of said contract by said plaintiffs, by the transfer and conveyance of said boat to the said Musson & Culley according to the tenor and effect of the aforesaid agreement for a sale of said steamboat to said firm of Musson & Culley, to guarantee said note for the said last mentioned firm. And the said defendant avers, that, after the said note was guaranteed by the said defendant as aforesaid, and delivered to said plaintiffs, and before the said plaintiffs had transferred and conveyed said boat, her fixtures and furniture, or either or any part thereof, to the said firm of Musson & Culley, the said plaintiffs, well knowing the premises, afterward, to wit, at St. Louis, Missouri, on the —— day of October, A. D. 1865, did abandon said contract of bargain for the sale of said boat, her fixtures, etc., to said firm of Musson & Culley (and never did, in whole or in part, in any manner, convey the same to said Musson & Culley), but, on the contrary

thereof, then and there, to wit, on the day and year last aforesaid, at, etc., aforesaid, did by bill of sale transfer, convey and deliver the said steamboat 'Ella,' her fixtures and furniture, exclusively to Rodney C. Culley individually, whereby and by reason whereof, the said defendant in fact says, that the consideration of said note and the said guaranty sued on in this behalf, has wholly failed, and this he is ready to verify, wherefore, etc.

Replication and issue joined.

Defendant offered in evidence the following:

"BILL OF SALE.

"To all people to whom this present bill of sale shall come: We, Thomas Gaff and George W. Cochran and J. W. Gaff, owners of the steamboat 'Ella,' send greeting:

"Know ye, that we, the said Gaff, Cochran & Co., for and in consideration of the sum of seven thousand dollars in hand, and well and truly paid, at or before the ensealing and delivery of these presents by Rodney C. Culley, of Cairo, State of Illinois, the receipt whereof we do hereby acknowledge, and are therewith fully and entirely satisfied and contented, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said Rodney C. Culley, the hull or body of the steamboat 'Ella,' together with all and singular, her engines, machinery, tackle, apparel and furniture, as she now lies at the port of Cairo, Illinois, and enrolled at the port of Memphis, the certificate of which enrollment is as follows, viz.: (said boat has not been enrolled in the name of present owners, for the reason that she has not been engaged in coasting trade since their ownership.)

"'Enrollment in conformity to an act of the congress of the United States of America, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same;" William Drake, of Memphis, Tenn., having taken and subscribed the oath required by the said act, and having sworn that he is a citizen of the United States, and sole owner of the ship or

Statement of the case.

vessel called the "Ella" of Memphis, whereof John F. Rule is at present master, and as he hath sworn, a citizen of the United States, and that the said ship or vessel was built at Elizabeth, Pa., in the year 1854, as appears by her last enrollment, No. 63, issued at the Port of St. Louis, on the 6th of August, 1863, and now surrendered on change of owners, and the said certificate of indorsement having certified that the said "ship or vessel, has one deck and no mast, and that her length is one hundred and fifty-three feet — inch; her breadth thirty feet, $\frac{5}{10}$ feet, — inch; her depth four feet — inch, and that she measures one hundred and seven $\frac{1}{95}$ tons, and that she is a steamer," has a cabin on deck and plain head, and the said William Drake having agreed to the description and admeasurement above specified, and sufficient security having been given according to the said act, the said steamer 'Ella' has been duly enrolled at the port of Memphis.

"'Given under my hand and seal of office, at the port of Memphis, this 18th day of December, in the year one thousand eight hundred and sixty-three.'

"To have and to hold the said granted and bargained steamboat and premises with the appurtenances, unto the said Rodney C. Culley, his heirs, executors, administrators or assigns, to his only proper use, benefit and behoof forever; and we, the said Gaff, Cochran & Co., do vouch ourselves to be true and lawful owners of the said steamboat 'Ella' and her appurtenances, and have full power, good right and lawful authority to dispose of the said steamboat and her appurtenances in the manner aforesaid. And furthermore, we, the said Thomas Gaff and George W. Cochran & Co., covenant and agree to warrant and defend the said steamboat 'Ella' and appurtenances against the lawful claims and demands of all persons whomsoever, unto the said Rodney C. Culley. That is to say, all lawful claims and demands of every nature, that accrued against said vessel prior to or on the twenty-third day of June, 1865, being the date upon which the sale of said vessel was consummated.

"In witness whereof, we, the vendors, have hereunto set our

hands and seals, this 23d day of June, in the year of our Lord, one thousand eight hundred and sixty-five.

"THOMAS GAFF, [SEAL.]
GEO. W. COCHRANE, [SEAL.]
J. W. GAFF, [SEAL.]
By THOS. GAFF.

"Signed, sealed and delivered, in presence of
THOMAS A. NEWKIRK."

And also the deposition of George E. Lightner, who testified, that his knowledge in relation to the bill of sale was as follows: With the exception of the enrollment, it is in the handwriting of John C. Rankin; it was drawn by him soon after the 25th of June, 1865, at the instance of Rodney C. Culley, and brought to him by Culley; think that Musson was with Culley, and also Mr. Cochran; they were at my office at one time about the purchase; think this was the time, but am not positive; it may have been before this; I told them they must give me the last enrollment before they could get the bill of sale recorded and a new enrollment issued; this paper (bill of sale) was left with me by the parties with the request that I write to Memphis for a copy of enrollment; I did so; got a copy of the enrollment and inserted it; I do not recollect whether the paper, when left with me, was signed or not; do not recollect whether I delivered it to Culley, or sent it to Cochran or Mr. Edson at Cairo; I think it was signed, however, for the enrollment seems to have been written after the stamps were affixed; it was as near as I can say, from my book, about the first or middle of August; I cannot say positively why the conveyance was made to Culley; I think there was some understanding to that effect between the parties, but my recollection is not clear as to this matter; I recollect that I was compelled to write two or three times to Memphis, and that the boat made several trips in charge of Culley, and had some trouble with the custom house, and, as agent for Gaff, Cochran & Co., here, I assisted in arranging temporary permits.

For the plaintiffs, Edson testified, that he knew the parties;

that he wrote the note and contract (set out in plea) or bill of sale of the boat to Musson & Culley; that the boat was deliv ered to Culley; thinks that Musson was in Chicago; never heard any thing of the abandonment of contract in relation to sale by plaintiffs; and (on cross-examination) was not present when the boat was delivered; saw Culley's hands on the boat afterward; does not know why the bill of sale afterward was made to Culley at St. Louis.

Green, witness for plaintiffs, testified, that he first talked with Musson & Culley, a few days before the execution of the contract above, in regard to selling them the boat, and that afterward the trade was closed with Culley, and the contract drawn up and signed by all the parties. He further testified, that he delivered the boat to Musson & Culley about the date of the contract and before the delivery of the notes.

The court gave the following instructions for the plaintiffs, to which defendant excepted:

"If the title to the boat in question passed by sale and delivery from plaintiffs to Musson & Culley, on the 23d day of June, 1865, if you find from the evidence such sale and delivery was made, and the contract by which the same passed was never abandoned or rescinded, the plaintiffs are entitled to recover in this suit if the material allegations in the declaration have been supported by the evidence."

"The court instructs the jury, that, under the issues in this case, it devolves upon the defendant to show by evidence an abandonment of the contract for the sale of the steamboat 'Ella' to J. W. Musson and R. C. Culley, if that fact is relied on as a defense to this action."

"Although, in the bill of sale of the boat 'Ella,' by plaintiffs, the same may have been conveyed to Rodney C. Culley, one of the purchasers, yet that fact does not relieve the defendant from proving an abandonment by plaintiffs of the contract for the sale of said boat. If the jury believe, from the evidence, that James W. Musson and R. C. Culley bought the steamboat 'Ella' from plaintiffs, and the said boat was delivered to them,

or one of them, for both, and that said sale or contract was never abandoned by plaintiffs, and that the other material averments in the declaration have been proved or admitted by the pleadings, the verdict should be for the plaintiffs."

The court, at the instance of defendant, gave the following instructions:

"The court instructs the jury, that any material facts in defendant's plea, which are not denied by the plaintiffs' replication, are to be admitted."

"That the issue in this cause is, whether the plaintiffs abandoned the first contract set out in the second and third pleas of defendant; and, if you believe, from all the evidence in this cause, that the plaintiffs did abandon the said first agreement and sell the boat 'Ella' to Rodney C. Culley individually, you should find for the defendant."

And refused to give the following instructions:

"The court instructs the jury for the defendant, that, to transfer by sale an American vessel, so that the same can be used in navigating any of the rivers of the United States, the same must be transferred by bill of sale, or instrument of writing, containing and reciting therein the last certificate of registry or enrollment; and, unless you find, from the evidence in this case, that Gaff, Cochran & Co. did, by such bill of sale or instrument in writing, convey the boat mentioned in defendant's plea to the firm of Musson & Culley, you should find for the defendant."

"If the jury believe, from the evidence, that the boat named in the defendant's pleas was bargained and sold by the plaintiffs to the firm of Musson & Culley, to be used for the purpose of navigating the western rivers of the United States, and that plaintiffs never completed that contract, but did make a bill of sale of the steamboat to Rodney C. Culley only, and delivered the same to him, then your verdict should be for the defendant."

To which refusal the defendant excepted.
Verdict for plaintiffs.

Messrs. O'MELVENY and HOUCK, for the plaintiff in error.

I. The second plea (same as the third, printed at length) avers, that plaintiffs abandoned their contract to sell to the firm of "Musson & Culley," and sold and conveyed the boat without the knowledge or consent of Byington, the defendant, guarantor, to Rodney C. Culley, individually. The replication takes issue on no other part of that plea than to traverse the abandonment of the contract to sell to the firm; and the only question on the record is, whether the defendant proved that part of his pleas; for every other allegation in the pleas, not denied or traversed by the replication, is, by the rules of pleading, admitted to be true. *Dana* v. *Bryant*, 1 Gilm. 104.

II. The original contract for the sale, by the plaintiffs, was to "Musson & Culley" both, and for "Musson & Culley" jointly Byington guaranteed, and the note was delivered to the plaintiffs; but they sold by a new and different contract afterward to Culley alone, and applied the note to pay for his individual debt and purchase without the consent of Byington; therefore he is released.

When a note is indorsed for a special purpose, and the object of making the indorsement fails, the guaranty is at an end. Edwards, 316, 317, 319; Collyer on Partnership, § 614; 3 U. S. Dig. 283; 2 Am. Lead. Cas. 390, 391.

The surety or guarantor cannot be forced into a situation never contemplated by him. Story on Part. § 248.

The surety or guarantor cannot be held in any other way than he contracted. 1 Parsons on Cont. pp. 503, 504.

An indorsement for a partnership firm does not inure to the remaining partner. Collyer on Part. § 624.

Because the character of the obligor enters into the contract. Collyer on Part. § 616; Story on Part. § 246, note 2, § 247; 1 Parsons on Cont. 505.

If A guarantees a lease and a new lease is afterward substi

tuted, A cannot be compelled to pay on the new lease, and is discharged from his liability. *White* v. *Walker*, 31 Ill. 423.

III. The writing, *i. e.* the first contract set out in the pleas, counsel hold to be a bill of sale, never was intended as such, and is not upon its face a bill of sale:

1. The writing is signed by both parties, thus showing its executory character and the fact that it was an agreement for a future sale.

2. Only a twenty-five cent internal revenue stamp is used.

3. The certificate of registry is not recited in the writing, which is absolutely necessary to constitute a valid bill of sale:

To secure the American character of the vessel. 1 Brightly's Dig. § 14, p. 828.

To prevent the forfeiture of the vessel. 1 Brightly's Dig. § 16, p. 829.

4. The writing referred to could not be recorded in the proper offices under the act of congress of 1850.

That act only provides for admission to record of bills of sale, etc., with the register recited. 1 Brightly's Dig. § 44, p. 833.

Under the act of congress of 1865, every bill of sale of a vessel must be acknowledged before it can be recorded in the proper offices. 2 Brightly's Dig. § 10, p. 402.

However, the plaintiffs' counsel admit the contract set out in the plea to be executory, by the issue made up, and it is only material in so far as it proves that the note was guaranteed on a contract for a sale of the boat to the firm of "Musson & Culley."

IV. The bill of sale really made is that set out in the abstract, and, although it purports to bear date of the 23d of June, 1865, was made in October of that year. We think it is palpably manifest that it is not the sale of the boat to the *firm* of "Musson & Culley," and not the execution of the contract, for which the note was given and guaranteed, which was for a sale to that firm. Whether the abandonment of the contract to sell to the firm was or was not by consent or agreement of the other parties, or did or did not injure Byington, the defendant, we think it is not for us to prove. The change

of the contract without his consent, on which he guaranteed the note, released him. 1 Parsons on Cont. 504, note G; *Mayhew* v. *Boyd*, 5 Md. Ch. 102.

V. The court ought to have given the instructions severally on the part of the defendant, which were refused, and ought to have refused the plaintiffs' instructions, because in form they are calculated to mislead the jury, especially so the concluding part of the second instruction, as it implied doubt as to whether the defendant relied on the only issues made up in the first and second pleas.

Messrs. ALLEN & WEBB, for the defendants in error.

I. It would seem almost too clear for argument, that, by the terms of the writing set out in plaintiffs' third plea, defendants in error *sold* the steamboat "Ella" to J. W. Musson and R. C. Culley. The language of that writing furnishes no excuse for discussing the question as to its being an *executed* or an *executory* contract. In addition to the clear legal import of the writing, the evidence of Green shows that he, as agent of defendants in error, about the date of said writing, delivered the boat to Musson & Culley, and that this delivery was before the notes, which expressed the consideration of the sale, were delivered to defendants in error.

II. Plaintiff in error seems to complain, that, after the sale and delivery of the boat to Musson & Culley, a bill of sale, under the act of congress, was made to Culley alone; in other words, that before the boat was ready for enrollment under Musson & Culley's purchase, Musson had parted with his interest in the boat to Culley, in whose name alone the bill of sale was made and the boat enrolled; the position assumed, in substance, being that to render plaintiff in error liable on his guaranty, Musson must never part with his interest in the boat. Such a proposition we are not disposed to argue. The guaranty of plaintiff in error was not a continuing one, but simply an undertaking that if Musson & Culley did not pay the note guaranteed, he (Byington) would pay the same himself. It is respectfully submitted that all the authorities referred to by

counsel for plaintiff in error upon this point are wholly inapplicable, and would only have the least pertinency if this suit had been brought upon a continuing guaranty. But the plaintiff in error, according to his own statements, testified to by Mr. Webb, guaranteed the note because Culley "told him he would indemnify him against loss by a mortgage on two lots."

III. Although a bill of sale, under the act of congress, must be made to the purchaser upon the sale of a vessel in order to enrollment, yet, a boat being but a chattel, title to the same may pass to the purchaser without such bill of sale. A bill of sale was, however, regularly made out, according to the act of congress, by defendants in error to Culley, and delivered to him. The evidence of Lightner shows, that there was some arrangement between Musson & Culley by which the bill of sale was made to the latter, and that this was some days after Musson & Culley had taken possession of the boat, and even after they had repaired the boat at St. Louis.

IV. The instructions given by the court embody the law, and the court might well have refused to instruct the jury at all, at the instance of plaintiff in error, upon the issue of an abandoment of the contract, for no evidence whatever, looking to an abandonment of the contract for the sale, by defendants in error, of the boat, was introduced by the plaintiff in error in the court below.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Plaintiff in error insists that the judgment of the court below should be reversed, because of the refusal to give two instructions asked by him. We can see no error in refusing to give them. As asked, they were calculated to mislead the jury. The evidence shows, that the boat was sold to Musson & Culley, and under that sale was delivered alone to Culley; and it would seem that the delivery was in pursuance to, and fulfillment of, the contract of purchase; and the evidence tends to show that the transfer by the deed was made in the same manner, and to fulfill the agreement.

If it was transferred to him for both Musson & Culley, with their assent, and in accordance with their wishes, then there can be no doubt that the agreement was substantially and legally performed, while these instructions would require the jury to find for defendant, unless the transfer had been made to both of them.

Plaintiff in error had assumed the burden of proving that the original agreement had been abandoned, and a new sale made alone to Culley; and these instructions assume that the transfer of the boat to Culley, no difference how made, proved that fact; while, on the contrary, we have seen that the possession was delivered to Culley under the sale to Musson & Culley, and the jury were warranted in finding that the transfer was made to Culley in the same manner; unless they had been properly modified, the court did right in refusing to give them to the jury. Perceiving no error in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

AUGUST WERNER

v.

FREDERICK ROPIEQUET.

DISTRESS FOR RENT—*warrant for—cannot issue after six months from the time of termination of lease.* By the act of 1857, the common law relative to proceedings for distress for rent is so modified as to authorize distress to be made for the period only of six months after the expiration of the lease; and, where a distress warrant issues more than six months after rent has become due, and the lease terminated, and the demised premises abandoned, such warrant is without authority of law, is null and void, and affords no protection to the officer levying it.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Mr. WILLIAM WINKLEMAN, for the appellant.

Mr. N. NILES, for the appellee.

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

The only question made on this record is, the decision of the court overruling the demurrer to defendant's fourth plea.

The action was replevin for certain articles of personal property described in the declaration alleged to have been taken by the defendant and detained by him.

The fourth plea was as follows:

"And for further plea in this behalf, said defendant says *actio non*, etc., because he says that at the time when, etc., he was sheriff of said county of St. Clair, and that on the 20th day of October, 1866, at said county, a landlord's warrant issued by James C. Hasselton against Henry Stricker was placed in the hands of said defendant as bailiff of said Hasselton, whereby said defendant was required and directed to distrain the goods and chattels of said Stricker in said county, where he then resided, for the sum of $200, being one year's rent due the said Hasselton on the 1st day of March, A. D. 1866, for certain land in said county and described in said warrant, demised by said Hasselton to said Stricker; and that by virtue of said warrant the defendant did, as such bailiff, on the 20th day of October, at said county, distrain the said goods and chattels in the declaration mentioned, to satisfy the said rent due as aforesaid under and by virtue of said warrant; and said defendant avers that the said goods and chattels so distrained were, on the said day and at the time of said distress made as aforesaid, the property of the said Stricker, and subject to said distress; without this, that the property of said goods and chattels, or any part thereof, at the said time when, etc., was in said plaintiff, as by said declaration is supposed, and this defendant is ready to verify, and prays judgment, etc."

The demurrer admits the facts stated in this plea, which are well pleaded, and nothing more. It admits none of the inferences of law which may be drawn from the facts.

The fair intendment from the averments in this plea, is, that Stricker had rented certain premises from Hasselton, for one year, which expired on the 1st day of March, 1866, at which time he was indebted for rent in the sum of $200, to his landlord, Hasselton, and had abandoned the premises. The warrant was not issued until the 20th day of October following, more than seven months after the rent was due and payable.

By the common law, a distress warrant could not be issued after the termination of the lease, nor after the goods had been removed from the land out of which the rent issued. It was also requisite, as distress can only be for rent in arrears, and as rent does not become due until the last moment of the day when it is made payable, that a distress should not be taken until the next day after the rent became due, but a warrant given on that day to make distress generally would be good.

To remedy this, the general assembly of this State, on the 10th of February, 1857, passed an act providing, that, in all cases of the demise of lands or tenements, whether the rent reserved be payable in money, in specific articles of property, or in any part of the products of the demised premises, the landlord shall have the right to distrain the personal goods of the tenant for the period of six months after the expiration of the term for which the premises were demised; such distress to be made in the manner now provided by law, etc. Scates' Comp. 718.

The warrant in this case, having been issued more than six months after the rent had accrued and was in arrears, was without authority of law, and was null and void, affording no protection to the defendant who executed it. The demurrer reached this defect, and should have been sustained.

After six months, and the tenant has abandoned the premises, there can be no distress upon the goods of the tenant, although he will remain personally responsible to his landlord for the rent, which can only be recovered by the ordinary suit

at law. Taylor's Landlord and Tenant, 237, referring to *Tenboss* v. *Williams*, 5 Cowen, 407, and the same case in the Court of Errors, 2 Wend. 148.

We are of opinion the court erred in overruling the demurrer to this fourth plea, and for the error the judgment must be reversed. The plea is no defense to the action.

The cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

FRANCIS WITTRAM
v.
ABRAM VAN WORMER.

1. PARTNER—*when unable to bind the firm.* Without the consent of his copartners, one partner cannot bind the firm of which he is a member by giving the firm note in satisfaction of his personal indebtedness.

2. So, where two parties formed a partnership, one putting in as stock his saw-mill and a quantity of saw-logs, and the other an equivalent in money, it was *held*, that the first party could not bind the firm by giving the firm note for a balance due upon the saw-logs, although the firm received the benefit of the logs.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

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

Mr. WM. H. UNDERWOOD, for the appellant.

Mr. N. NILES, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Van Wormer against De Clausel & Wittram, upon the following note:

"$979.86. ST. LOUIS, 18 .

after date we promise to pay to the order of ourselves $979.86 for value received, negotiable and payable without defalcation or discount.

DE CLAUSEL & WITTRAM."

Indorsed, "DE CLAUSEL & WITTRAM."

On the trial the plaintiff, Van Wormer, testified that he was formerly in partnership in running a saw-mill with the defendant De Clausel; that, in March, 1860, he went out of the firm, and afterward the defendant, Wittram, took his place, constituting the firm of De Clausel & Wittram; that they dissolved their partnership on the 1st of January, 1861; that, on the 20th of December, 1860, De Clausel gave this note to witness in payment of the balance due on a quantity of logs sold by him to the firm of De Clausel & Wittram, at the formation of their partnership.

The defendant, Wittram, testified that he never saw or heard of the note until this suit was brought, in 1867, and that the logs in question were a part of the stock put into the firm by De Clausel, on the formation of the partnership of De Clausel & Wittram; that he put in $3,418 in cash, and De Clausel put in the logs and mill.

The question in the case is, whether the sale of the logs by Van Wormer, at the dissolution of the old partnership, was to De Clausel alone, or to the firm, afterward formed, of De Clausel and Wittram.

On the trial the defendant asked the court to instruct the jury as follows:

"One partner has no right to give the note of the firm for his own private debt, without the consent of his copartners; and if this note was given by De Clausel to pay for logs, etc., which De Clausel put in the firm as a part of his (De Clausel's) capital stock, then the jury should find for defendants, unless Wittram consented to the making and indorsing of this note."

The instruction was refused.

Probably, the court refused this instruction, from the opinion that the same idea had been sufficiently expressed in another. We think, however, it should have been given, as it presented to the jury the true point in controversy more distinctly than it was presented in any other instruction. On the evidence the case is exceedingly doubtful. It is clear, from the testimony of the plaintiff himself, that the logs were sold by him when the old firm was dissolved. If they were purchased by De Clausel, in order to furnish his part of the capital stock of the new firm, and on his individual credit, the fact that the new firm received the benefit of the logs would not render the firm liable, nor would De Clausel alone have the power to bind it by the subsequent note. *Watt* v. *Kirby*, 15 Ill. 201. This was the meaning of the refused instruction; and, in view of the very conflicting evidence, we think there should be another trial, in which this point can be explicitly stated to the jury.

Judgment reversed.

SAMUEL W. LESSLEY *et al.*
v.
MARY LESSLEY.

WIDOW — *of her rights upon a renunciation of the will.* Under the fifteenth section of the dower act, the widow of a person dying testate and leaving no children or descendants of children, upon renouncing the will, is entitled to one-half the estate in fee, and to the specific articles enumerated in the statute; but she is not entitled to dower in the remainder of the real estate or to the whole of the personal property.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. SILAS L. BRYAN, Judge, presiding.

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

Messrs. O'MELVENY & HOUCK, for the plaintiff in error.

Mr. WM. H. UNDERWOOD, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in chancery filed by defendant in error in the Circuit Court against plaintiffs in error. The bill alleges that defendant in error is the widow of Matthew Lessley, deceased; that he died in April, 1864, leaving no children or a descendant or descendants of children, or father or mother surviving him, but left a brother and the descendants of his deceased sisters; that he left both real and personal property which the bill describes; that he made a last will by which he made sundry bequests and legacies, — among others, he gave to defendant in error, his lands to hold during her life, with a remainder over in fee to Matthew Lessley; that she renounced the provisions made in her favor, and elected to take her dower and legal share of the estate of her husband; that subsequently she, under her hand and seal, elected to take, in lieu of dower and the provisions of the will in her favor, one-half of the real estate, and dower in the other half, and the whole of his personal property after payment of debts; and prays for partition, and assignment of her dower, and the establishment of her title to the property.

The answer admits that defendant in error is the widow of Matthew Lessley, deceased; that he left no children or descendants of children; admits the will is correctly stated; that defendant in error relinquished the provisions of the will as stated in the bill, but denies that she is entitled to one-half of the real estate, or to dower in the other half of the lands, or is entitled to the personal property of the deceased, inasmuch as the whole of it was bequeathed by the will and is charged with the payment of such bequests. On the hearing, the Circuit Court granted the prayer of the bill and decreed the relief sought. The cause is brought to this court to reverse that decree.

In the case of *Tyson* v. *Postlethwaite*, 13 Ill. 727, it was held that a widow of an intestate husband, under the forty-sixth section of our statute of wills, inherits, as heir to her intestate husband, one-half of his real and the whole of his personal property of which he died seized, after the payment of the debts of the estate, and also to be endowed in the remainder of his real estate. It was also held that this section was not repealed by the fifteenth section of the dower act of 1845, and that these sections were not repugnant. Again, in the case of *Sturgis* v. *Ewing*, 18 Ill. 176, the same rule was recognized and a construction was given to the fifteenth section of the dower act. And in this latter case it was held that the widow of a testator leaving no children or descendants of children may, if she elect, have, in lieu of her dower in the estate of which her husband died seized, one-half of all his real estate; that this section in its provisions applied to testate estates, while the forty-sixth applied to intestate estates.

By the latter of these cases the rule is announced, that the widow of a testator having no children, or descendants of children, may elect to renounce the provisions of the will made in her favor, and to take one-half of the real estate of which he died seized; and, as heir to her husband, she thereby becomes invested with the title in fee to that portion. Again, in the case of *Pitney* v. *Brown*, 39 Ill. 468, the same rule was announced, and the widow permitted to elect to take one-half of the land in fee of which her husband died seized of an estate of inheritance either at law or in equity. Under these authorities the widow, in this case, was entitled to the decree for one-half of the real estate named in her bill, and which was decreed to her by the court below.

This right of election proceeds upon the ground, that the wife has an interest in the estate of the husband, of which he cannot deprive her by will or otherwise, without her consent. And when he attempts to do so, she has the right to elect whether she will take the provision made for her by the will, or renounce it, and hold such rights in his estate as the law gives to her. She cannot claim a portion of the provisions of

the will and reject others, and claim under the statute. She must claim alone under the will, or altogether independent of its provisions. When, however, she has renounced the provisions of the will, she is restored to her rights under the statute. And such cases are provided for by the fifteenth section of the dower act. It declares, that, if a husband dies leaving a widow but no children, or descendants of children, the widow may, if she elect, have, in lieu of her dower in the estate of which her husband died seized, whether it shall or shall not have been assigned her, one-half of the real estate in fee simple, in her sole right, which shall remain after the payment of the debts and claims against his estate. And she may make an election within two months after being notified of the payment of such debts.

By this provision, the widow, by renouncing the provisions of the will, waives her dower in her husband's real estate, but gets in lieu of it one-half of the lands after payment of the debts.

This section, in the case of *Sturgis* v. *Ewing*, 18 Ill. 176, was held to apply alone to testate estates. And the case of *Tyson* v. *Postlethwaite*, 13 Ill. 727, holds, that the forty-sixth section of the statute of wills applies to intestate estates, and was the most liberal of the two in its provisions. It is not more liberal and beneficial to the widow, unless it is because it gives dower in the remaining half of the real estate, or the personal property which remains after the payment of the debts, while the fifteenth section of the dower act only gives one-half of the real estate, as it declares that, if the widow elects to take one-half of the lands of which her husband died seized, it shall be in lieu of dower. This language is comprehensive enough to embrace dower in all of the lands. It will not reasonably bear any other construction.

The sixth section of the act of February 11th, 1847 (Sess. Laws, p. 169), defines the word "dower," as employed in the forty-sixth section of the chapter entitled "wills," to embrace a saving to the widow of one-third of the personal estate of intestate estates forever, after the payment of debts. If this is taken as the definition of the word, then all of the personal property remaining after the payment of debts cannot be claimed where

there has been such an election by the widow. The land is taken in lieu of that, as well as dower in the other half of the real estate. A different rule prevails under these two sections. The first section of the act of 1847, however, gives to the widow in all cases the specific articles of personal property enumerated in the act. It makes no distinction between testate and intestate estates. The right is the same in all cases, if the widow resides, and administration is had, in this State. We, therefore, have no hesitation in believing that defendant in error is entitled to one-half of the real estate of her deceased husband, and the specific articles enumerated in the statute. But the court below erred in decreeing that she was entitled to dower in the remaining half of the real estate, and all the personal estate, after payment of debts. The decree must, therefore, be reversed and the cause remanded.

Decree reversed.

INDEX.

ABATEMENT.

DEATH OF ONE OF SEVERAL PLAINTIFFS.

1. *Whether the suit abates thereby.* The statute relative to the abatement of suits by the death of parties, was designed to prevent abatement in any case where the cause of action would survive, on the suggestion of the death, which suggestion is a matter of form, and may be made by either party. *Stoetzell et al.* v. *Fullerton*, 108.

2. In a joint action of assumpsit, on account, by two plaintiffs, where one of them, pending the suit, died, and judgment was afterward rendered therein, and without suggestion of such death having been made,—*held*, that the suit did not abate; the survivor, on the death of his co-plaintiff, being entitled to prosecute the action to final judgment. Ibid. 108.

3. *Defendant should avail himself of the death of plaintiff by plea in abatement—failure to do so—effect of.* In such case, the defendant, to have availed himself of the fact of the death of one of the plaintiffs, should have pleaded it in abatement; but, having failed to do so, and allowed the cause to be tried upon the merits, under the plea of *non-assumpsit*, under which plea such death could not have been proved, he is bound by the judgment rendered therein, and cannot afterward question it in a collateral proceeding. Ibid. 108.

ACTIONS.

EX TURPI CAUSA NON ORITUR ACTIO.

1. Where a person sends money to another with the object of inducing the latter to use his influence to get the former nominated for an office, without reference to the fitness of the applicant for the position he seeks, or the public good, and the party receiving the money does not use his influence for such applicant, but against him, the transaction on the part of him who sends the money, is of such improper character that the law will afford him no remedy to recover it back. *Liness* v. *Hesing*, 113.

2. During the late civil war, one B., engaged in illicit trade with the enemy, was detected by A., and to prevent his exposure to the authorities, he paid A. $1,000. *Held*, that B. could not recover it back. The law affords no relief to joint actors in an unlawful scheme. *Arter* v. *Byington*, 468.

LACHES OF AN ADMINISTRATOR.

In not defending suit—remedy of the heirs. See ADMINISTRATION OF ESTATES, 3; CHANCERY, 4.

ACTIONS. *Continued.*

TO RECOVER BACK USURY.

Voluntarily paid—action will not lie. See USURY, 1.

MONEY VOLUNTARILY PAID.

Whether it may be recovered back, when the promise under which it was paid was within the statute of frauds. See STATUTE OF FRAUDS, 4.

REFUSING A VOTE AT AN ELECTION.

Who has a right of action therefor. See ELECTIONS, 1.

ACTION OF DEBT.

When it will lie and when not. See DEBT, 1, 2, 3.

FORCIBLE ENTRY AND DETAINER.

Against whom the action will lie. See FORCIBLE ENTRY AND DETAINER, 1, 2, 3, 4.

ADMINISTRATION OF ESTATES.

PERSONAL ESTATE — ADMINISTRATOR.

1. *Administrator sole representative of personal estate.* An administrator or an executor, so long as he retains his office, is the sole representative of the personal estate of the deceased. *Gold, Admr., et al.* v. *Bailey*, 492.

JUDGMENT AGAINST ADMINISTRATOR.

2. *Binds the personal estate.* In such case, in the absence of fraud, the judgment binds the personal estate. Ibid. 492.

LACHES OF ADMINISTRATOR.

3. *Remedy of the heir.* And, if the administrator has been guilty of *laches* in not defending the suit at law, the remedy is on his bond. It will not be required of persons holding claims against an estate, to litigate them first with the representative of the deceased, and afterward with the heirs in like manner, without alleging fraud or collusion on the part of the administrator. Ibid. 492.

RIGHTS OF THE HUSBAND AS ADMINISTRATOR.

4. *May administer, but must distribute.* Under our statute, a husband has the right to become administrator of his wife's estate, but, like all other administrators, he must distribute the estate according to the statute of distribution. The statute of the 29th Car. 2d was never in force in this State. *Townsend et al.* v. *Radcliffe*, 446.

5. *Effect of act of* 1861. Nor does the act of 1861, securing to married women their separate property "during coverture," operate to change the rule in that regard, but on the death of the wife, intestate, her property becomes subject to the provisions of the statute concerning the distribution of intestate estates. Ibid. 446.

OF FOREIGN JUDGMENTS.

6. *Against an administrator of the same estate.* A judgment rendered in the State of Ohio against the executor of an estate was allowed as a claim against the estate of the deceased in the County Court of Cook county.

ADMINISTRATION OF ESTATES. OF FOREIGN JUDGMENTS. *Continued.*

Held, that such allowance was only *prima facie* evidence of the justice of the demand against the estate. *Rosenthal, Admr.*, v. *Renick et al.* 203.

7. And in such case, the claim having been founded upon a judgment to be paid in the State of Ohio, in due course of administration, its allowance by the County Court of Cook county was improper. A judgment against an administrator in one State, is no evidence of indebtedness against a different administrator of the same decedent in another State, for the purpose of affecting assets received by the latter under his trust. Ibid. 203.

RIGHTS OF CITIZENS OF OTHER STATES.

8. *Where administration has been granted in another State.* A citizen of another State, in which administration has been granted upon an estate, may come to this State and cause administration to be taken out here, a claim allowed, and real estate sold for its payment; and, in such case, it is not necessary to show that the personal estate in the other State has been exhausted. Ibid. 203.

REVOCATION OF LETTERS OF ADMINISTRATION.

9. *Who may apply therefor.* Where letters of administration had been granted to one as the widow of the intestate, on an application to revoke the letters on the ground that the administratrix had another husband living at the time of her marriage with the decedent, it was *held,* if the marriage with deceased were void, the issue are illegitimate, and do not stand in a position to apply for a revocation of the letters of administration, they having no right to administer upon the estate. *Myatt* v. *Myatt, Admx., et al.* 473.

LIMITATION OF CREDITOR'S LIEN.

Within what time such a lien should be asserted. See LIMITATIONS, 1 2, 3, 4.

WHAT ARE ASSETS.

Of a pre-emption right. See PRE-EMPTION, 2.

ADMISSIONS.

ADMISSIONS AS EVIDENCE. See EVIDENCE, 11, 12, 13.

AGENCY.

POWERS OF AGENT.

1. *He must act within the scope of his authority.* The rule is an established one, that an attorney in fact can only act within the strict letter of his authority, for the purposes and in the manner prescribed, a departure from which will not be sanctioned. *Chase* v. *Dana,* 262.

2. *Application of this rule to the confession of a judgment under a warrant of attorney.* See JUDGMENTS, 6.

3. *Power to execute a replevin bond in the name of his principal.* M. executed to H. a power of attorney under seal, authorizing him to settle his business and collect all claims due to him in the State of Illinois; which instrument conferred upon him extensive powers in relation thereto

AGENCY. POWERS OF AGENT. *Continued.*

giving him authority to generally do all and every act and acts, thing and things, service and services, in the law whatsoever needful and necessary to be done, in the settlement of such business, and the collection of the claims. *Held*, that a replevin bond, executed by H. as M.'s attorney, under this instrument, was within the scope of his authority and binding upon M. *Merrick* v. *Wagner*, 266.

CONTINUING AUTHORITY OF AGENT.

4. *Presumption.* Where a party is shown to have been the agent of another in a particular business, and continues to so act within the scope of his former authority, it will be presumed that his authority still continues, and will bind his principal unless the persons with whom he acts have notice that his agency has ceased. *Diversy* v. *Kellogg*, 114.

RESCISSION OF CONTRACTS.

5. *Authority of agent.* An agent for a commercial house who travels and solicits orders for his principal, in the absence of proof will not be presumed to have authority to rescind his contracts and take back goods furnished by the house for which he is agent, when they prove unsatisfactory to the customer. Ibid. 114.

DELIVERY OF GOODS TO AN AGENT.

6. *Of notice that his agency had ceased.* In an action to recover the price of goods sold, and delivered to an agent of the vendee, it is not error for the court to instruct the jury that a party could only recover by showing that the person receiving goods for his principal was his general agent and acted within the scope of his authority, or was his special agent to receive the goods in dispute, unless it was shown that his general agency was continued after his principal ceased to do business. Such an instruction excludes the fact that the person may have the general agency of his principal before he quit business and the seller not notified that he had ceased to be his agent. Ibid. 115.

PROOF OF AGENCY.

7. *By the pretended agent.* A party claiming that he had authority to act as the agent of another in a particular transaction, cannot establish such agency by his own uncorroborated testimony. *Maxey et al.* v. *Hecke-thorn*, 437.

8. *By former acts of recognition by principal.* Proof of the fact, that a person had on former occasions recognized another as his agent in making purchases for him, is not sufficient to charge him for a purchase afterward made by such person, claiming to act as his agent, without proof that at the time of such subsequent purchase the vendor was cognizant of such former acts of recognition. Ibid. 437.

RATIFICATION BY THE PRINCIPAL.

9. *Must be complete.* Where an attorney compromised a debt of his principal, who, after a full knowledge of all the facts attending it, retained the money paid on such compromise, he will be held bound by it, and will not be permitted to ratify it so far as it is for his interest and repudiate the residue. *Henderson et al.* v. *Cummings*, 325.

AGISTMENT.

CARE AND DILIGENCE REQUIRED.

1. An agistor of stock for hire is bound to exercise reasonable care and diligence, by himself and his servants, for the safety of the property committed to his charge; and whether this has been done, is a question of fact for the jury to determine, in view of all the testimony before them. *Halty* v. *Markel*, 225.

2. An agistor of stock is bound to employ careful, skillful and trustworthy servants, and is liable for all injuries done by them, in the course of their employment, through negligence or carelessness; but is not liable for any malicious or willful act committed by them without his knowledge or consent. Ibid. 225.

ALLEGATIONS AND DECREE.

MUST CORRESPOND.

1. Parties can only recover on the case made in their pleadings. *Maher* v. *Bull, Admx.* 98.

2. So upon bill filed by one partner against another for a dissolution of the partnership, and for an account, the complainant cannot be allowed damages against the defendant for a failure in duty on the part of the latter, unless there are allegations in the bill upon which such relief can be based. Ibid. 98.

3. Nor can the complainant have specific relief based upon a sale made by the defendant in fraud of the complainant's rights, except the latter furnish the basis for such relief by appropriate allegations in his bill. Ibid. 98.

4. When a complainant in chancery seeks a specific performance, his bill must be framed with that view. *Pitts et al.* v. *Cable et al.* 103.

ALLEGATIONS AND PROOF. See PLEADING AND EVIDENCE, 5, 6, 7.

AMENDMENTS.

AMENDMENT OF RECORD.

1. *When allowable.* When in the record of a criminal case, a clerical error is made, the court has the power to permit such mistake to be corrected, upon a proper application by the people. *Kennedy* v. *The People*, 283.

2. So where a grand jury returns an indictment into court, and the clerk erroneously enters upon the record the return of an indictment for a different offense from that named in the indictment, the erroneous entry may be corrected by the court. Ibid. 283.

AMENDING A VERDICT.

Where the verdict was sealed and the jury separated. See VERDICT, 2.

APPEAL.

FROM BOARD OF SUPERVISORS.

1. *To the Circuit Court — concerning an assessment for taxation.* Under the act of 1861, an appeal will lie from a board of supervisors to the Cir-

APPEAL. FROM BOARD OF SUPERVISORS. *Continued.*

cuit Court, in the matter of equalizing assessments for taxation. *Board of Supervisors of Bureau Co.* v. *The Chicago, Burlington and Quincy Railroad Co.* 229.

2. *Constitutionality of the act.* The act of 1861, allowing appeals in such cases is constitutional. Ibid. 229.

APPEALS AND WRITS OF ERROR.

WHEN THEY WILL NOT LIE.

From decision of Circuit Court in proceedings to locate highways. Under the 38th section of the statute relative to public roads, and the authority of the case of the *County of Sangamon* v. *Brown*, 13 Ill. 210, the decision of a Circuit Court, in proceedings brought to that court for locating a public highway, is final, and cannot be appealed from. *Marion County* v. *Harper*, 482.

ASSESSMENTS.

FOR PUBLIC IMPROVEMENTS. See SPECIAL ASSESSMENTS.

ASSESSMENT OF DAMAGES.

ON JUDGMENT UPON DEMURRER.

Admissibility of evidence. See PLEADING AND EVIDENCE, 8.

ASSIGNMENT.

INDORSEMENT IN BLANK.

1. *What may be written over it.* The rule is firmly established, that the holder of commercial paper with a general indorsement may fill it up with any contract consistent with such paper, and in accordance with the agreement of the parties when the indorsement was made. Also, such indorsement may be filled up at any time before or at the trial. The contract of assignment and that of guaranty are not the same, but different. *Croskey* v. *Skinner*, 321.

2. *Effect of filling up the blank improperly.* Where a holder fills up a general indorsement with both an assignment and a guaranty, and the indorser files a plea denying the guaranty, verified by oath, the holder may abandon his claim to a recovery under the guaranty, and, upon proper proof of diligence or insolvency, recover on the assignment; and, when the question of authority to write the guaranty is withdrawn, the court will not, in the absence of evidence, presume that it was unauthorized. Even if the wrongful writing of a guaranty in such an indorsement could be held to be an alteration of the contract of assignment and could have that effect, there must be evidence that it was wrongful. Ibid. 321.

3. There being no doubt of the right to fill up the indorsement with an assignment, it is not perceived how filling in the guaranty could affect the assignment, whether authorized or not at the time. But if it could be so held, the court would not presume a want of authority in the absence of proof. It does not matter whether the assignment were filled up before or on the trial. The writing of an unauthorized guaranty over such an

ASSIGNMENT. INDORSEMENT IN BLANK. *Continued.*
indorsement in no wise affects, alters or modifies the contract of assignment. *Croskey* v. *Skinner*, 321.

FORECLOSURE BY SCIRE FACIAS.
Where the note is assigned, foreclosure in the name of the payee. See MORTGAGES, 21.

ASSIGNEE OF TITLE BOND FOR LAND.
Whether liable for unpaid purchase money due the first vendor. See PURCHASERS, 3.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.
PREFERENCE OF CREDITORS.
1. *Is allowable.* A debtor in failing circumstances may make an assignment for the benefit of his creditors, and in so doing, he may make a preference in favor of a portion of his creditors. *Blow et al.* v. *Gage et al.* 208.
2. But to be valid, it must be done in good faith; for if intended to delay creditors, or otherwise, for fraudulent purposes, or if the preference be a secret trust, it is void. Ibid. 208.
3. Transactions of this character are required to be fairly and honestly made, and, to that end, they will be rigidly scrutinized. Ibid. 208.

PROVISION FOR PAYMENT OF DAMAGES.
4. *When incurred in relation to the execution of the trust.* It is no objection to a deed of assignment, that it contains this language: "deducting and retaining all such costs, charges, *damages*, expenses and disbursements, as shall be sustained, incurred, or reasonably due, for or in relation to the execution of the trusts." The use of the word "damages" therein, does not vest in the trustee power to squander the assets, by the charge of fictitious damages. Ibid. 208.

ALLOWANCE OF DAMAGES.
5. Where a trustee, in an effort to execute his trust justly, renders himself liable to damages, which are awarded against him, he will be allowed to retain the amount thereof out of the fund. Ibid. 209.

EXPENSES OF THE TRUST.
6. *Are always allowed.* The law allows all reasonable charges, costs, expenses and disbursements, to be paid out of the fund, but they are always subject to be reviewed by a court of equity; and such disbursements will be allowed, whether provided for in the deed or not. Ibid. 209.

EMPLOYMENT OF THE DEBTOR.
7. *By the trustee.* Where the trustee employed the debtor to assist him in the settlement of the affairs of the firm, the management of the trust fund remaining strictly under the control of the trustee, such employment will not be considered as a badge of fraud, unconnected with other facts tending to prove fraud. Ibid. 209.

OF A DEBT DUE A FORMER PARTNER.
8. The fact that a debtor, making an assignment for the benefit of his creditors, includes in the list of preferred creditors a debt fairly and

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

OF A DEBT DUE A FORMER PARTNER. *Continued.*

honestly incurred by him, in buying out a former partner, and for money loaned to him by such retiring partner after his withdrawal, cannot be regarded as a fraud upon the creditors. *Blow et al.* v. *Gage et al.* 209.

SALE BY ONE PARTNER TO ANOTHER.

9. *What is proof of insolvency.* It is no evidence that a firm is insol vent, because, if forced to wind up its business at a particular time, i would be unable to pay all of its liabilities. And it is no fraud upon the creditors, for one of its members to sell out to the other partners at such a time his interest in the partnership, and to be so there must be proof of such fraudulent design. Ibid. 209.

PURCHASES BEFORE ASSIGNMENT.

10. *Whether fraudulent.* Purchases made by a firm some time before an assignment, arriving subsequently, the title thereto vests in the assignees, the seller having failed to exercise the right of stoppage *in transitu.* Ibid. 209.

11. Purchases made by a party, on credit, at a time when he knew he could not pay his debts, will not, for that reason alone, be regarded as fraudulent. Ibid. 209.

12. But the rule is otherwise as to purchases made in contemplation of an assignment. Ibid. 209.

NOTICE OF FAILURE.

13. *Need not be given.* There is no rule of law that requires a debtor to give notice of his failure. Ibid. 209.

FRAUD MUST BE PROVED.

14. The fraudulent design of a debtor in making an assignment must be proved, and cannot be established by mere suspicion; but can only be sustained upon satisfactory proof of the fact. Ibid. 209.

ATTACHMENT.

RESIDENCE — WHAT CONSTITUTES.

Within the meaning of the attachment act. Whether a person who moves from New York to Illinois gains a residence in this State, within the meaning of our attachment law, is a question of intention deducible from facts and circumstances.

In 1859 a party, formerly a resident of Medina, New York, came to DeKalb county, Illinois, and purchased a farm which he cultivated and lived on from the spring of 1861 to August 1864, but never moved his wife thereto from Medina.

While thus living on his farm he voted in this State and spoke of Illinois as his residence, and declared his intention to make the farm his permanent home, and said his wife would join him on the decease of her mother, who was then too old to be removed. In May, 1864, his property was attached on the ground that he was not a resident of Illinois.

Held, that these facts and circumstances manifest a residence, and, therefore, that the attachment would not lie. *Wells* v. *The People, etc.* ...

ATTORNEY AT LAW.

OF HIS AUTHORITY.

1. *And when it ceases.* An attorney usually has the power to receive his client's money in the case in which he is employed, and this, by virtue of his retainer. The fact of employment implies such authority, unless limited, and even then a client would be bound, unless the party paying the money to the attorney had notice of the limitation. *Ruckman et al.* v. *Alwood et al.* 183.

2. The power of an attorney ceases upon the termination of the relation, after which any and all acts of an attorney, whether in the matter of receiving the benefits of a judgment, or decree, releasing errors of record, or otherwise, are unwarranted, being without authority, and therefore do not bind the client. Ibid. 183.

THEIR BRIEFS SHOULD BE DECOROUS.

3. It is expected that attorneys, in their briefs in the Supreme Court, will abstain from indulging in unkind remarks or allusions toward the judge who tried the cause below, and that they will be decorous to opposing counsel. *Belton, Admx.*, v. *Fisher*, 36.

AURORA, CITY OF.

SUMMONS.

For violation of ordinance—requisites of summons. See PROCESS, 2.

AUTHENTICATION.

RECORDS OF FOREIGN JUDGMENTS.

1. When the transcript of the proceedings and judgment in a suit tried before a justice of the peace in another State, is authenticated in such manner as to be admissible in evidence, under the laws of such State, in other counties than that in which the judgment was rendered, then the authentication is sufficient in this State. *Belton, Admx.*, v. *Fisher*, 35.

2. *Transcript of judgment rendered by a justice of the peace in Wisconsin.* Where a transcript of a judgment rendered by a justice of the peace in the State of Wisconsin has attached thereto the certificate of the clerk of the Circuit Court of the county in which the justice resides, under the seal of the court, specifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace of such county, that is a sufficient authentication to render the transcript admissible in evidence in the courts of this State. Ibid. 35–6.

BAILMENT.

OF AGISTMENT. See that title.

LOSS OF NOTE BY EXPRESS COMPANY.

Liability of the company. See EXPRESS COMPANY, 1, 2.

BELLIGERENTS.

WHO ARE BELLIGERENTS.

And subject to what law. See PERSONAL LIBERTY, 3, 4, 5.

BILLS OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS, 2 to 6.

BILL TO REDEEM. See MORTGAGES, 23, 24, 25.

BLANK INDORSEMENT. See ASSIGNMENT, 1, 2, 3.

BOUNDARIES.
OF GRANTS UPON WATER COURSES. See GRANT, 1, 2, 3.

BURDEN OF PROOF. See EVIDENCE, 5.

CHANCERY.
JURISDICTION.

1. *When the right must be first established at law.* Where three persons, in possession respectively of certain lands, viz., A of those lying upon the east bank of a river, B of those lying upon the west bank, and C of an island in the center, made their respective entries for the same at the government land office on the same day, and which lands had been separately surveyed and purchased by them as distinct tracts,—*held*, in a suit in chancery brought by A against the others to settle their respective rights to the use of the water bounding these grants, that a court of equity could not acquire jurisdiction in such case, to settle the legal rights of the respective parties to the water course, until after the right and its infringement had been established in a court of law. *Stolp et al.* v. *Hoyt*, 219.

2. That the rights of the respective parties in the water are sufficiently certain to be easily determined by a court of law for any infringement thereof by either. Ibid. 219.

3. *Where there is a defense at law.* Where it appears that a full and complete defense might have been interposed at law, a court of equity will not relieve. *Gold, Admr., et al.* v. *Bailey*, 491.

4. So, when a judgment is obtained against an administrator, equity will not interfere to relieve against it at the suit of an heir of the deceased, it appearing by the bill, that the grounds upon which impeachment of the judgment was sought constituted a good defense, and might have been interposed in the suit at law, and no fraud or collusion in obtaining it was alleged against the administrator. Ibid. 491.

MULTIFARIOUSNESS.

5. *When it must be objected to.* The objection that a bill is multifarious cannot be raised for the first time in this court. It should be made in the court below, either by demurrer, plea or answer. *Henderson et al.* v. *Cummings*, 325.

6. *Waiver thereof.* And, where a party files his answer, and goes into an examination of the testimony on the merits, he will be considered as having waived such objection. Ibid. 325.

CHANCERY. *Continued.*

TECHNICAL DEFECTS IN PLEADING.

7. *How questioned.* Technical objections to a bill in chancery, to be available at any time, can only be raised by demurrer. *McCloskey* v. *McCormick et al.* 336.

SPECIFIC PERFORMANCE.

8. *Of a decree providing against a contingent right of dower.* In a proceeding to compel the specific performance of a contract for the sale and conveyance of land, the court decreed a conveyance, upon payment by the purchaser of $880, the amount due on the contract, and that in case the wife of the defendant should refuse to join in the deed, the purchaser might retain $250 out of the purchase money. *Held*, that this provision in the decree, authorizing the purchaser to retain $250 out of the purchase money, as an indemnity against the contingent right of dower, was erroneous, there being no grounds upon which to base such judicial action. *Humphrey* v. *Clement*, 299.

9. A contract for the sale and conveyance of lands, in order to protect the purchaser against the consequences resulting from a refusal of the wife of the vendor to join in the deed, should specify what proportion of the purchase money he may retain, in the event the wife should refuse to release dower. In the absence of such provision the purchaser must take his deed and rely upon its covenants. Ibid. 299.

10. *A mere naked verbal promise* by a party to convey lands, supported by no consideration, if not afterward executed by a conveyance, confers no title, either legal or equitable, in the premises. *Holmes* v. *Holmes*, 168.

COMPELLING A RELEASE OF TITLE.

11. A party having a pre-emption right to a certain tract of land, under the pre-emption clause of the act incorporating the Illinois Central Railroad company, died, leaving several heirs. A party purchased the interests of all the heirs but one, and, paying the purchase money to the company for the entire tract, obtained a deed therefor from the company, through a commissioner appointed under a decree for that purpose. It was *held*, that the heir who had not sold her interest under the pre-emption, could maintain a bill to compel the party holding the deed from the commissioner, to release and convey to her, her interest in the land, upon payment of her proportionate share of the purchase money with interest. *Lester et al.* v. *White's Heirs*, 464.

ANSWER TO CROSS-BILL.

12. *Time should be allowed therefor.* Where a defendant to a bill in chancery, was ruled to answer within a certain time, and after the expiration of the rule, filed his answer, and afterward obtained leave to amend it, but, instead thereof, filed a cross-bill, and took a rule upon complainant in the original bill, to answer *instanter*, and at the same time, and in the same order, took a *pro confesso* decree upon his cross-bill, granting him affirmative relief,—*held*, that the complainant should have had a reasonable time given him, to answer the cross-bill. That under such circum-

CHANCERY. ANSWER TO CROSS-BILL. *Continued.*
stances, to allow defendant to take a *pro confesso* decree *instanter*, was irregular and unreasonable. *Holbrook* v. *Prettyman et al.* 311.

SWORN ANSWERS IN CHANCERY.
13. *Degree of proof required to overcome them.* Where an answer to a bill in chancery is required to be made under oath, and is responsive to the allegations of the bill, it must be received as true, unless disproved by the evidence of two witnesses, or that of one and corroborating evidence amounting to the evidence of another, such answer being evidence of a higher grade than that of a single witness. *Blow et al.* v. *Gage et al.* 208.

MOTION TO DISMISS BEFORE ANSWER.
14. Although irregular and unknown to correct chancery practice, a motion to dismiss a bill, interposed before answer, and acted upon by the court, must be held to have the same effect as a demurrer. *Vieley* v. *Thompson et al.* 9.

DISMISSING BILL WITHOUT PREJUDICE.
15. *When proper.* Where a bill in chancery is not framed on a basis such as will entitle the complainant to the relief he seeks, but it is obvious to the court that he has equities which under a proper bill he could enforce, the true practice is to dismiss his bill without prejudice. *Sheldon* v. *Harding et al.* 68.

REPLICATION.
16. *Pending leave to amend an answer.* Where a defendant in chancery has obtained leave to file an amended answer, the complainant is under no obligation to file a replication to the original answer pending such leave and the amended answer not filed. *Holbrook* v. *Prettyman et al.* 311.

EXCEPTIONS TO MASTER'S REPORT.
17. *Whether necessary to be taken.* Where it appears from the record, that an improper decree has been rendered, it will be reversed, although objections may not have been interposed on the coming in of the master's report. *Strang et al.* v. *Allen*, 429.

PRESERVATION OF EVIDENCE.
18. Under our practice, the evidence in chancery proceedings should be preserved in the record. *Quigley et al.* v. *Roberts*, 503.

BILL TO REDEEM.
By a junior incumbrancer or his assignee from the assignee of a prior mortgage. See MORTGAGES, 23, 24, 25.
Statement of account on bill to redeem. See same title, 26 to 29.

ENFORCING A TRUST. See LIEN, 2.

MISTAKE.
Reforming instrument therefor. See MISTAKE.

DISSOLUTION OF PARTNERSHIP.
When it will be decreed. See PARTNERSHIP, 1, 2, 3.

CHANCERY. *Continued.*
RECEIVER TO COLLECT DEBTS.
When appointed, in a suit for a dissolution of partnership. See RECEIVER, 1.
TRIAL BY JURY IN CHANCERY.
On a question of alleged insanity. See INSANITY, 1.
OF SALES OF LAND EN MASSE.
Whether they will be set aside. See SALES, 18.

CHATTEL INTEREST.
OF A PRE-EMPTION RIGHT. See PRE-EMPTION, 1.

COLLECTOR'S NOTICE.
IN THE CITY OF CHICAGO. See TAXES, 15.

CONDEMNATION OF LAND.
FOR PUBLIC USE.
Its effect on the title. See DOWER, 8.

CONDITION PRECEDENT. See CONTRACTS, 7.

CONFESSION OF JUDGMENT. See JUDGMENTS, 4, 5, 6.

CONFLICT OF LAWS.
POWER OF CONGRESS.
1. *Over rights in the States.* Congress has no power to interfere with the remedies furnished by State laws, through State tribunals, for the injury of one citizen by another. *Johnson* v. *Jones et al.* 144.
2. So where a person was illegally deprived of his liberty, under an order of the President of the United States, the remedy given by the laws of the State, in favor of the injured party against the person making the arrest, cannot be taken away by any subsequent act of congress. Ibid. 144.
JUDGMENTS IN OTHER STATES.
When against an administrator—of their footing in this State. See ADMINISTRATION OF ESTATES, 6, 7.
ADMINISTRATION OF ESTATES.
Rights of citizens of other States. See same title, 8.

CONSIDERATION.
QUITCLAIM DEED.
Sufficient consideration to support a contract. A quitclaim deed for land, without reference to the character of title, is, in the absence of fraud, a sufficient consideration to support a contract. Money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance, unless fraud has been practiced on the grantee. *Sheldon* v. *Harding et al.* 68.

CONSTITUTIONAL LAW.

APPEALS FROM BOARD OF SUPERVISORS.

1. *The act of* 1861, allowing appeals from the decision of a board of supervisors to the Circuit Court, in the matter of the equalization of assessments for purposes of taxation, is constitutional. *Board of Supervisors of Bureau County* v. *The Chicago, Burlington and Quincy Railroad Co.* 229.

OF THE RULE OF CONSTRUCTION.

2. This court has repeatedly declared, that it will not pronounce a statute unconstitutional, except in a case where the violation is plain and palpable. Ibid. 229.

SPECIAL ASSESSMENTS.

Power of the legislature to authorize the assessment of benefits. See SPECIAL ASSESSMENTS, 1.

PENALTY FOR NON-PAYMENT OF TAXES.

Power of the legislature in that regard. See TAXES, 18, 19.

CONTRACTS.

WHERE MADE.

1. *Within the meaning of the act of* 1861, *in relation to sending process to foreign county.* See PRACTICE, 9, 10, 11.

MODE OF PERFORMANCE.

2. *Need not be performed in installments.* Where a railroad company agrees to furnish six cars, for an excursion, upon certain notice to be given, and there was a request for only four cars, a failure to furnish the smaller number was no breach of the contract. The company had a right to perform the contract as an entirety, or could not be required to perform it at all. *Illinois Central Railroad Company* v. *Demars*, 292.

WHERE NO TIME OF PAYMENT SPECIFIED.

3. *When due.* Where time of payment is not specified in a contract, the law will presume that it was intended by the parties to be paid in a reasonable time. *Niemeyer* v. *Brooks*, 77.

4. *Necessity of a demand in such case.* And in such case, where a reasonable time has elapsed and payment has not been made, it is not necessary to make a demand before bringing suit. Ibid. 77.

CONTRACTS PAYABLE IN GOLD.

5. *Are payable in legal tender notes.* A contract for the payment of a certain sum of money "in gold," may be discharged by the payment of the same sum in legal tender notes. This rule applies as well in a suit in equity for a specific performance, as in an action at law upon the contract. *Humphrey* v. *Clement*, 299.

EXCUSE FOR NON-PERFORMANCE.

6. *On a sale of grain — tender unavailing.* Where a party through his agent purchases grain to be delivered at a future day, and he fails to furnish his agent with means to pay for it, and it is proved that the property would not have been received if a tender had been made, and that the

CONTRACTS. EXCUSE FOR NON-PERFORMANCE. *Continued.*

grain was ready for delivery under the agreement and offered to be delivered, and it was refused, — then there was a right of recovery. *McPherson* v. *Nelson et al.* 124.

DEPENDENT AND INDEPENDENT COVENANTS.

7. *What is a condition precedent — and of the necessary averments in respect thereto.* Where an agreement under seal contains a number of covenants to be performed by one party, and the other party, in consideration of such covenants, agrees to perform an act, the first are precedent covenants, and their performance must be averred and proved to warrant a recovery on the latter and dependent covenant. *Hoy* v. *Hoy*, 469.

RESCISSION OF CONTRACTS.

8. *What constitutes.* Jones, the owner of certain lands which were incumbered by deeds of trust, conveyed the same to one Lloyd, subject to all recorded mortgages, for which Lloyd executed to him his note for $4,200. Subsequently Jones and Lloyd effected a settlement with the owner of the incumbrances, by which Jones and Lloyd and wife quit-claimed the premises to the mortgagee, Lloyd, and the mortgagee at the same time executing a contract whereby the latter agreed to convey the lands to Lloyd upon the payment of $2,330.30, the amount found to be due to the mortgagee upon such settlement, in ten years at ten per cent interest. *Held*, that this transaction between the parties must be regarded as a rescission of the sale of the premises by Jones to Lloyd. *Jones* v. *Miller*, 181.

9. *Whether notice required — and of the manner of exercising the right.* In an action of forcible entry and detainer by vendor against vendee, under a contract making time of the essence of the agreement, and giving vendor the right to rescind and hold vendee as tenant at will in case of failure to make payments as stipulated, it appeared that default was made and notice of rescission served on vendee's wife during his absence in the military service of the government, as a volunteer soldier; the court instructed the jury that the contract could not be rescinded except by personal notice, and that notice upon vendee's wife while he was thus absent was not sufficient; *held*, that the instructions were erroneous; that the contract required no personal notice of rescission to be served on vendee, and that the right of rescission, being reserved by the vendor to be exercised at his option in case of default, could be asserted by the vendor in any manner manifesting an intention to rescind, and that the absence of vendee, however meritorious, did not change the terms of the contract or furnish immunity from the consequence of its violation. *Murray* v. *Schlosser*, 14.

10. *By acts of the parties.* As a general rule, a breach of contract by one party absolves the other from a performance of its terms and conditions. When such breach occurs, the other party is at liberty to rescind the agreement. *Graham et al.* v. *Holloway*, 385.

11. *As to the mode of rescission.* The party having the right to rescind may manifest his intention to do so in a variety of modes; one of which is by suing, and recovering damages sustained by the breach. Ibid. 385.

CONTRACTS. RESCISSION OF CONTRACTS. *Continued.*

12. *Effect of rescission.* And where a party elects to rescind by suing and recovering for a breach of the contract, he cannot afterward insist upon the performance of any of its conditions, unless the contract should be renewed. *Graham et al.* v. *Holloway*, 385.

RENEWAL AFTER RESCISSION.

13. *The contract may be renewed.* The contract may be renewed after such a rescission, either by an express agreement of the parties, or by acts which show an intention to give it new force and effect. Ibid. 385.

14. *Relations of the parties after such renewal.* But if a contract should be thus revived after having been rescinded by the recovery of a judgment for a breach of its conditions, the party who had rescinded cannot enjoy the fruits of his judgment and also insist upon the performance of the contract,—he cannot hold the two-fold and antagonistic position of a party to the contract, entitled to have its provisions executed, and a judgment creditor, whose rights as such are based upon a rescission of that contract. Ibid. 385.

15. So where a purchaser of land from one who held under a contract of purchase, having paid his purchase money, sued and recovered a judgment against his vendor for the money paid and interest, as damages for non-compliance of such vendor with his contract to convey, the recovery of such judgment operated as a rescission of the contract; and upon the original vendor filing his bill to subject the land to his lien for unpaid purchase money due from his vendee, such second purchaser who had recovered the judgment, filed his cross-bill asserting his rights as a purchaser, to the fee in the land after such prior vendor's lien was satisfied, and a decree was rendered recognizing him in that position, and at the sale under that decree he became the purchaser for the sum remaining due the original vendor, which was less than the amount of his judgment, and paid the money. Afterward, upon his attempting to collect his judgment, it was *held*, that, having assumed the position of a purchaser in his cross-bill, and obtained relief as such, he abandoned his position as a judgment creditor, and that, upon being reimbursed the amount he had bid at the sale to satisfy the prior vendor's lien, he must enter his judgment satisfied. Ibid. 385.

AUTHORITY OF AGENT TO RESCIND.

16. *Presumption.* See AGENCY, 5.

CONSTRUCTION OF CONTRACTS.

17. In giving a construction to a contract, the question is: What was the bargain, by a fair and reasonable construction of the words and acts of the parties, and not what was the secret intent or understanding of either of them. *Nichols* v. *Mercer*, 250.

CONTRACTS CONSTRUED.

18. *Construction of a release of one of several co-obligors, as to its effect on the others.* See RELEASE, 1 to 6.

19. *Construction of a lease as to the length of the term.* See LANDLORD AND TENANT, 10.

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

20. *Covenant by a mortgagee to reconvey—nature of the title to be reconveyed.* See MORTGAGES, 6.

OF ILLEGAL CONTRACTS.

21. *Ex turpi causa non oritur actio.* See ACTIONS, 1, 2.

CONVEYANCES.

WHEN A DEED TAKES EFFECT.

1. A deed takes effect from its delivery. *Blake* v. *Fash*, 302.

DELIVERY OF A DEED.

2. *Presumption.* The presumption is, that a deed was delivered on the day of its date. Ibid. 302.

QUITCLAIM DEED.

Is a sufficient consideration to support a contract. See CONSIDERATION, 1.

OF LAND OF A MARRIED WOMAN.

The husband must join in the conveyance thereof. See MARRIED WOMEN, 1.

OF A PRE-EMPTION RIGHT.

Mode of transfer thereof. See PRE-EMPTION, 1.

CORPORATIONS.

MUNICIPAL CORPORATIONS.

1. *Of their duty and liability in respect to keeping their highways in safe condition.* See HIGHWAYS, 1, 2, 3, 4.

2. *Authority of a town to prevent the establishment of a cemetery, under a power "to abate and remove nuisances."* See NUISANCES, 1.

COUNTY COURT OF LA SALLE.

OF ITS JURISDICTION.

As extended by the act of 1865. See JURISDICTION, 1.

COURTS.

TWENTY-SIXTH CIRCUIT.

Franklin county remained therein, under act of 1867. See JUDICIAL CIRCUITS.

COVENANTS FOR TITLE.

COVENANT BY MORTGAGEE TO RECONVEY.

Nature of the title to be reconveyed. See MORTGAGES, 6.

CRIMINAL LAW.

JURY MUST BE IN CHARGE OF SWORN OFFICER.

1. The 189th section of the Criminal Code requires, that the officer having charge of a jury, when they retire to consider of their verdict, shall be sworn to attend them to some private place, and to the best of his ability to keep them together without meat or drink, water excepted, unless by leave of the court, until they shall have agreed upon their

CRIMINAL LAW.

JURY MUST BE IN CHARGE OF SWORN OFFICER. *Continued.*

verdict, nor suffer other persons to speak with them, and when they agree, to bring them into court. *Held*, that it is error, in a case of felony, to omit to so swear the officer into whose charge the jury are placed. *Lewis* v. *The People*, 452.

2. The 190th section declares, that, if any such officer shall knowingly violate his oath, he shall be punished for a contempt of court by fine or imprisonment. These provisions were adopted to secure a fair and impartial trial to the accused, as he not unfrequently is in prison at the time, and is unable to guard his rights. It is the duty of courts to strictly guard human life and liberty from being sacrificed by public prejudice or excitement. Outside influences should be kept from the jury trying such causes. These provisions of the statute are clear, explicit and peremptory, and cannot be omitted, and when refused it is error. Ibid. 452.

SEPARATION OF JURY.

3. *When ground for reversal.* If a jury, in a capital case, during the progress of the trial, separate without the authority of the court, their verdict will be set aside, where it appears, that, in consequence of such separation, they were exposed to improper influences, which might have operated to the prejudice of the accused in such manner as to affect their verdict. *Russell et al.* v. *The People*, 508.

OF RECALLING A JURY.

4. *After they have sealed their verdict and separated.* See **JURY, 1 to 4.**

CURTESY.

ESTATE AS TENANT BY THE CURTESY.

Effect of act of 1861 *on that estate.* See MARRIED WOMEN, **2, 3.**

DAMAGES.

MITIGATION OF DAMAGES.

1. *In trespass for an illegal arrest and false imprisonment.* In an action of trespass against a civil officer for illegally arresting and imprisoning the plaintiff, while it is no bar to the action for the defendant to plead that the arrest was made under the order of the President, in time of war, for alleged disloyal practices of the plaintiff, yet such alleged facts may be proved in mitigation of vindictive or exemplary damages, and for the purpose of rebutting the presumption of malice. *Johnson* v. *Jones et al.* 144 Mr. Justice BREESE *dissenting.*

VINDICTIVE DAMAGES.

2. *Whether recoverable.* See MEASURE OF DAMAGES, **1.**

NEGLECT TO ASSIGN DOWER.

3. *When the widow entitled to damages.* See DOWER, **5, 6, 7.**

4. *Measure of damages in such case.* See same title, **8, 9, 10.**

5. *Measure of damages, generally.* See MEASURE OF DAMAGES.

DEATH.

DEATH OF ONE OF SEVERAL PLAINTIFFS.

Whether the suit will abate thereby. See ABATEMENT, 1, 2.

DEBT.

WHEN THE ACTION WILL LIE, AND WHEN NOT.

1. Where a party covenants to pay a specified sum of money, annually, for ten years, on a specific day in each year, debt is the proper remedy, notwithstanding the agreement contains other covenants, the performance of which are precedent to the payment of the money. *Hoy* v. *Hoy*, 470.

2. The action of debt lies on a lease for the recovery of rent in arrear, on an annuity deed for the recovery of the annuity, and on a mortgage to recover the mortgage debt. Ibid. 470.

3. The action of debt will not lie to recover on a bond for the payment of a sum of money payable by installments, until the last is due; but it will lie to recover money payable at different times, for a specified period of time. Ibid. 470.

DEBTOR AND CREDITOR.

A DEBTOR MAY PREFER HIS CREDITOR.

Where a debtor who is insolvent has property in his possession, a portion of which was purchased with the money of another, the latter has an equitable right to be protected as a creditor, and to be preferred by the debtor over other creditors not so situated. *Hart* v. *Wing*, 142.

DECLARATIONS.

AS EVIDENCE. See EVIDENCE, 14, 15.

DECREE.

DECREE AGAINST INFANTS.

1. *When set aside.* Where a decree has been rendered against a minor, without a guardian, or appearance by attorney or otherwise, it will be set aside on proper motion made, and the party will be allowed to make any defense to which he is entitled. *Hall et al.* v. *Davis*, 494.

2. *Cannot be set aside on motion of a person not made a party to the suit.* A decree rendered in a suit will not be set aside on the motion of a person who was not made a party to the proceeding. But, where the decree has been set aside on motion of a party entitled to it, such person may then file his cross-bill and have his rights in the case determined. Ibid. 494.

MUST CONFORM TO THE ALLEGATIONS. See ALLEGATIONS AND DECREE, 1 to 4.

DEDICATION.

EVIDENCE THEREOF.

Admissibility of a map or plat of a town. See EVIDENCE, 6.

DEEDS. See CONVEYANCES.

DEED OF TRUST.

OF AN ENTRY BY THE TRUSTEE.

Whether necessary. Under a trust-deed containing a provision to the effect that it should be lawful for the grantee in case of default, to enter in and upon the premises conveyed, and to sell and dispose of the same at auction, after having given notice, etc., it is not necessary, in order that a legal sale of the premises may be had by the trustee, that an entry or demand for possession should first be made by him. Entry in such case is not a condition precedent to the making of the sale. *Kiley et al.* v. *Brewster et al.* 186.

DELIVERY.

DELIVERY OF CUMBROUS ARTICLES.

What is sufficient. An actual removal of the entire mass of corn in a crib, or of any other cumbrous article, is not necessary to constitute a delivery and change of possession. *Hart* v. *Wing*, 141.

OF SALES ON AN ORDER.

Effect of delivery to a carrier, in passing title. See SALES, 1.

SALE FOR PAYMENT ON DELIVERY.

What will excuse the vendor for non-delivery. See SALES, 8.

ON SALE OF PROPERTY TO A FIRM.

Effect of delivery to one of the firm. See SALES, 13.

DELIVERY OF A DEED. See CONVEYANCES, 2.

DEMAND.

DEMAND OF A DEBT.

Where a contract specifies no time of payment—whether demand necessary. See CONTRACTS, 4.

DEMAND FOR DOWER.

What constitutes. See DOWER, 6.

DEMURRER.

JOINDER IN DEMURRER.

Not necessary. See PLEADING, 6.

WAIVER OF DEMURRER.

By pleading over. See PRACTICE, 7.

DEMURRER IN CHANCERY.

When motion to dismiss will answer the same purpose. See CHANCERY, 14.

DEPENDENT AND INDEPENDENT COVENANTS. See CONTRACTS, 7.

DISTRESS FOR RENT.

WHEN ALLOWABLE. See LANDLORD AND TENANT, 11.

DOWER.

WHEN THE RIGHT ACCRUES.

1. The widow is entitled to her dower immediately upon the death of her husband. *Bonner et al.* v. *Peterson*, 254.

DOWER. *Continued.*

WHO MAY ASSIGN DOWER.

2. *Of guardians and minors.* A guardian or minor cannot assign the widow her dower in the lands of her husband, so as to bind the minor on arriving at age; and cannot, therefore, be in default in not making such assignment, if demanded. *Bonner et al.* v. *Peterson*, 254.

IN WHAT THE WIDOW HAS DOWER.

3. *Of lands condemned for public use—the right exists in the money paid therefor.* Where lands are condemned for public improvements, the assessment of the damages therefor, unless a contrary appears, satisfies all the title to the property, including the fee simple and all lesser estates; and the widow having dower in the land appropriated by a city to public use, must in equity be held to have dower in the proceeds paid in satisfaction of the judgment against it, as damages for such appropriation. Ibid. 254.

OF THE MODE OF ASSIGNING DOWER.

4. *Of a decree allowing dower in gross.* And, in such case, the heir being an infant, the court may, if deemed for the interest of the heir, order the fund to be invested in other real estate, and endow the widow with one-third thereof for life, and have it allotted to her, the same as if the husband had been seized of it in his life-time; or endow her of the legal interest on one-third of the proceeds for life, to be paid annually, in such case, providing ample security of the principal and the payment of the interest punctually, and payment of the principal to the heir, at the death of the dowress; and the decree may be made a specific lien on the remaining real estate, to render this annual payment, less the taxes. But, in the absence of legislative authority, it is a matter of doubt, whether a decree for a gross sum can be rendered without the consent of all parties. If so, it should not be done, unless there are no means of securing to her the payment of an annual sum equal to one-third of the rents and profits of the fund in which she is dowable. Ibid. 254.

OF DAMAGES FOR NOT ASSIGNING DOWER.

5. *And herein, of a demand of dower.* Where a party capable to act refuses to assign the widow her dower, upon demand so to do, he is in default, and the widow is entitled to damages from the date of such demand and refusal. Ibid. 254.

6. The commencement of a suit for dower is a legal demand therefor, and when commenced against a minor heir, it is such a demand as contemplated by law, and from that time the widow will be entitled to damages for withholding dower. Ibid. 254.

7. Where two suits have been brought for dower, and the decree in the suit first brought has been set aside as erroneous, the widow is only entitled to damages from the time the last proceedings were instituted. Ibid. 254.

DOWER. *Continued.*

MEASURE OF DAMAGES.

8. *For failure to assign dower.* In such case, the measure of damages is usually the net profits, or income, of one-third of the estate in which the widow has dower. *Bonner et al.* v. *Peterson*, 254.

9. *Net profits—how ascertained.* To ascertain the net profits, the necessary repairs of the premises from which the fund is derived, as well as the taxes, and necessary insurance on the same, should be deducted from the gross receipts of the rents and profits. Ibid. 255.

10. *Measure of damages in this case.* In this case the widow had obtained a decree for dower, which was procured to be set aside by the heirs, who were in possession; and a portion of the premises had been condemned by the city of Chicago for a street; and the damages therefor paid to the heirs in bonds and money. In a second suit by the widow for dower, it was held, for the delay in assigning the dower, the heirs should be required to account for one-third of the net proceeds of the rents and profits derived from the real estate in which the widow was dowable received from the commencement of the second suit by her, also for one-third of the interest received on the fund derived from the city which remains after paying the debts of the estate, and the expenses incurred in the suit against the city, and the taxes paid on the money or bonds, if any, yielding such interest. Ibid. 255.

OF DEFENSES BY THE HEIRS.

11. Where a widow has obtained a decree for dower, which she assigned, and afterward it was set aside at the instance of the heirs, they cannot set up the assignment of such decree as a bar to the claim for dower in a subsequent proceeding. Ibid. 254.

12. Nor can the heirs urge the rights of such assignee, as an excuse for refusing to assign the widow her dower. Ibid. 254.

13. Until the heirs can show, either an assignment of dower to the widow or a release by her, they cannot set up, as a bar to her dower, what another may have paid her for such right. Ibid. 254.

CONTINGENT RIGHT OF DOWER.

14. *Of the rights in respect thereto as between the husband and his vendee.* See CHANCERY, 8, 9.

15. *As an incumbrance.* While the husband lives, the wife's contingent right of dower in land sold by him, is not an incumbrance thereon. *Humphrey* v. *Clement*, 301.

EJECTMENT.

EJECTMENT BY A MORTGAGOR.

1. *When the right of action accrues.* A mortgagor cannot maintain ejectment where the title, entry and ouster in the declaration are laid before the date of extinguishment of the mortgage debt. In such case the right of possession only accrues after extinguishment of debt. *Holt et al.* v. *Rees*, 30.

EJECTMENT. *Continued.*

CONVEYANCE BY PLAINTIFF PENDENTE LITE.

2. *Its effect on the right of recovery.* Under our statute, a conveyance of plaintiff's title to a third person, pending suit, does not defeat his right of recovery. In such case the recovery in ejectment inures to the benefit of the grantee of the plaintiff. *Mills* v. *Graves*, 50.

3. *Construction of the statute.* The 25th section of the chapter on ejectment, which provides that if the title of the plaintiff expires, pending the suit, no recovery shall be had, applies to cases where the plaintiff claims an estate for years or for the life of another; but has no application where the plaintiff merely conveys his title to another pending the suit. Ibid. 50.

ELECTIONS.

REFUSING A VOTE.

1. *Liability of judges of election.* By the act of 1849, the right of action is given only when the vote of a qualified elector has been rejected. *Mills et al.* v. *McCabe*, 194.

NATURALIZATION.

2. *What courts have jurisdiction thereof.* See NATURALIZATION.

ELIGIBILITY TO OFFICE.

RESIDENCE.

Effect of a conditional removal from the State, and return. See OFFICE, 1.

ERROR.

WAIVER OF DEMURRER — PLEADING OVER.

1. If a party does not abide by his demurrer he cannot avail on error of any defect in the pleading. *Camp et ux.* v. *Small*, 37.

HOW AFFECTED BY SUBSEQUENT LEGISLATION.

2. *Legalizing a town ordinance after it has been decreed to be invalid* When by a decree of court, a town ordinance was declared invalid, and afterward, by an act of the legislature, the ordinance in question was declared valid, such act made the ordinance valid only from the day of its own passage, and cannot affect the question of error in a decree rendered prior to that date. *Town of Lake View* v. *Letz et al.* 82.

RELEASE OF ERRORS. See PRACTICE IN THE SUPREME COURT, 2.

ERROR WILL NOT ALWAYS REVERSE. See same title, 1.

ESTOPPEL.

1. M. and wife executed a mortgage upon their homestead without the statutory waiver, and afterward conveyed it to P. subject to the mortgage lien, and which lien formed a part of the purchase price. *Held*, in a suit to foreclose by the mortgagee, that, P. having obtained the premises by admitting the lien and assuming its payment, he was estopped from setting up as a defense the omission of M. and wife to release their homestead right in the mortgage. *Pidgeon* v. *Trustees of Schools*, 501.

ESTOPPEL. *Continued.*

2. Estoppels *in pais* relating to real estate, cannot be made available in a court of law. *Blake* v. *Fash*, 303.

What will estop a party to seek a reversal of a judgment or decree. See PRACTICE IN THE SUPREME COURT, 2.

EVIDENCE.

PAROL EVIDENCE.

1. *To contradict the date of a deed.* Parol evidence is admissible to contradict the date of a deed, as not the date of its delivery, the date of the instrument not being essential to its operation. *Blake* v. *Fash*, 303.

EXPLAINING A RECEIPT.

2. *Of evidence for that purpose.* A written receipt is evidence of the highest and most satisfactory character, and, to do away with its force, the testimony should be convincing, and not resting on mere impressions, and the burden of proof rests on the party attempting the explanation. *Winchester* v. *Grosvenor*, 425.

SECONDARY EVIDENCE.

3. *To prove contents of a deed which had been voluntarily destroyed.* Where a party has voluntarily destroyed a written instrument, he cannot prove its contents by secondary evidence, unless he repels every inference of a fraudulent design in its destruction. *Blake* v. *Fash*, 302.

4. The general rule is, that the highest and best evidence of which the case is susceptible must be produced. Ibid. 302.

BURDEN OF PROOF.

5. *In action by a bailor against a bailee.* In case of a bailment for hire, as well as when the bailment is gratuitous, where it appears the goods, when placed in the hands of the bailee, were in good condition, and they were returned in a damaged state, or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose on him the burden of showing he exercised such care as was required by the nature of the bailment. *Cumins et al.* v. *Wood*, 416.

MAP OR PLAT OF A TOWN.

6. *Admissibility thereof.* In an action on the case against a railway company for killing a colt, the defendant, for the purpose of showing that the place where the accident occurred was inside of the limits of the village of Hinsdale, offered to give in evidence to the jury a map or plat thereof, recorded subsequent to the date of the accident. The court excluded the map on the ground that it had not been recorded at the time of the accident. *Held*, that the map was proper to show the intent of the owners of the land to dedicate, and the extent of the dedication, and therefore ought not to have been excluded from the jury. *Chicago, Burlington & Quincy R. R. Co.* v. *Banker*, 26.

EVIDENCE. *Continued.*

RECORD OF ANOTHER SUIT.

7. *When not admissible.* It is a fatal error to allow the plaintiff to introduce in evidence, against the objection of the defendant, the record of a suit to which the defendant was not a party. *Whitaker* v. *Wheeler*, 440.

ADMISSIBILITY, GENERALLY.

8. *Of a report concerning a railroad, made by its president, not under oath.* On the trial of the question of the proper valuation to be put upon the property of a railroad company for purposes of taxation, a report, not under oath, made by the president of the company to the stock and bondholders, having reference, among other things, to the value of the property of the company, is not admissible in evidence. *Chicago & Northwestern R. R. Co.* v. *Board of Supervisors of Boone County*, 241.

9. The voluminous character of such a report, in this case, was such that the bearing it had upon the issue before the court would have to be ascertained, if at all, by a careful analysis and dissection, to which a jury would scarcely be able to subject it. Besides, if it contained any statements bearing on the issue, they could be proved by witnesses under oath. Ibid. 241.

10. *In an action against a city for negligence* in failing to place proper guards to secure persons from falling into an excavation in which there was water, whereby a person lost his life, proof of the noxious condition of the water is admissible to show that by reason of its condition the danger to the life of a person falling into it would thereby be enhanced. *City of Chicago* v. *Gallagher, Admx.* 295.

ADMISSIONS.

11. *When admissible.* The voluntary admissions of a party, no matter when or how made, if made with knowledge of the circumstances, are proper to be given in evidence. *Chicago & Northwestern R. R. Co.* v. *Board of Supervisors of Boone County*, 241.

12. So upon the trial of the question as to the proper valuation to be put upon the property of a railroad company for purposes of taxation, it is competent to give in evidence, in behalf of the party adverse to the company, the deposition of the general superintendent of the road, which had been taken in another case and used by the company, adopting and acting on the statements therein as facts. Ibid. 241.

13. *For what purposes to be considered.* As a general rule, where admissions of a party are received in evidence generally they are proper for all purposes, and should be considered by the jury and receive such weight as they may deem proper to give them. *Diversy* v. *Kellogg*, 115.

DECLARATIONS.

14. *When admissible.* In an action of trover against a sheriff to recover damages for selling the property of the plaintiff under an attachment against another person, the declarations of the defendant in the attachment, while in the apparent possession of the property, as explanatory of his possession, and in disparagement of any claim in himself, are

EVIDENCE. DECLARATIONS. *Continued.*
admissible in evidence in behalf of the plaintiff; and he may also prove the fact that while in possession of the property he claimed it as his own *Whitaker* v. *Wheeler*, 440.

STATEMENTS OF AGENT.
15. *When not binding on the principal.* Statements made by a person in the employment of another as to the amount his employer owes another, are not binding upon his principal, but are proper evidence to contradict the witness and to show whether he is disposed to testify fairly. *Davis* v. *Hoeppner*, 306.

PROOF OF AGENCY.
What is sufficient. See AGENCY, 7, 8.

AUTHENTICATION OF FOREIGN JUDGMENTS.
What is sufficient. See AUTHENTICATION, 1, 2.

DEDICATION—EVIDENCE OF.
Admissibility of a plat or a map of a town. See this title, 6.

EVIDENCE UPON JUDGMENT ON DEMURRER.
In the assessment of damages. See PLEADING AND EVIDENCE, 3.

SWORN ANSWERS IN CHANCERY.
Degree of proof required to overcome them. See CHANCERY, 13.

EVIDENCE AFFECTING CREDIT OF A WITNESS.
What is admissible. See WITNESS, 3, 4.

PROOF OF MARRIAGE.
Of its sufficiency. See MARRIAGE, 1, 2, 3.

WHEN EVIDENCE SHOULD BE PRESERVED IN THE RECORD. See EXCEPTIONS AND BILLS OF EXCEPTIONS.

EXCEPTIONS AND BILLS OF EXCEPTIONS.
EXCEPTIONS.
1. *When necessary.* Where instructions asked by a party have been refused, unless excepted to, this court will not review them. *McPherson* v. *Hall*, 265.

BILLS OF EXCEPTIONS.
2. *When necessary.* The finding of a court upon the issue of *nul tiel record* will be presumed correct in the absence of a bill of exceptions. *Dean* v. *Gecman*, 286.

3. It was assigned as error on foreclosure by *scire facias*, that the judgment greatly exceeded the principal and interest of the note. The note bore ten per cent interest, and was payable with exchange on New York. The record contained no evidence as to what the exchange amounted to *Held*, that in the absence of such evidence the court would presume proof was made of the amount due for exchange. *Camp et ux.* v. *Small*, 37.

4. *Absence of the seal in the transcript—presumption.* Where there appears to be no seal to the bill of exceptions as transcribed into the record, and no suggestion of a diminution of the record is made by the

EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILLS OF EXCEPTIONS. *Continued.*

appellant, it will be presumed that there was none to the original bill. *Miller* v. *Jenkins*, 443.

5. *Must be sealed.* The statute 13 Edward I, chapter 31, required that a seal should be attached to the bill of exceptions, and since that time the British courts have regarded it essential. And the 21st section of our practice act requires a bill of exceptions to be signed and sealed by the judge trying the case, and thereupon the exception becomes a part of the record. If it is wanting in either of these requirements it fails to become a part of the record. Where there is no seal to a bill of exceptions this court will not look into it to see if there is error. Ibid. 443.

6. *Their requisites.* Where the bill of exceptions fails to state that it contains all of the evidence, the court will not examine to see whether that which appears in the record does sustain the verdict. In such a case it will be presumed that the finding is correct until it is rebutted by evidence in the record, as the presumption must be indulged that there was other evidence sufficient to warrant the verdict. *McPherson* v. *Nelson et al.* 124.

EXCESSIVE DAMAGES.

New trial therefor. See NEW TRIALS, 12, 13.

EXECUTION.

WHAT IS SUBJECT TO LEVY AND SALE.

Of a pre-emption right. See PRE-EMPTION, 2.

EXPRESS COMPANY.

LOSS OF NOTE TAKEN FOR COLLECTION.

1. *Liability of the company.* If a bailee is robbed of goods, is is no defense to an action against him, that the owner may still pursue the thief and recover the property by replevin. An express company, undertaking to collect a note, must employ the usual means therefor, or be liable for damages resulting from their negligence. *American Express Co.* v. *Parsons*, 312.

2. In case of the loss of a note, as in this case, if the debt may yet be collected, the trouble, expense and inconvenience should fall on the company and not the creditor. By paying the damages occasioned by the loss of the note, the company became invested with the right to look to the maker for the amount due on the note to indemnify them for the money thus paid. Ibid. 312.

FEDERAL POWERS AND STATE RIGHTS.

POWER OF CONGRESS.

Over rights and remedies in the State courts. See CONFLICT OF LAWS, 1, 2.

FORCIBLE ENTRY AND DETAINER.

AGAINST WHOM THE ACTION WILL LIE.

1. *And herein, of forcible detainer.* In case of a tenant holding over against his landlord, either the tenant, or any person claiming under him, is, by the express provision of the statute, liable to this action. *Clark* v. *Barker*, 349.

2. But, in the case of a forcible entry, it is the person who makes it who is liable to the action. Ibid. 349.

3. Probably, also, the action might lie against any person going in under the person who had made the forcible entry, collusively, with knowledge of such force, and for the purpose of availing himself of it, because such person might be well considered as himself committing the forcible entry. Ibid. 349.

4. But, where a person has entered into the possession of premises, peaceably and in good faith, as the tenant of a purchaser from one who had previously made a forcible entry, the tenant, or even his landlord, not being a privy to the wrongful act of the grantor, or having any knowledge of it, such occupant is not liable to be turned out by this summary remedy. Ibid. 349.

FORECLOSURE. See MORTGAGES, 21, 22.

FOREIGN JUDGMENTS. See JUDGMENTS, 1; ADMINISTRATION OF ESTATES, 6, 7.

FORFEITURE.

AS BETWEEN LANDLORD AND TENANT.

For non-payment of rent. See LANDLORD AND TENANT, 1 to 9.

FORMER ADJUDICATION.

WHEN NOT A BAR.

After it is set aside. In February, 1857, P. filed her bill for dower, in which suit a money decree was rendered for $3,455.44, in lieu of dower in the lands; and in December, 1858, she assigned the decree to S. In June, 1855, the city of Chicago condemned a portion of the lands in which dower was claimed, for public improvements, and assessed the damages thereon, but refused to pay them, whereupon suit was brought by the heirs against the city, and judgment recovered for $12,162.65, which in December, 1861, was satisfied by the payment of $11,500, in city bonds, and the balance in money. In January, 1863, upon a bill of review brought by the heirs, the decree allowing dower in gross was set aside, and thereupon P. filed her second petition, and the court decreed dower in the lands unappropriated by the city, and also in the bonds, at the sum of $1,277.73, and $426.72 as interest on the same. S., the assignee of the first decree, was not made a party to the bill of review, nor to this second petition filed by P. *Held*, that the decree rendered in the former suit having been set aside, it constituted no bar to the proceedings under the second petition filed by P. for the same purpose. *Bonner et al.* v. *Peterson*, 253.

FORMER DECISIONS.

ALWOOD *v.* MANSFIELD, 33 Ill., 458, in regard to rendering final judgment in the Supreme Court, overruled in *Storing* v. *Onley*, 123. See PRACTICE IN THE SUPREME COURT, 5.

FRANKLIN COUNTY.

REMAINS IN TWENTY-SIXTH CIRCUIT.

Under act of 1867. See JUDICIAL CIRCUITS.

FRAUD.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Whether certain matters will render it fraudulent. See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 1 to 14.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

GARNISHMENT.

WHEN THE PROCESS MAY ISSUE.

Not under judgments in rem. Under our statute, a judgment *in rem* by attachment does not authorize the issuance and return of a general execution *in personam* so as to issue garnishee process thereon. *Gilcreest* v. *Savage*, 56.

GIFT.

FROM HUSBAND TO WIFE.

Whether such gift will be supported. See HUSBAND AND WIFE, 1.

GOLD CONTRACTS.

PAYABLE IN LEGAL TENDER NOTES. See CONTRACTS, 5.

GRANT.

RIPARIAN OWNERS.

1. *Of the boundaries.* Where three persons, in possession respectively of certain lands, viz., A of those lying upon the east bank of a river, B of those lying upon the west bank, and C of an island in the center, made their respective entries for the same at the government land office on the same day, and which lands had been separately surveyed, and purchased by them as distinct tracts, — *held*, that the mainland and the island having been separately surveyed and purchased by these parties respectively as distinct tracts, the grantees of the mainland cannot claim, that the island purchased at the same time by C was not reserved but included in the grant to them. *Stolp et al.* v. *Hoyt*, 220.

2. That, the grant to each being separate and distinct, neither can claim beyond the calls of his entry and patent. That C acquired the same riparian rights as A and B, two *fila aquæ* being established, one on each side of the island. Ibid. 220.

3. In a grant of land lying on a stream not navigable, if there be a clear reservation of the islands, either expressly or by implication, they do not pass to the grantee, and the *filum aquæ* which bounds the grant is the center thread between the mainland and the island. Ibid. 220.

GUARDIAN.

CANNOT ASSIGN DOWER. See DOWER, 2.

GUARDIAN AND WARD.

EQUITIES OF THE LATTER.

1. *As against third persons.* A guardian who had money belonging to his ward in his hands, purchased a tract of land and received a title bond therefor, but paid none of the purchase price therefor, and after his death his widow paid the purchase money out of her own funds, and obtained the legal title to the land, which she exchanged for other land. In a suit by the ward to subject this land in the hands of the widow to the satisfaction of the ward's claim thereon, on the alleged ground that the guardian had used the trust funds in the purchase and improvement of the land bought by him, it was *held*, that, upon the facts, the ward had no preferable equity, to the exclusion of all others, in the premises in question. *McFarland et al.* v. *Conlee et al.* 455.

2. But even if the money of the ward had been invested in the land purchased by the guardian, inasmuch as the money of the widow of the guardian was also invested therein, she had an equal equity, and having also the legal title, she would have the preference, and would have the right to relieve the premises from the ward's claim by paying the amount due; or, if the premises should be sold, the purchaser of the legal title should first be reimbursed the price paid therefor, with interest, then the claim of the ward, with interest, and the overplus, if any, to the owner of the legal title. Ibid. 455.

HEIRS.

LACHES OF ADMINISTRATOR.

In not defending suit — remedy of the heirs. See ADMINISTRATION OF ESTATES, 3.

OF A PRE-EMPTION RIGHT.

It goes to the heir, not to the executor. See PRE-EMPTION, 2.

HIGHWAYS.

SAFETY OF HIGHWAYS IN CITIES.

1. *Of negligence in that regard.* In an action brought by G. against the city of Chicago, for the loss of her husband's life, caused by falling into a slip, it appearing by the proof that the slip was crossed by a bridge much narrower than the street, and that there was no protection in the course from the sidewalk to the bridge to prevent persons proceeding in that direction from falling into it, if they continued in a direct line from the walk to the slip, — *held*, that the omission to erect proper barriers to protect persons from walking or falling into it, was negligence for which the city was liable for all damages resulting therefrom. *City of Chicago* v. *Gallagher, Admx.* 295.

2. The city having permitted the excavation to be made, it was its duty to have made it secure, and fully protected persons in passing from walking or falling into it under any circumstances. Ibid. 295.

HIGHWAYS. SAFETY OF HIGHWAYS IN CITIES. *Continued.*

3. And even had it been a natural channel, or one made before the limits of the city were extended so as to embrace it, the duty to have rendered it safe to the public would have been the same. *City of Chicago* v. *Gallagher, Admx.* 295.

4. And the failure to properly protect persons from falling into such a place, when the water is in such noxious condition as to enhance the danger to the life of a person falling in, establishes a greater degree of negligence than if the water had been free from such pollution. Ibid. 295.

APPEAL FROM CIRCUIT COURT.

5. *In respect to locating a highway — decision of Circuit Court final.* See APPEALS AND WRITS OF ERROR, 1.

HOMESTEAD.

NECESSITY OF OCCUPANCY.

1. *Where the owner has mortgaged the premises.* To entitle a mortgagor to a homestead in the mortgaged premises, such mortgagor must not only be the head of a family, but, at the time of mortgaging, therewith reside and so continue to reside on the mortgaged premises. *Fergus et al.* v. *Woodworth et al.* 374.

2. So the owner of a homestead cannot abandon the lot of ground, remove his dwelling to other premises, remove his family to the latter place, incumber the premises on which he formerly resided, and, after an absence of three or four years, return to his former home, and claim and hold it as a homestead against such an incumbrance, merely by showing that it had been his home, and that he had during his abandonment of the property as a residence, a secret intention at some time in the future to resume it as a home. Ibid. 374.

OF JUDGMENT FOR TORTS OF HUSBAND.

3. *Whether embraced in the exemption.* Under the acts of 1851 and 1857, concerning the homestead exemption, the homestead is exempt from sale under an execution issued on a judgment against the husband, whether such judgment is obtained for the violation of a contract, or his torts. *Conroy* v. *Sullivan et al.* 451.

HUSBAND AND WIFE.

GIFT FROM HUSBAND TO WIFE.

1. *Whether revocable.* At law a gift from husband to wife is ordinarily void, and, being so, can be revoked by the husband. Courts of equity will, in certain cases, support such gifts, but require clear and incontrovertible evidence. *Manny* v. *Rixford,* 129.

2. *Not embraced in the act of* 1861, *concerning the separate property of married women.* See MARRIED WOMEN, 4.

SLANDEROUS WORDS BY THE WIFE.

Liability of the husband. See SLANDER, 3.

CONVEYANCE OF THE WIFE'S LAND.

Husband and wife must join in the deed. See MARRIED WOMEN, 1.

HUSBAND AND WIFE. *Continued.*

HUSBAND'S ESTATE IN THE WIFE'S LAND.

How affected by the act of 1861. See MARRIED WOMEN, 2, 3.

RIGHTS OF HUSBAND AS ADMINISTRATOR.

May administer, but must distribute. See ADMINISTRATION OF ESTATES, 4, 5.

IDEM SONANS. See NAMES, 1, 2.

IMPLIED TRUSTS. See TRUSTS, 1, 2, 3.

IMPOUNDING ANIMALS.

SALE BY POUND MASTER.

1. *Necessity of a judicial investigation.* The act of 1861, which gives to towns the power to restrain or prohibit the running at large of certain animals, and authorizes the distraining, impounding and sale of the same for penalties incurred, and the costs of the proceedings, does not give to towns the power to confer upon any of its officers authority to make sales of impounded animals except upon the contingency that penalties have been incurred. *Poppen* v. *Holmes*, 360.

2. But to ascertain whether a penalty has been incurred or not is a proceeding purely judicial in its character, and the power cannot be exercised by the pound-master by virtue of his office; nor can a town by its by-laws authorize the pound-master to sell property without a judicial ascertainment that some law has been violated. Ibid. 360.

3. And a sale of property by the pound-master without such judicial ascertainment being first had, will not divest the owner of his title. Ibid. 360.

INCUMBRANCE.

OF A CONTINGENT RIGHT OF DOWER. See DOWER, 15.

INFANTS.

MUST DEFEND BY GUARDIAN.

1. A guardian *ad litem* must be appointed for infant defendants, or the proceedings against them will be erroneous. *Quigley et al.* v. *Roberts*, 503.

STRICT PROOF REQUIRED.

2. The rule of practice is well settled, that, in proceedings against minors, even where there is a guardian, strict proof is required. Nothing can be admitted, but every thing must be proved, against them, the same as if every material allegation had been denied by answer. Ibid. 503.

CANNOT BE DEFAULTED.

3. Neither can a default or a decree *pro confesso* be entered against an infant. Ibid. 503.

DECREE AGAINST INFANTS.

4. *When set aside.* Where a decree has been rendered against a minor, without a guardian, or appearance by attorney or otherwise, it will be set aside on proper motion made, and the party will be allowed to make any defense to which he is entitled. *Hall et al.* v. *Davis*, 494.

INJUNCTIONS.

RESTRAINING COLLECTION OF TAXES.

1. *When injunction will lie for such purpose.* A court of equity will not interpose its power to prevent the collection of a tax, simply for mere irregularities. If, however, the tax is not authorized by law, or, if authorized, it is imposed upon property exempt from the burden, it is otherwise. *Vieley* v. *Thompson et al.* 13.

2. So, where a town is authorized to levy a tax for a specified purpose, upon its being so determined by a vote of the legal voters of the town, at a special election to be called for that purpose, an omission to give the notice of such election as required by the law, will render the levy of the tax so far illegal that a court of equity will interpose by injunction to restrain its collection. Ibid. 13.

3. And where the purpose for which the tax was authorized to be levied was the payment of bounties to soldiers who might enlist or be drafted after the passage of the law, if the quota of the town was filled, and there was no reasonable probability that any more soldiers would be required, such a tax would be unauthorized, and its collection would be restrained by injunction. Ibid. 13.

WHEN INJUNCTION WILL LIE.

Where the damages for which a judgment has been rendered, have been set off in another action, pending an appeal from the judgment. See JUDGMENTS, 7.

TO PREVENT OR ABATE A NUISANCE.

When an injunction will lie. See NUISANCES, 2, 3, 4.

INSANITY.

TRIAL BY JURY.

1. *In chancery.* In all proceedings in chancery, involving questions of insanity, it is the duty of the court to direct that an issue be formed and tried by a jury. *Myatt et al.* v. *Walker et al.* 485.

OF PROOF OF INSANITY.

2. *Where incompetency to contract is alleged. It seems,* that, in cases involving questions of insanity, sanity is the rule and insanity the exception; and, where there is only a balance of evidence, or evidence merely sufficient to raise a doubt, the presumption in favor of sanity must prevail. An instrument, therefore, made by a person of competent age, and under no legal disabilities, will, as a rule, be taken and held to be binding until incompetency is established; and the proof of that fact devolves upon the party contesting its binding force. Ibid. 485.

INSOLVENT DEBTORS.

MAY PREFER CREDITORS. See DEBTOR AND CREDITOR, 1.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. See that title.

WHAT IS PROOF OF INSOLVENCY. Same title, 9.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *Should be based on the evidence.* It is not error to refuse an instruction announcing a correct legal principle, if there is no evidence in the case upon which it can be based. *American Express Co.* v. *Parsons*, 313.

2. Instructions not based upon the evidence in the case, and which were calculated to mislead the jury, constitute good grounds upon which to award a new trial. *Gibson* v. *Webster*, 483.

3. M. sold to N. eighteen hogs, and, while driving them to the town of Arlington, three of them died from heat, and, upon N.'s refusal to pay for the dead hogs, M. brought suit to recover; and, the question being, whether by the contract of sale the hogs were to be driven at the risk of M. or of N., — *held*, that the court properly refused an instruction based upon the theory that plaintiff contracted to deliver them at a place other than at Arlington, and directing the jury, that, if such was the fact, and plaintiff could by reasonable care have made the delivery at such other place, and failed to do so, defendant was not liable; there being evidence tending to show, that, whatever may have been the original contract as to the place of delivery, it was subsequently agreed that the delivery should be at Arlington. *Nichols* v. *Mercer*, 250.

4. *Should not be misleading.* Although an instruction may express a correct legal proposition, as it would be construed by lawyers, yet if liable to be misunderstood by a jury, and to lead them astray, it is proper to refuse it. Ibid. 250.

5. *Slight verbal inaccuracies will not vitiate.* An instruction, containing verbal inaccuracies, such as the use of the word "plaintiff," in one instance, when the word "defendant" was intended, and the omission of the word "if" in another place, are not errors calculated to mislead a jury. Ibid. 250.

6. *Need not be repeated.* This court has repeatedly held, that it is not necessary to repeat instructions to a jury. The court, having once directed the jury upon the law, may properly refuse to announce the same principles in other instructions, though couched in different language. *Halty* v. *Markel*, 226.

7. *Should not assume facts as proven.* In an action of trespass, an instruction to the jury that the plaintiff was "entitled to recover all damages proved to have been sustained by him on account of the trespasses committed by the defendant on the plaintiff's premises as alleged in the declaration," was held to be erroneous, because it assumed the defendant committed the trespass, and that the only question before the jury was the amount of damages. *Small* v. *Brainard*, 355.

8. *Assuming the guilt of a party.* An instruction in an action for slander which informed the jury, that if a sufficient number of the words laid in the declaration had been proved, which, in their common acceptation, would amount to a charge of fornication, they should find for plaintiff, was not calculated to mislead the jury, and the court did not

INSTRUCTIONS. OF THEIR QUALITIES. *Continued.*

err in giving it. *Held*, that it does not mean that it did not matter how the words were connected, but that they must be considered in their connection with each other in the sentence. *Baker et al.* v. *Young*, 43.

9. An instruction in a case of slander which informs the jury that the law implies damages from the speaking of slanderous words, and that a defendant intends the injury the slander is calculated to produce, and that the jury, in case they find a verdict of guilty, are to determine what damages ought to be given under all of the circumstances, is not erroneous. Such an instruction does not inform the jury that the defendant is guilty. Ibid. 43.

IN A CRIMINAL CASE.

10. *As to a reasonable doubt.* In a criminal proceeding it is not necessary that each instruction given to the jury should inform them, that, before they could convict, they must believe the accused to be guilty beyond a reasonable doubt. *Kennedy* v. *The People*, 283.

11. *Omissions obviated by proof.* Although instructions given for the plaintiff in a suit against a railroad company to recover damages for injury to stock, omit to state, that it must be proved that the road had been operated for six months prior to the accident, yet no harm could result to the defendant for such omission, when it clearly appeared from the evidence that the road had been in use for a much longer period. *Chicago and Northwestern Railway Co.* v. *Dement*, 75.

OF QUESTIONS OF LAW AND FACT. See JURY, 9.

INSURANCE.

TO WHOM INSURANCE MONEY BELONGS.

As between subsequent purchaser and prior vendor. Where a subsequent purchaser of premises obtains insurance thereon to protect his own interest, in case of loss the insurance money will belong to the party insured, and a prior vendor, having a lien on the premises for unpaid purchase money, cannot require him to account for any part of it. *Hammer* v *Johnson et al.* 192.

JOINDER IN DEMURRER.

NOT NECESSARY. See PLEADING, 6.

JOINDER OF PARTIES. See PARTIES, 9; SLANDER, 3.

JUDGMENTS.

OF FOREIGN JUDGMENTS.

1. *Presumption as to service of process.* Where a judgment rendered by confession in the Court of Common Pleas, in the State of Ohio, was revived by *scire facias* in the same court, upon the following return of the officer upon the writ of *scire facias*: "June 3, 1853, served personally by copy. John Boyer, Sheriff,"—this court will presume such return to have been sufficient under the laws of that State to have authorized the order reviving such judgment. *Rosenthal, Admr., v. Renick et al.* 203.

JUDGMENTS. OF FOREIGN JUDGMENTS. *Continued.*

2. *Judgments against administrators in other States—what footing they have in this State.* See ADMINISTRATION OF ESTATES, 6, 7.

3. *What is a sufficient authentication of a transcript of a judgment rendered by a justice of the peace in another State.* See AUTHENTICATION, 1.

JUDGMENTS BY CONFESSION.

4. *Where to object for want of proof.* Where a judgment is entered by confession in vacation, under a power of attorney, more than a year and a day after the power of attorney was executed, it is necessary for the defendant to apply to the court in which the judgment was entered, to set the same aside, and to show some equitable reason therefor, before it will be reversed on the ground that no affidavit was filed showing the defendant was still alive, and that the debt was due and unpaid. *Stuhl* v. *Shipp*, 133.

5. *Where the judgment is entered for too much.* And when the judgment is within the *ad damnum* laid in the declaration, it will not be reversed because it may appear to be for an amount greater than the sum due on the note which was the basis of the confession, no application having been made in the court below to correct the error. Ibid. 133.

6. *Under warrant of attorney — when void.* Where, under a warrant of attorney, to enter the appearance of the maker of a note bearing date April 24, 1846, and confess a judgment thereon, the appearance was entered and a judgment taken upon a note bearing date April 24, 1856,—*held*, that the action was unauthorized, and the judgment entered therein a nullity, and binding upon no person, either in a direct or collateral proceeding. *Chase* v. *Dana*, 262.

SATISFACTION OF JUDGMENT.

7. *By having set off the damages for which it was rendered, in another suit.* A plea proposing to set off damages for which a judgment has already been obtained, pending an appeal therefrom, and the offering of evidence under it, would be a satisfaction of the judgment already obtained, and its collection may be enjoined in the event of its affirmance in the appellate court. *King et al.* v. *Bradley et al.* 342.

JUDGMENT AGAINST AN ADMINISTRATOR.

Binds the personal estate. See ADMINISTRATION OF ESTATES, 2.

JUDGMENT ON DEMURRER.

On overruling demurrer to a declaration — of evidence admissible on assessment of damages. See PLEADING AND EVIDENCE, 3.

JUDICIAL ACTS.

SALE OF IMPOUNDED ANIMALS.

Must be a judicial ascertainment that a law has been violated. See IMPOUNDED ANIMALS, 1, 2, 3.

JUDICIAL CIRCUITS.

OF THE TWENTY-SIXTH.

Concerning acts of 1859, 1865 *and* 1867, *relative to the twenty-sixth judicial circuit — Franklin county not deprived of the judicial system.* The

JUDICIAL CIRCUITS. Of the twenty-sixth. *Continued.*

act of 1859, arranging Franklin county into the twenty-sixth judicial circuit, and that of 1865, fixing the terms of court therein, are not repealed by the act of 1867. This last named act is to be construed as merely adding other counties to the twenty-sixth circuit, and not as depriving Franklin county of the benefits of the judicial system. *The People ex rel. Freeman* v. *Barr*, 198.

JUDICIAL SALES. See SALES, 15, 16, 17.

JURISDICTION.

Of La Salle County Court.

Under the act of 1865. By an act of 1865, entitled "An act to extend the jurisdiction of the County Court of La Salle county," that court acquired equal and concurrent jurisdiction with the Circuit Court, as to all matters except crimes and misdemeanors. *Bedard* v. *Hall et al.* 191.

Jurisdiction of the person.

In proceedings by quo warranto—how acquired. See QUO WARRANTO, 1, 2.

Sending process to foreign county. See PRACTICE, 9, 10, 11.

In the matter of naturalization.

What courts have jurisdiction thereof. See NATURALIZATION, 1, 2.

JURY.

Recalling a jury.

1. *After their discharge, or separation on sealing their verdict.* Where a jury is discharged, they cannot be again impaneled in the case, without the consent of the parties. *Williams et al.* v. *The People*, 478.

2. So where, by agreement, on the trial of a party charged with larceny, the jury found their verdict, sealed it, left it with the clerk and separated; and it, when opened next day, was found to be defective in not finding the value of the property stolen,—it is error, three days after they agreed to their verdict, to get them together and have them supply the defect. Ibid. 478.

3. To permit a jury to mingle three days after hearing the evidence, with the community, and then to come together and find an essential fact in the case, would be attended with danger to liberty, and in disregard of all the safeguards thrown around the accused to secure a fair and impartial trial. Ibid. 478.

4. When a jury is thus discharged, the further consideration of the case is as clearly out of their power as if they had come into court and their verdict received and they discharged. This seems to be supported by reason as well as authority. Ibid. 478.

Of amending a verdict.

5. *Where a jury were to seal their verdict and separate—and if defective it was to be amended.* See VERDICT, 2.

JURY. *Continued.*

TRIAL BY JURY IN CHANCERY.

6. *On a question of alleged insanity.* See INSANITY, 1.

SEPARATION OF JURY.

7. *In a capital case — effect thereof.* See CRIMINAL LAW, 2.

IN CRIMINAL CASES.

8. *Officer having charge of a jury must be sworn.* See CRIMINAL LAW, 1, 2.

QUESTIONS OF LAW AND FACT.

9. The fact of the readiness and willingness of a party to perform his contract is a question solely for the jury to determine, and which it is error for a court to attempt to pass upon, by its instructions. *Cummings* v. *Tilton*, 172.

JUSTICES OF THE PEACE.

WHO ARE SUCH IN WISCONSIN.

A police justice of the city of Janesville, in the State of Wisconsin, is a justice of the peace. *Belton, Admx.*, v. *Fisher*, 35.

LANDLORD AND TENANT.

OF RE-ENTRY BY LANDLORD.

1. *For non-payment of rent — forfeiture.* At common law, a lease containing a condition for a re-entry for non-payment of rent, the law not favoring forfeitures, required of the landlord, before he could re-enter, that he should demand the precise amount due; that it be made the day it fell due; to be made at a convenient hour before sunset; on the land at the most conspicuous place, unless a different place is named in the lease, then, at that place; the demand must be made in fact, and, to be availing, had to be pleaded and proved. The tenant had the whole day in which to make payment, but, failing to do so, the reversioner might then re-enter. *Chadwick* v. *Parker*, 326.

2. As leases of every kind frequently contain these conditions, in favor of trade and agriculture, and as forfeitures are odious to the law, such forfeitures are never enforced but upon a strict compliance with all the requirements of the law. All leases having such conditions are, without reference to the length or value of the term, attended with the same consequences, and are liable to be swept away, if the rent is not paid on the day it falls due, notwithstanding it may owe almost its entire value to the expenditure of the labor and money of the tenant. It is only reasonable that the landlord should, on the day his rent falls due, indicate his intention of terminating the lease, and the tenant have the entire day within which to make payment. Ibid. 327.

3. *Act of* 4 *George II, amendatory of the common law.* The act of 4 George II, chapter 28, section 2, amended the common law, only requiring the landlord, if a sufficient distress could not be found, to sue in ejectment, and, if a recovery be had, and execution be had, without the tenant paying the rent, and failing to file his bill in six months, the term was ended, unless the judgment should be reversed. Ibid. 327.

LANDLORD AND TENANT. OF RE-ENTRY BY LANDLORD. *Continued.*

4. The British courts, in construing this act, held that it gave an additional remedy to the landlord; that he might proceed under the statute, or resort to the common law, as he might prefer, but, in adopting either course, he must conform to the law regulating that mode of terminating the lease. *Chadwick* v. *Parker*, 327.

5. *Act of* 1865 — *of notice to quit, for non-payment of rent.* The act of 1865 declares that in all cases of tenancies, when default shall be made in the payment of rent due, or in any of the covenants of the lease, it shall not be necessary to give more than ten days' notice to quit, or of the termination of such tenancy; and it may be terminated on giving such notice to quit at any time after default in any of the covenants of the lease. That no other notice or demand shall be necessary. It also declares, that, in all cases of a lease or contract, when all of its covenants are performed, the lease or contract shall be notice of its termination, and no other notice be required. Ibid. 327.

6. The second section of the act of 1865, designed to dispense with the necessity of demanding the rent on the very day it falls due or the breach of covenant occurs, and to extend the right when the lease contains no clause for a re-entry; and it contemplates a notice to quit, and one of the landlord's intention to terminate the lease. While it does not in terms require ten days' notice of an intention to terminate a lease, it declares that more than that need not be given, and thereby renders ten days' notice before the lease terminates sufficient. Ibid. 327.

7. It was the intention of the legislature to give the tenant ten days' notice, within which he might pay the arrears of rent, and thus prevent a forfeiture. It could not have been the legislative intention to bring even future leases under so rigid a rule as to permit a landlord to declare an instant forfeiture of a lease, because the rent was not paid on the day it falls due, although payment may have been prevented by accident or uncontrollable necessity, but rather to give a reasonable opportunity to avoid such disastrous consequences. Ibid. 327.

8. When ten days expires after the notice and demand without the payment of the rent in arrear, the tenancy is terminated, and the landlord may sue and recover possession. Ibid. 328.

9. In such a case it is not error to reject evidence that the tenant offered to pay part and was ready on the premises to pay the balance when it became due, as he had the opportunity of paying when the demand was made and the notice given, and for ten days after. Ibid. 328.

OF THE LENGTH OF TERM OF A LEASE.

10. *Construction of a lease in that regard.* A lease bearing date on the 22d of May, 1860, provided that the lessee should have certain land, "forty acres of said land being now broken, and the balance of said tillable land, estimated at one hundred and twenty acres, said lessee is to break, this season, if practicable, from which said lessee is to have three crops off of said forty acres, and four crops off the balance of the land he breaks, esti

LANDLORD AND TENANT.

OF THE LENGTH OF TERM OF A LEASE. *Continued.*

mated at one hundred and twenty acres." "The crops taken off of said land, leased as aforesaid, shall be as follows, to wit: From the forty acres now broken, in three years from the 1st day of March, 1860, and from the one hundred and twenty unbroken, in four years from the 1st day of March, 1861, and at the end of said time, or sooner if the number of crops provided for in said lease are had and obtained from said land, the said land to be surrendered to the lessor." *Held*, that the lease terminated on the 1st day of March, 1865. The provision that the unbroken land should be broken in 1860, "if practicable," did not authorize the lessee to occupy such portion as it might not be "practicable" for him to break that season, beyond the four years from the 1st of March, 1861. *Burris* v. *Jackson, et ux.* 345.

DISTRESS FOR RENT.

11. *Warrant cannot issue after six months from the time of termination of lease.* By the act of 1857, the common law relative to proceedings for distress for rent is so modified as to authorize distress to be made for the period only of six months after the expiration of the lease; and, where a distress warrant issues more than six months after rent has become due, and the lease terminated, and the demised premises abandoned, such warrant is without authority of law, is null and void, and affords no protection to the officer levying it. *Werner* v. *Ropiequet*, 522.

LEASE FROM A MORTGAGEE.

12. *Payment of the mortgage debt*, by a mortgagor, terminates the right of possession of a lessee from the mortgagee. *Holt et al.* v. *Reese*, 30.

LA SALLE COUNTY COURT

OF ITS JURISDICTION.

As extended by the act of 1865. See JURISDICTION, 1.

LEASE — LESSOR — LESSEE. See LANDLORD AND TENANT.

LEGALIZING ILLEGAL ACTS.

BY SUBSEQUENT LEGISLATION.

From what time the legalization will operate. Where by a decree of court, a town ordinance has been declared invalid, and afterward, by an act of the legislature, such ordinance was declared valid, the ordinance will become valid only from the time of the passage of the act. *Town of Lake View* v. *Letz et al.* 82.

LIEN.

VENDOR'S LIEN.

1. *To what it extends.* Where a mill, which is the possession of a subsequent purchaser, is destroyed by fire, the machinery saved from the fire, being a part of the mill, is subject to a prior vendor's lien upon the premises for unpaid purchase money. *Hammer* v. *Johnson et al.* 193.

LIEN. VENDOR'S LIEN. *Continued.*

2. And if the subsequent purchaser sells such machinery, he will hold the proceeds in trust for the benefit of the prior vendor, and equity will subject the proceeds to the same uses for which the property was held subject to a lien. *Hammer* v. *Johnson et al.* 193.

OF A LIEN UPON TWO FUNDS.

Rights of the party holding such lien. See MORTGAGES, 7, 8, 9.

CREDITOR'S LIEN AGAINST AN ESTATE.

Whether barred by lapse of time. See LIMITATIONS, 1 to 4.

LIMITATIONS.

LAPSE OF TIME ASIDE FROM THE STATUTE.

1. *Creditor of an estate—when his lien is barred.* In determining the question, whether a creditor has waived his lien upon the property of an intestate, by failing to pursue his remedy within a reasonable time, in the absence of a legislative rule, each case must be left to depend largely upon its own circumstances. *Rosenthal, Admr.*, v. *Renick et al.* 202.

2. And in cases where the delay of the creditors is *unexplained*, and even where the title is still in the *heirs*, the period of seven years from the death of the intestate may be properly adopted, by analogies of the law, as a bar to such liens. Ibid. 202.

3. And in many cases a much shorter limitation may be applied, to protect innocent purchasers against the secret lien. The facts of each case must decide the limitation to be applied. Ibid. 202.

4. Where a person died in Ohio, having devised all of his real estate in Ohio, Indiana and Illinois, to R., first to pay all of his debts, and then to convey it to his son H., and subsequently such trustee and devisee died, the devisee H. leaving a will, and administrators with the will annexed were appointed in each of the States of Ohio and Illinois,—*held*, that the lien of a creditor upon the property of the testator was not barred by his failure to pursue his remedy within seven years after the death of the testator, it appearing that the property against which the lien was sought to be enforced, and of which the devisee H. died seized, had never been aliened by his devisee, nor any improvements made thereon *by him*, and that the estate was *still unsettled* in Ohio. Ibid. 202.

LIMITATION ACT OF 1839.

Mortgagee cannot avail of the statute. See MORTGAGES, 12.

MARINE COURT OF NEW YORK.

IN THE MATTER OF NATURALIZATION.

Has no jurisdiction. See NATURALIZATION, 2.

MARRIAGE.

PROOF OF MARRIAGE.

1. *What is sufficient.* In a proceeding to revoke letters of administration which had issued to the widow of M. deceased, upon the ground, that, at the time of her intermarriage with deceased, she had another husband,

MARRIAGE. PROOF OF MARRIAGE. *Continued.*

one W., then living,—*held*, that the proof of such former marriage, consisting simply of general report to that effect, and of the fact of cohabitation together as husband and wife, with one or more children born to them, is not sufficient to establish it. *Myatt* v. *Myatt, Admx., et al.* 473.

2. While the presumption of law is always in favor of a marriage between parties cohabiting together as man and wife, yet such presumption may be rebutted. Ibid. 473.

3. Nor, in such case, will proof of her admissions that she was married to such other person, coupled with the fact of cohabitation as man and wife, establish such former marriage. Ibid. 473.

LEGALITY OF MARRIAGE.

4 *Should not be determined in a collateral proceeding.* The legality of the marriage ought not to be determined in a collateral proceeding to revoke letters of administration granted to the widow; other proceedings should be instituted, whereby the whole merits of the case can be fully investigated. Ibid. 473.

MARRIED WOMEN.

CONVEYANCE OF LAND OF THE WIFE.

1. *The husband must join.* The act of 1861, entitled "An act to protect married women in their separate property," does not empower a wife to convey her real estate without the consent and joinder of her husband in the deed, as required by section seventeen of our statute of conveyances. And although the act modifies during coverture the husband's estate by the curtesy, it does not enable the wife to divest him thereof, or prevent its taking effect after her death. *Cole* v. *Van Riper*, 58.

ESTATE OF THE HUSBAND IN THE WIFE'S LAND.

2. *Estate during coverture.* The estate during coverture which, at the common law, the husband held in the lands of the wife, would doubtless be held, under the act of 1861, to be substantially abolished, in cases where the estate did not become vested before the passage of the act. Ibid. 65.

3. *As tenant by the curtesy.* But the estate of the husband as tenant by the curtesy is not totally abolished by that act, though it is materially modified. Where no interest vested in the husband prior to the passage of the law, he has no control over the wife's lands during her life, nor has he an interest in them subject to execution; but his estate as tenant by the curtesy may take effect on the death of the wife. Ibid. 65.

GIFT FROM HUSBAND TO WIFE.

4. *Not embraced in the act of* 1861. A gift from the husband to the wife is not embraced in the act of 1861, concerning the separate property of married women, as that act has reference only to property acquired by the wife through some source other than her husband. *Manny* v. *Rixford*, 132.

DISTRIBUTION OF THEIR PERSONAL ESTATE.

5. *And herein, of the rights of the husband, as administrator of his wife*

See ADMINISTRATION OF ESTATES, 4, 5.

MARTIAL LAW.
WHAT CONSTITUTES.
And where it may prevail. See PERSONAL LIBERTY, 6 to 10.

MASTER IN CHANCERY.
NOTICE OF TAKING PROOF.
Whether sufficient. See NOTICE, 1.

MASTER'S REPORT.
Whether exceptions thereto necessary. See CHANCERY, 17.

MASTER AND SERVANT.
WHEN THE FORMER LIABLE.
For acts of the latter. See AGISTMENT, 1, 2.

MEASURE OF DAMAGES.
IN TRESPASS.
1. *For personal injuries.* In an action of trespass, for personal injuries, when the act complained of is without malice, vindictive damages cannot be given. *Pierce* v. *Millay*, 189.

2. In such case, full compensation for the pain and suffering, loss of time, expenses incurred for medical treatment, and compensation for the injury, if permanent, is all that should be given. Ibid. 189.

IN TRESPASS AGAINST AN OFFICER.
3. *For levying upon and selling the property of plaintiff under execution against another.* While it is true, as a general rule, that the value of property wrongfully sold on execution is the measure of damages sustained by the owner, still, that is not true except in cases where the purchaser has obtained the property. *Warner* v. *Ostrander*, 356.

4. A rule of more general application is, that in cases not requiring punitive damages, the loss actually sustained is the true measure. Ibid. 356.

5. So, where the property of the plaintiff was levied upon and sold under an execution against another person, but remained in the possession of the owner, who sold it and received the benefit of the proceeds beyond the amount for which it had been sold on the execution, there being no circumstances connected with the levy and sale calling for punitive damages, the proper measure of damages in an action of trespass by the owner against the officer would be the actual damage sustained,—that is, the amount for which the property was sold on the execution. Ibid. 356.

6. *Where goods are wrongfully levied upon.* If the goods of one person are wrongfully levied on under an attachment against another, the statute does not contemplate that the rightful owner is to be permitted to recover only such a sum in damages as his property may have brought under a forced sale. *Whitaker* v. *Wheeler*, 440.

MEASURE OF DAMAGES. *Continued.*

IN TROVER.

7. *For conversion of a note.* In an action of trover and conversion for a note, the measure of damages, *prima facie*, is the sum due on the instrument. *American Express Co.* v. *Parsons*, 312.

IN AN ACTION ON THE CASE

8. *Against an express company—for loss of a note.* In case, and other actions for wrongs, where there are no circumstances which authorize punitive damages, the true measure is the amount the plaintiff has really sustained. Where it appears that a note intrusted to an express company was lost through negligence, the injury is the same as if it had been converted, and the measure of damages should be the same. *American Express Co.* v. *Parsons*, 312.

9. Notwithstanding the company is *prima facie* liable for the sum of money due on the note, they have the right to establish, by any legitimate evidence, that the damages were less in fact. Should it appear that the maker was insolvent, or that there was a legal defense to the note, or other facts rebutting the presumption of loss, it will reduce the damages. Ibid. 312.

SUIT ON SUPERSEDEAS BOND.

10. *Liability of the sureties.* The obligation of a surety upon a supersedeas bond, is limited to the prosecution of the writ of error with effect, and his undertaking is, that if the writ is not so prosecuted he will pay all resulting damages. *Cook* v. *Marsh*, 178.

11. In an action on such a bond, where it appeared that real and personal property had been decreed to be sold, and the sale suspended by the supersedeas, the property in the mean time having deteriorated in value, the extent of the deterioration of the property would constitute the damages, which the plaintiff would be entitled to recover. Ibid. 178.

12. And in such case, a claim by the plaintiff for the rents received by the defendant from the real estate, after the rendition of the decree, will not be allowed, plaintiff having no right by the decree, nor under the law, to its possession, or the rents thereof. Ibid. 178.

ON CONTRACT TO FURNISH CARS.

13. *Measure of damages for breach thereof.* In an action against a railroad company for a failure to furnish passenger cars, as agreed upon, for an excursion, at a stipulated price, the measure of recovery would be the amount the plaintiff would have received as passage money, if the train had gone as proposed, less the amount agreed to be paid for the use of the cars. *Illinois Central Railroad Co.* v. *Demars*, 292.

FOR NEGLECT TO ASSIGN DOWER. See DOWER, 8, 9, 10.

MILITARY LAW.

WHAT CONSTITUTES. See PERSONAL LIBERTY, 6 to 10.

MISJOINDER OF PARTIES.

WHAT CONSTITUTES. See PARTIES, 9.

TIME FOR OBJECTING THERETO. See PRACTICE, 12.

MISTAKE.

REFORMING WRITTEN INSTRUMENTS.

1. A court of chancery will correct a written instrument, where clearly made to appear that it was entered into and executed under mistake. *McCloskey* v. *McCormick et al.* 336.

2. The fact that a party had brought an action at law upon the instrument sought to be reformed, which was ineffectual by reason of the mistake, and was therefore abandoned, will not be a bar to a suit in chancery subsequently brought to correct the mistake. Ibid. 336.

MITIGATION OF DAMAGES. See DAMAGES, 1.

MORTGAGES.

WHAT CONSTITUTES A MORTGAGE.

1. *Intention of parties governs.* To ascertain whether a transaction between parties amounts to a sale or a mortgage, courts of equity will look beyond the mere forms with which it is clothed, and, although it be a sale in form, if it clearly appears by proof to have been a loan or debt and security for its payment, it will be treated as a mortgage. *Owen, Exr.*, v. *Blake, Exr.* 135.

2. *When in form a sale—proof must be clear to change its character.* Where parties give to a transaction all the forms of a sale, the proof must be clear that it was intended as a mortgage, in order to change its character. Slight, indefinite evidence is not sufficient. Ibid. 135.

3. *What will be considered a mortgage.* T., desirous of entering certain lands, applied to M., an agent of G., for the purchase of land warrants, for such purpose; whereupon an agreement was made between them, whereby M. sold to him certain warrants, for which T. executed to him his notes for the purchase price, the payment of which was secured by entering the lands in the name of M., M. giving to T. his bond for the conveyance of the same to him, upon the payment of the notes. T. failed to pay the notes, and G., the principal, having died, M. quitclaimed the lands to G.'s heirs. Subsequently, the premises were sold on execution against T., who was in possession, on a judgment in favor of J., and B. redeemed from the sale, as a judgment creditor of T. On a bill to redeem filed by B., *held*, that the transaction amounted to a sale of the warrants, and the entry of the lands in M.'s name, was intended as a security for the payment of the notes, and must be treated as a mortgage; that M. held the land in trust for G.'s heirs, subject to T.'s equity of redemption, and that the deed by him to them was without consideration, and received by them merely as such heirs, and not as *bona fide* purchasers; and that B. by his purchase under J.'s execution succeeded to all of the rights of T. Ibid. 135.

MORTGAGES. WHAT CONSTITUTES A MORTGAGE. *Continued.*

4. *Or whether the transaction was a sale and resale.* The mere execution of a deed absolute on its face, and a bond for the reconveyance of the premises, upon certain conditions, does not of itself stamp the transaction as a mortgage; and when in such case, the proof shows that the parties intended an absolute sale, with right to repurchase simply, such intention must govern. *Pitts et al.* v. *Cable et al.* 103.

5. An absolute conveyance of property for money borrowed, with covenants back as a part of the same transaction, that upon the payment of the debt so created such property shall be reconveyed, amounts merely to a loan of money and a mortgage to secure its payment. *Parmelee et al.* v. *Lawrence*, 405.

COVENANT TO RECONVEY BY MORTGAGEE.

6. *Nature of title.* And a covenant by the mortgagee to reconvey the premises by "good and sufficient deed," will be construed as a covenant to pass the same title conferred by the original conveyance. Ibid. 405.

OF A LIEN ON DIFFERENT FUNDS.

7. *Of the rights of a mortgagee as to prior and subsequent incumbrances.* Where a person takes a mortgage on property a portion of which is incumbered at the time and a portion is not, he thereby acquires the right to satisfy his debt out of the portion not previously incumbered. And this right passes to an assignee of the debt and security. And on a foreclosure he could be compelled to resort for satisfaction, first, to lands upon which the debtor did not reside. *Dodds* v. *Snyder et al.* 53.

8. A person taking a deed of trust on the lot of ground occupied as a homestead by the debtor and also on a tract of land not so situated may resort, for satisfaction of his debt, first, to the land; nor is his right impaired by the debtor subsequently giving a mortgage on the land. The law will not compel the first incumbrancer to advance a thousand dollars to reach the surplus of the homestead before resorting to the land for satisfaction. Ibid. 53.

9. The law does not require a person having a lien on two funds, one of which is subject to a lien or incumbrance prior to his, and the other a lien subsequent to his, to remove the incumbrance prior to his, to enable the person holding the lien subsequent to his on the other fund, to obtain satisfaction. If a creditor having a lien on two funds, one of which was a homestead which is indivisible, and the other not subject to a prior lien, the court could not compel him to advance one thousand dollars, and sell the surplus of the homestead; to do so would be to make a new contract. Ibid. 53.

RELATION OF PARTIES TO EACH OTHER.

10. *And as to strangers.* A mortgage, as between the parties to it, is considered simply as a security for a debt, but, as between the mortgagee and a third person, the former is regarded as the owner of the freehold. *Moore* v. *Titman*, 367.

MORTGAGES. *Continued.*

RENTS AND PROFITS.

11. *Rights of the parties respectively.* A mortgagee, for condition broken may enter upon the mortgaged premises and appropriate the rents and profits arising therefrom to the benefit of his security. But a mortgagor in possession is not required to account for the rents and profits to the mortgagee, during his possession. *Moore* v. *Titman*, 367.

TAXES AND TAX TITLES.

12. *Relative rights of the parties.* A mortgagee cannot affect the rights of the mortgagor by purchasing the mortgaged premises at a sale for delinquent taxes; nor will he be permitted to set up as a bar to redemption the payment of taxes and possession acquired prior to a foreclosure; nor will payment of taxes and seven years' possession by him, their relations not being adverse, create the bar of the statute. Ibid. 367.

13. A mortgagee in possession is bound to pay the taxes, and will be allowed for all necessary expenses incurred to preserve the property and protect the mortgagor's title, to be paid out of the rents and profits arising therefrom. Ibid. 367.

MORTGAGEE OF A LEASE.

14. *Renewal of lease by mortgagee.* Where a mortgagee of a lease obtains a renewal, such renewal inures to the benefit of the mortgagor, he paying the mortgagee's charges, whether such lease expired before renewal or not. Ibid. 367.

MORTGAGEE AS A PURCHASER.

15. *Under a power contained in the deed.* A mortgagee or a trustee is prevented from purchasing at his sale of the premises under a power contained in the deed, so as to bar the equity of redemption. Ibid. 368.

ACQUIRING OUTSTANDING TITLE BY MORTGAGEE.

16. *Its effect on the rights of the parties.* Although the relation of trustee and *cestui que trust* may not be created by the mortgage as between the parties, yet they are not on the same footing as to each other as a stranger to the estate; and many acts, which a third person might perform, and thereby acquire an interest in the premises, would not, if performed by a mortgagee, give him any new rights as against the mortgagor, but would inure to the benefit of the estate. Ibid. 368.

17. Where a mortgagee, by an agreement with the mortgagor, purchased an outstanding prior incumbrance against the premises, after foreclosure, and before the right of redemption by the mortgagor had expired, and with the understanding, that such title, like his own, should be subject to redemption, — *held*, that, under such agreement, the mortgagor had a clear right of redemption from the outstanding title, which a court of equity would enforce. Ibid. 368.

18. *Such agreement not within the statute of frauds.* Such an agreement is not within the statute of frauds, the relation of the parties being that of mortgagor and mortgagee, and the purchase having been made by the consent of the mortgagor, and for the benefit of the estate. Ibid. 368.

MORTGAGES. *Continued.*

PURCHASER FROM MORTGAGOR.

19. *Estoppel.* M. and wife executed a mortgage upon their homestead without the statutory waiver, and afterward conveyed it to P. subject to the mortgage lien, and which lien formed a part of the purchase price. *Held,* in a suit to foreclose by the mortgagee, that, P. having obtained the premises by admitting the lien and assuming its payment, he was estopped from setting up as a defense the omission of M. and wife to release their homestead right in the mortgage. *Pidgeon* v. *Trustees of Schools,* 501.

OF A JUNIOR INCUMBRANCER.

20. *Extent of his rights.* A person taking a second mortgage on real estate, only acquires a lien on the equity of redemption, and when such mortgage is foreclosed and the property sold, the purchaser only obtains that right. And it will be presumed that such a purchaser regulates his bid with reference to the prior incumbrance, and only gave what it was worth subject the prior lien. *Dodds* v. *Snyder et al.* 53.

FORECLOSURE BY SCIRE FACIAS.

21. *When the note has been assigned.* The assignment of a note secured by mortgage, does not prevent a foreclosure by *scire facias* in the name of the assignor for use of the assignee. The proceeding is on the mortgage, the legal right to which is in the mortgagee, and he alone can institute the proceeding. *Camp et ux.* v. *Small,* 37.

22. *What defenses allowable.* In a proceeding to foreclose by *scire facias,* no defense can be interposed except the defense of payment, discharge, release, satisfaction, or that the mortgage never was a valid lien on the land. Pleas of usury and *non est factum* are not proper. Ibid. 37.

REDEMPTION.

23. *By a junior incumbrancer or his assignee.* A junior incumbrancer, not being a party to the bill to foreclose a prior mortgage, retains his right to redeem from such prior mortgage, unaffected by a decree of foreclosure thereof, and such right of redemption will pass to a purchaser under such junior incumbrancer. *Strang et al.* v. *Allen,* 428.

24. *Redemption from assignee of prior mortgage.* The purchaser under a junior incumbrancer having a right to redeem from a prior mortgage, notwithstanding its foreclosure, has the right to redeem from the assignee of such mortgage. Ibid. 428.

25. So, where a judgment creditor of a mortgagor redeems, as such, from the sale under the foreclosure of a prior mortgage, a junior mortgagee, who holds an intervening lien, between the elder mortgage and the judgment, may maintain a bill to redeem from such judgment creditor, he holding the relation of assignee of the prior mortgage. Ibid. 428.

STATEMENT OF ACCOUNT.

26. *On bill to redeem.* The party having such right to redeem must pay the assignee of the prior mortgage the amount paid by him to redeem from the prior mortgage, with six per cent interest, and the decree should be taken as the basis of the account, and not the original debt upon which the decree was rendered. Ibid. 428.

MORTGAGES. STATEMENT OF ACCOUNT. *Continued.*

27. *Rents and profits.* A mortgagee in possession must account to the mortgagor for the rents and profits, less the amount paid for taxes and necessary repairs, and the same rights and liabilities in regard to the rents and profits attach as between their respective assigns. *Strang et al. v. Allen*, 428.

28. So, in stating the account between such party, having the right of redemption, and the redeeming judgment creditor, as the assignee of the prior mortgage, there should be deducted from the amount, to be charged to the party redeeming, the rents and profits received by such assignee of the prior mortgage while in possession of the mortgaged premises, less the taxes and necessary repairs; because a mortgagee in possession is always liable to account for the rents and profits received over and above the necessary repairs and taxes. Ibid. 428.

29. *Where junior incumbrancer was not a party to the foreclosure.* It is proper, in stating the account, to charge the party seeking to redeem with the amount paid to redeem from the prior mortgage, notwithstanding the junior incumbrancer, under whom the party seeking to redeem claims, was not a party to the proceeding to foreclose the prior mortgage; the decree of foreclosure of such prior mortgage must be taken as *prima facie* correct, subject, however, to be attacked in that regard by the party seeking to redeem, by proper allegations in his bill, which he must sustain on the hearing. Ibid. 428.

LESSEE FROM A MORTGAGEE.

Termination of his term by the payment of the mortgage debt. **See LANDLORD AND TENANT, 11.**

EJECTMENT BY A MORTGAGOR.

When the right of action accrues. See **EJECTMENT, 1.**

SALE UNDER DEED OF TRUST.

Whether the trustee must first enter upon the premises. **See DEED OF TRUST, 1.**

TENDER BY MORTGAGOR.

Whether necessary. See **TENDER, 2.**

PARTIES ON FORECLOSURE.

Wife of mortgagor should be a party. See **PARTIES, 7.**

MULTIFARIOUSNESS. See CHANCERY, 5, 6.

MUNICIPAL CORPORATIONS. See **HIGHWAYS, 1, 2; NUISANCES, 1.**

NAMES.

VARIANCE THEREIN.

1. *Idem sonans.* Courts at the present day are not confined to the rigid rules of *idem sonans*, but inquire whether the variance is material. *Belton, Admx., v. Fisher*, 33.

2. So in an action in this State, in the name of Elizabeth *Belton*, as administratrix, upon the record of a judgment recovered in another State,

NAMES. VARIANCE THEREIN. *Continued.*

the transcript showing the original suit was brought in the name of Elizabeth *Beton*, administratrix, etc., the variance was not deemed material, it being likely it was a simple omission of a letter in copying. *Belton, Admx.*, v. *Fisher*, 33.

IDENTITY OF PERSONS.

3. *When presumed.* Where depositions were taken by William Rifenburg, under a commission addressed to William Roffenburg, and cross interrogatories were duly propounded and answered, and no objection was taken except to the variance in the spelling of the name, the court might well presume that the commission was executed by the proper person. *Whitaker* v. *Wheeler*, 440.

4. Where several debtors, who were partners, made an assignment for the benefit of creditors, and the schedule of unpreferred creditors contained this item, "Jacob Baker, house account, $11.93," and it appeared that one of the persons executing the deed was of the same name, this court will not presume that they are one and the same person, in the absence of all proof of the character of the debt, or of who such person is. *Blow et al.* v. *Gage et al.* 208.

NATURALIZATION.

WHAT COURTS HAVE JURISDICTION.

1. *Of the Marine Court of the city of New York.* The act of congress which declares that every court of record in any State, having common law jurisdiction, and a seal and clerk, shall be considered as a District Court, for purposes of naturalization, only has reference to a court of record for general, and not special purposes. *Mills et al.* v. *McCabe*, 194.

2. So the "Marine Court of the city of New York," being a court of record only to the extent that it was so declared by statute, not possessing other powers incident to such a court, is not such a court of record as was contemplated by the act of congress, and has, therefore, no jurisdiction for purposes of naturalization. Ibid. 194.

NEGLIGENCE.

NEGLIGENCE IN RAILROADS.

1. *Passenger leaving the train at an improper place.* While a passenger train stopped upon a side track, away from a station, a passenger started to get off the train, and was warned by the conductor not to do so, and as the passenger stepped down upon the steps the conductor took hold of his shoulder, and again told him to not get off there, but the passenger persisted in getting off, and the train just then starting to move, he was thrown under the wheels and injured. *Held*, that there was no negligence on the part of the company, but was on the part of the passenger, and he could not recover for the injury received. *Ohio and Mississippi Railroad Co.* v. *Schiebe*, 460.

2. Nor would it have been negligence on the part of the company, under such circumstances, if there had been a violent jerking of the train

NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

at the time the accident occurred, as the train had not reached the platform where passengers were expected to get off. *Ohio and Mississippi Railroad Co.* v. *Schiebe*, 460.

3. *Stopping a passenger train on a side track.* It is not negligence to run a passenger train on the side track, where it is necessary to permit a freight train too long to run into the side track, to pass, when the evidence shows that such a course was not unusual. Ibid. 460.

WHEN PRESUMED.

4. In an action against an express company to recover the amount of a note taken by the company for collection, and alleged by them to be lost, it is not error to instruct the jury, that, if the company fail to show the circumstances of the loss, it may be presumed to have been through carelessness. When a party is intrusted with property, and is not able to account for it, except that it is lost, if not a legal presumption of carelessness, it is so far conclusive that a court would not reverse for giving such an instruction. *American Express Co.* v. *Parsons*, 313.

AS TO THE SAFETY OF HIGHWAYS IN CITIES. See HIGHWAYS, 1 to 4.

NEW TRIALS.

MOTION FOR NEW TRIAL.

1. *When not necessary.* In cases tried by the court, it is not necessary that a motion for a new trial should be made, in order that the evidence in the case may be reviewed in this court. *Mahony* v. *Davis et al.* 289.

2. It is only to cases when trial is had by a jury, that the practice of moving for a new trial is confined. Ibid. 289.

VERDICT AGAINST THE EVIDENCE.

3. A judgment not supported by the evidence in the case is erroneous. Thus, where, in an action on the case against the American "Express company," "Merchants' Despatch," and certain individuals by name, the court gave judgment against the American Express company and the Merchants' Despatch, for the value of cases of plate glass which were shipped from New York to Chicago, and when there opened the glass found broken; and the evidence offered in the case, and under which the glass was shipped, was a bill of lading purporting to be issued by the Merchants' Despatch, without using the name or referring to the American Express company therein, and nothing in the record tending to show that the express company ever assumed any liability in regard to the carriage of the goods, — *held*, that, there being no proof tending to show the American Express company ever undertook the carriage of the glass, the judgment was unsupported by the evidence and was erroneous. *Merchants' Despatch, etc.*, v. *Smith et al.* 319.

4. Where a verdict is manifestly against the weight of evidence, the court should on motion set it aside and grant a new trial, and failing to do so, this court will reverse for error. *Ohio and Mississippi Railroad Co.* v. *Schiebe*, 460.

NEW TRIALS. VERDICT AGAINST THE EVIDENCE. *Continued.*

5. A sued B for work and labor performed for him. Both parties were sworn, and the defendant testified that he had paid plaintiff in full, and was corroborated in this by other witnesses, who worked for defendant, in the same shop with plaintiff, and who testified that defendant paid his workmen every week, and never delayed longer than two weeks, and that they had seen plaintiff paid nearly every week. *Held*, that a verdict of the jury in favor of the plaintiff was unwarranted *Koester* v. *Esslinger*, 476.

6. In an action for the unsoundness of a horse, a verdict for the plaintiff was set aside as not being supported by the evidence, there being no warranty shown, and it appearing the animal was sold as an unsound animal. *Nickle* v. *Williamson*, 48.

7. Although the correctness of a verdict may be doubtful, yet if it is not clearly against the evidence, or unsupported by it, the finding will not be disturbed. *Chicago and Northwestern Railway Co.* v. *Dement*, 74.

8. So in an action against a railroad to recover the value of a cow alleged to have been killed by a train, the proof as to the manner in which the cow was killed was, that, when found, she was lying on her back in the railway ditch, between two and three feet from the track, bloated, and the blood oozing from her nose. The jury found she came to her death from a passing train, and the court, though doubtful of the correctness of their finding, refused to disturb it. Ibid. 74.

9. A verdict against evidence cannot stand. In an action to recover $180, balance due on a contract, the plaintiff proved, without contradiction, that he made and delivered to the defendant, at a stipulated price, two hundred washing machines, which were received without objection. The defendant claimed that forty or fifty of the machines were not exactly according to the pattern furnished. The jury found for plaintiff, but only gave him $45; the court refused a motion for a new trial. *Held*, that the verdict was against the evidence, and that the court ought to have granted a new trial. *Tilley* v. *Spalding*, 80.

10. The jury, seeing the witnesses on the stand, have opportunities superior to an appellate court to determine the weight proper to be given to evidence when conflicting. So has the circuit judge who presides at the trial better means of determining whether the verdict is sustained by the evidence. An appellate court will not, therefore, interfere to set aside a verdict because it is against the weight of evidence, unless it is clearly unsustained. *Davis* v. *Hoeppner*, 306.

11. When the proof, though slight, supports the verdict, and is uncontradicted, this court will not disturb it. *Chicago & Northwestern R. R. Co.* v. *Williams*, 176.

EXCESSIVE DAMAGES.

12. In an action of trespass, when the right of recovery is limited to compensatory damages merely, and a verdict for vindictive damages is given, a new trial will be granted. *Pierce* v. *Millay*, 189.

NEW TRIALS. EXCESSIVE DAMAGES. *Continued.*

13. In an action for slander the damages are for the jury to determine, and their finding will not be disturbed, unless the damages are palpably excessive, or there was manifest prejudice, or other misconduct of the jury. *Baker et ux.* v. *Young*, 43.

INSUFFICIENT DAMAGES.

14. In an action for an assault and battery, it appeared the assault was unprovoked and of a brutal character, and resulted in serious injury to the plaintiff, for which he recovered a verdict of twenty-five dollars. The judgment was reversed because the verdict was for too small an amount. *Gibson* v. *Webster*, 483.

OBVIATING GROUNDS FOR NEW TRIALS.

15. *By concessions from the opposite party.* Where the plaintiff in a suit, who has a verdict returned in his favor, asks a new trial on the ground that the verdict is too small, it is not error for the court to state, that the new trial will be allowed unless the defendant will consent that the verdict shall be raised to the amount shown by the instrument sued on to be due, and upon such consent being given, to enter the judgment accordingly. *James* v. *Morey*, 352.

16. *Of remittitur.* Where the jury, finding for the plaintiff, assess the damages at an amount in excess of what the evidence proves the plaintiff is entitled to, a new trial will be granted, unless, on remanding the cause, a remittitur is entered for the damages so claimed to be excessive. *Winchester* v. *Grosvenor*, 425.

NON EST FACTUM.

ON FORECLOSURE BY SCIRE FACIAS.

Non est factum not pleadable. See MORTGAGES, 22.

NOTICE.

OF TAKING PROOF BEFORE A MASTER.

1. *Of sufficiency of notice.* Where a cause is referred to a master to state an account, it is not sufficient to mail a letter to a party's attorney about three days prior to the time fixed for the hearing, thus allowing, had no delay occurred in the mail, barely time to reach the office of the master at the appointed time — such notice is not sufficient. *Strang et al.* v. *Allen*, 429.

OF WHAT A PARTY MUST TAKE NOTICE.

Of purchaser at judicial sales. See PURCHASERS, 1, 2.

AS TO AUTHORITY OF AN AGENT.

When necessary to give notice that authority has ceased. See AGENCY, 6.

ON SALES OF GOODS.

When purchaser should give notice of non-acceptance. See SALES, 3.

Shipping goods on an order — whether notice to purchaser neccessary. Same title, 2.

NOTICE. *Continued.*

OF RESCISSION OF A CONTRACT.

Whether party rescinding must give notice of his intention so to do. See CONTRACTS, 9.

WHERE A PERSON HAS BECOME INSOLVENT.

Notice not necessary. See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 13.

TAX COLLECTOR'S NOTICE IN CHICAGO.

Of the notice that the collector will levy upon personal property, as required by the charter. See TAXES, 15.

EQUALIZING ASSESSMENTS IN CHICAGO.

Whether notice thereof required. See TAXES, 16, 17.

NOTICE TO QUIT.

FOR NON-PAYMENT OF RENT.

Under the common law, and under the act of 1865. See LANDLORD AND TENANT, 1 to 9.

NUISANCES.

PREVENTING THE LOCATION OF A CEMETERY.

1. *Authority of a town under a power "to abate and remove nuisances."* When, by an act of the legislature, certain officers of the town of Lake View were created a board of trustees, with power, among other things, "to abate and remove nuisances, and punish the authors thereof by penalties, fines and imprisonment, and to authorize and direct the summary abatement thereof;" and such board of trustees, under this authority, passed an ordinance, forbidding any cemetery to be opened in the town, without first obtaining their permission, under pain of a certain penalty, —*held*, that the board of trustees had no power under this grant, to prohibit in advance, the establishment of any cemetery except as authorized by the board. *Town of Lake View* v. *Letz et al.*, 81.

OF THE REMEDY.

2. *When in chancery and when at law.* Where the thing complained of is not necessarily a nuisance, but may or may not be so, according to circumstances, a court of chancery will not stay a party until the matter has been tried at law, or, in special cases, by a jury on an issue directed out of chancery. Ibid. 82.

3. And, where the alleged nuisance consists in the obstruction of a street, there is, unless in rare and exceptional cases, a complete remedy at law, to which resort must first be had, and in which the right must be established. Ibid. 82.

4. So, where it is proposed to establish a cemetery in a town, a court of chancery will not interpose its preventive power, upon the alleged grounds that the cemetery will be injurious to the public health, and that it will obstruct certain streets which have been dedicated to the public. Ibid. 82.

OFFICE.

ELIGIBILITY THERETO.

1. *Loss of residence.* On information in the nature of *quo warranto* to test the eligibility of a party to hold the office of judge; *held*, that a conditional removal from this to another State, does not render the party upon return ineligible to the office of judge, under the 11th section of article 5, of our Constitution. *Smith* v. *The People ex rel.* 16.

OFFICER.

TRESPASS BY AN OFFICER.

1. *How far process a protection.* When an officer, by virtue of an attachment, seizes property claimed by a third person under a sale from the defendant in the attachment suit, and judgment is recovered in the attachment suit, such officer, when sued for the property so seized, may show, that the sale of the property levied on was in fraud of creditors, and that, as to that property, he represented creditors. *Pease* v. *Anderson*, 218.

PARTIES.

PARTIES IN CHANCERY.

1. In chancery, all the parties in interest, and whose rights may be affected, ought to be made parties to the bill, except where the parties are very numerous, and so scattered that their names and residences cannot be ascertained without great difficulty. *Smith et al.* v. *Rotan et al.* 506.

2. This rule is enforced most generally in cases where titles may be divested. Ibid. 506.

3. In a bill for an accounting filed against the administrators of the deceased obligors in a guardian's bond, objection was made, that the heirs of the deceased obligors had not been made parties to the suit. *Held*, that this was unnecessary; that it was sufficient to make the administrators parties, and if they were compelled to pay, recourse to the heirs might be had by them, in the event they took any thing by descent. Ibid. 506.

4. *In a bill for dower.* A widow instituted proceedings and obtained a decree for her dower in the estate of her husband, and then assigned the decree to a third person; afterward, the heirs, by bill of review, procured the decree to be set aside as erroneous, the assignee of the decree thus set aside not having been made a party to the bill of review. *Held*, that, upon the widow bringing a second suit for her dower, the assignee of the decree in the first suit is a necessary party to the new proceeding. *Bonner et al.* v. *Peterson*, 257.

IN FORCIBLE ENTRY AND DETAINER.

5. *Against whom the action will lie.* See FORCIBLE ENTRY AND DETAINER, 1 to 4.

SLANDER BY A MARRIED WOMAN.

6. *Action should be against husband and wife.* See SLANDER, 3.

ON FORECLOSURE OF MORTGAGE.

7. *Wife of mortgagor.* In foreclosing by *scire facias* the wife, if she signed the mortgage, is a proper and necessary party in order to bar her equity of redemption and right of dower. *Camp et ux.* v. *Small*, 37.

PARTIES. *Continued.*

ON FORECLOSURE BY SCIRE FACIAS.

8. *Where the note has been assigned,* the mortgage may still be fore closed by *scire facias,* but it must be in the name of the payee. *Camp et ux.* v. *Small,* 37.

SURVIVING PARTNERS.

9. *Must sue alone.* The administrator of a deceased partner should not join with the surviving partner in a suit to recover a debt due to the firm At the common law, the surviving partner, alone, could sue. *Belton Admx.,* v. *Fisher,* 33.

MISJOINDER OF PARTIES PLAINTIFF.

10. *Time to object thereto.* See PRACTICE, 12.

PARTNERSHIP.

DISSOLUTION — IN CHANCERY.

1. *For default of one of the partners.* Where the articles of copartner ship between several persons, provide that one of the partners shall furnish a supply of the commodity in which the firm is to trade, and the others are to make the sales and pay over, at certain stipulated periods, out of the proceeds of the sales, to the partner furnishing such commodity, the amount of the cost thereof, a failure, on the part of those members of the firm whose duty it was to do so, to pay over the proceeds of the sales as required by the contract, will authorize the partner injured by such failure to maintain a bill in chancery for a dissolution of the partnership. *Maher* v. *Bull, Admx.* 97.

2. *Whether mutual failure to comply with covenants will be considered.* The partners thus being in default in not paying over the proceeds of sales, as agreed upon, would not be entitled to damages in such proceeding, for a failure on the part of the partner who had agreed to supply the article, to furnish what was necessary for the business. Ibid. 97.

3. *Of fraudulent conduct on the part of one partner.* And the partners who failed to pay over the money as stipulated, would be cut off from any claim for damages by reason of the other partner failing to supply what was necessary of the commodity to be furnished for the business, if they made a colorable sale of the stock on hand, inconsistent with the legitimate purposes of the partnership. Ibid. 97.

4. *Statement of account between the partners — upon what basis.* In stating the account between the partners in such a case, where it appeared that the partners who had control of the sales, had made a sale of a part of the stock of the firm, in fraud of the rights of the other partner, such sale should be considered as a sale for cash, and charged against the partners making it, accordingly. Ibid. 98.

5. If the firm should become liable for, and pay damages by reason of the failure of the partners controlling the sales to fulfill their contracts of sales, no portion of such damages should be charged against the other partner in stating the account between them, as the partners whose special

PARTNERSHIP. DISSOLUTION — IN CHANCERY. *Continued.*

duty it was to see that such contracts were complied with should not take advantage of their own wrong. *Maher* v. *Bull, Admx.* 98.

6. Where there are debts due the firm, and uncollected, at the time of stating the account between the partners, such debts should not be considered in making up the statement, unless they are of such character, that, under the contract, they are specially chargeable to one of the partners. Ibid. 98.

RECEIVER TO COLLECT DEBTS.

7. *When appointed.* See RECEIVER, 1.

GIVING FIRM NOTE FOR INDIVIDUAL DEBT.

8. *When one partner unable to bind the firm.* Without the consent of his copartners, one partner cannot bind the firm of which he is a member by giving the firm note in satisfaction of his personal indebtedness. *Wittram* v. *Van Wormer*, 525.

9. So, where two parties formed a partnership, one putting in as stock his saw-mill and a quantity of saw-logs, and the other an equivalent in money, it was *held*, that the first party could not bind the firm by giving the firm note for a balance due upon the saw-logs, although the firm received the benefit of the logs. Ibid. 525.

SALE TO THE FIRM.

And delivery to one of the partners. See SALES, 13.

SURVIVING PARTNERS.

Must sue alone. See PARTIES, 9.

OF PARTNERS AS WITNESSES. See WITNESSES, 2.

PAYMENT.

SALES FOR PAYMENT ON DELIVERY.

Effect of refusal to pay — as to delivery of a balance of the property sold. See SALES, 8.

PENALTY.

FOR NON-PAYMENT OF TAXES.

Of the power to impose a penalty therefor. See TAXES, 18, 19.

PERSONAL LIBERTY.

HOW A CITIZEN MAY BE DEPRIVED THEREOF.

1. *Power of the President of the United States in that regard, in time of peace or war.* A citizen has a right to his personal liberty, except when restrained of it upon a charge of crime, and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal. *Johnson* v. *Jones et al.* 142.

2. The President of the United States has no rightful power, *in time of peace*, to cause a marshal to arrest a citizen of one State, without process, and without any charge of crime legally preferred, and convey him to another State, and there imprison him, without judicial writ or warrant, in a military fortress. Ibid. 142.

PERSONAL LIBERTY.

HOW A CITIZEN MAY BE DEPRIVED THEREOF. *Continued.*

3. *Belligerents — subject to the law of war.* In time of war, any soldier has the right to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose, even unto death. This is the law of war. *Johnson* v. *Jones et al.* 143.

4. But the status of any person, as to the question of belligerency, depends upon his citizenship or nationality. A belligerent is a subject of the hostile power, and his character, in that regard, depends upon that of the community to which he belongs. Ibid. 143.

5. So in the late war of the rebellion, the people of the rebel States were recognized as belligerents, but the citizens of the loyal States, resident and remaining therein, and not engaged in the war, were not belligerents or subject to arrest as prisoners of war, notwithstanding they may have been domestic plotters against the government, in full sympathy with the rebels and rendering them their moral co-operation and aid. Ibid. 143.

6. *Military and martial law.* Military law, as distinguished from martial law, consists of the rules prescribed for the government and discipline of troops, which apply only to persons in the military or naval service of the government, whereas martial law, when once established, applies alike to citizen and soldier. Ibid. 143.

7. But martial law is in truth and reality no law, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer. Ibid. 143.

8. Martial law must be permitted to prevail on the actual theater of military operations, in time of war, as an unavoidable necessity. So, if a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, he can arrest and detain him so long as may be necessary for the security or success of his army. Ibid. 143.

9. But, beyond the enforcement of martial law on the actual field of military operations, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through the civil tribunals, and render a resort to the military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government, there seems to be no ground upon which it can be properly exercised. A state of war does not, of itself, suspend, at once and everywhere, the constitutional guaranties of the liberty of the citizen. Ibid. 143.

10. And, though the government be engaged in war, in the suppression of a rebellion in certain parts of the country, in those portions not engaged in the rebellion, where the civil courts, in the midst of loyal communities, are in the undisturbed exercise of their ordinary jurisdiction, martial

PERSONAL LIBERTY.

How a citizen may be deprived thereof. *Continued.*

law cannot properly exist, and the federal executive has no power to cause the arrest of citizens in such communities, for alleged disloyal practices therein, under his authority as commander-in-chief, and as incident to a state of war, and any person making such arrest by direction of the President, must respond in damages to the party so illegally deprived of his liberty. *Johnson* v. *Jones et al.* 143.

PLEADING.

Of the declaration.

1. *Where the consideration of a contract is executed, and where it is executory.* Where a party promises to pay a sum of money in consideration that the promisee releases all claims he holds against the promisor, although it does not appear what claims were released, yet, if the consideration of the promise to pay, in that regard, was treated by the parties as executed by the mere execution of the contract, the instrument furnishes a *prima facie* cause of action, in a suit for the money, so far as depends on that portion of it. *Armstrong, Admr.*, v. *Bartram*, 422.

2. But, where a part of the consideration of the promise to pay the money was executory, being an agreement on the part of the promisee to deliver the possession of land to the promisor, the contract describing no particular land, — in an action to recover the money, it is not enough, in averring performance by the promisee, to allege that "the land mentioned in the contract was given up," but the facts in regard to the transaction should be set forth in the declaration with such particularity, that it could be seen what land was in the contemplation of the parties, and that the surrender of the possession was such as the parties intended in the agreement. Ibid. 422.

3. *Averments in respect to a condition precedent.* Where an agreement under seal contains a number of covenants to be performed by one party, and the other party, in consideration of such covenants, agrees to perform an act, the first are precedent covenants, and their performance must be averred and proved to warrant a recovery on the latter and dependent covenant. *Hoy* v. *Hoy*, 469.

Pleas amounting to general issue.

4. *Of striking them from the files.* Where the general issue and special pleas are filed, and the matter of the special pleas can be given in evidence under the general issue, the special pleas are obnoxious to demurrer, and may be stricken from the files. *Manny* v. *Rixford*, 129.

Filing amended plea.

5. *After demurrer sustained to a former plea.* The practice is well settled, that where a defendant, after his pleas have been adjudged bad on demurrer for substance, takes leave to amend, and files as an amended plea a new and different plea, he thereby waives his first pleas and cannot assign for error the decision of the court sustaining the demurrer. *Dean* v. *Gecman*, 286.

PLEADING. *Continued.*

JOINDER IN DEMURRER.

6. *Not necessary.* It is no objection that a demurrer was taken up and disposed of without a formal joinder, and judgment rendered thereon. A joinder in demurrer is unnecessary. *Mix et al.* v. *Chandler et al.* 174.

PLEA OF TENDER.

On a sale of chattels of a specified quality — requisites of the plea. See SALES, 6.

ON FORECLOSURE BY SCIRE FACIAS.

Pleas of usury and non est factum, not proper. See MORTGAGES, 22.

PLEADING OVER, WAIVES DEMURRER. See PRACTICE, 7.

PLEADING AND EVIDENCE.

SALES FOR PAYMENT ON DELIVERY.

1. *Acceptance by vendee of part, after the time, and refusal to pay — set-off.* In an action by a purchaser of chattels against the vendor for non-delivery within the stipulated time, a plea that a part was delivered and accepted afterward, but that the purchaser refused to pay for the part thus accepted, on its delivery, as required in the contract, is a good plea. If the purchaser sought at the time of the delivery of such part to pay for it by setting off the damages for non-delivery of the residue, it was incumbent on him to have made a distinct offer so to do to the vendor. *Bradley et al.* v. *King et al.* 339.

2. In order to defeat the effect of such a plea, the purchaser should either traverse the averment of refusal to pay, and prove on the trial of the issue that damages were due him equal to the value of the property delivered, and that he offered the vendor to release the damages to that amount, or he may reply these facts specially to the plea. Ibid. 339.

UPON JUDGMENT ON DEMURRER.

3. *On overruling demurrer to declaration — evidence admissible on assessment of damages.* In an action of debt upon a supersedeas bond, the declaration assigned as breaches of the condition, that the writ of error had not been prosecuted with effect, but that the decree had been affirmed; and that the property mentioned in it had deteriorated in value since its rendition. The defendant filed a demurrer, which the court overruled, and gave judgment for the amount of the penalty in the bond, and nominal damages *only*, refusing to hear any evidence in support of the breaches assigned of deterioration of the property. *Held*, that it was error for the court, after having adjudged the declaration good on demurrer, to reject evidence offered to show the deterioration of the property; that the overruling of the demurrer was a recognition of the claim. *Cook* v. *Marsh*, 178.

EVIDENCE UNDER THE GENERAL ISSUE.

4. Under the plea of *non-assumpsit* the death of one of several plaintiffs cannot be proved. *Stoetzell et al.* v. *Fullerton*, 108.

ALLEGATIONS AND PROOF.

5. *Must correspond.* In suing for a violation of an ordinance of the city of Aurora, the summons must state the ordinance which is alleged to be

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOF. *Continued.*

violated; and where, in such a case, the ordinance named in the summons, as having been violated, is excluded upon the trial, the city cannot proceed against the defendant on another ordinance of a different character. The ordinance stated in the summons, to be violated, is the cause of action, and it cannot be shifted, without consent, to another cause, even if the magistrate has jurisdiction of that other cause. *Gates* v. *City of Aurora*, 121.

6. *When they need not correspond.* In a bill to redeem, a tender being unnecessary, an allegation in the bill of a tender, unproved, can not defeat the pre-existing right. *Dwen, Exr.*, v. *Blake, Exr.* 136.

7. *When the proof sufficient.* Where the declaration contains no averment of a tender but a readiness and willingness to perform, plaintiff need only show such readiness and willingness to perform. A tender need not be proved. *McPherson* v. *Nelson et al.* 124.

ALLEGATIONS AND DECREE.

Must correspond. See ALLEGATIONS AND DECREE, 1, 2, 3, 4.

EVIDENCE UNDER PARTICULAR ISSUES.

On the trial of the question as to the value of property, for purposes of taxation. See TAXES, 10, 11 12.

POUNDMASTER.

OF HIS POWERS. See IMPOUNDED ANIMALS, 1, 2, 3.

POWERS.

POWERS OF A TOWN.

To prevent the establishment of a cemetery, under a power "to abate and remove nuisances. See NUISANCES, 1.

PRACTICE.

WHERE A PART PLEAD SPECIALLY.

1. *Where a part of several defendants in trespass plead specially — rights of the other defendants.* An action of trespass is several as to each defendant, and each has a right to make his own defense and to have it tried without being compelled to rely upon a defective defense made by a co-defendant. *Johnson* v. *Jones et al.* 144.

2. Where one of several defendants in such action pleads specially such matter as shows the plaintiff cannot maintain his action against either, and the other defendants plead the general issue only, upon a demurrer to the special plea being overruled, and the plaintiff abides by his demurrer,— the defendants pleading the general issue have their option, either to claim the benefit of the judgment on demurrer in favor of their co-defendant, or to insist on a trial of the issue made by their own plea. Ibid. 144.

3. If the defendants who plead the general issue only, seek to avail themselves of the judgment of the court on the special plea of their co-defendant, and the court permits it, the plaintiff can except, and preserve against them in the record, the same question raised by his demurrer to the special plea. Ibid. 144.

PRACTICE. *Continued.*

4. But, if those defendants pleading the general issue insist upon a trial of that issue as to them, notwithstanding the ruling upon the demurrer to the special plea of their co-defendant, then, on such trial, a verdict and judgment may be had according to the proof. *Johnson* v. *Jones et al.* 144.

OF RULES OF PRACTICE.

5. *In inferior courts.* This court will not reverse a judgment, merely on the ground, that the court, in rendering it, disregarded one of its established rules of practice, unless such violation be plain, and likely to result in injustice. A court is the best interpreter of its own rules. *Mix et al.* v. *Chandler et al.* 174.

PRACTICE IN THE SUPERIOR COURT OF CHICAGO.

6. *Construction of the thirty-fourth rule.* Under the thirty-fourth rule of practice, adopted by the Superior Court of Chicago, it is proper for the court to dispose of a demurrer in a cause, when reached upon the docket for trial, without any notice; it being the duty of counsel to be present, and prepared for its disposition, whether upon an issue of fact or law. Ibid. 174.

WAIVER OF DEMURRER.

7. *By pleading over.* A party whose demurrer has been overruled, by pleading over waives any error committed thereby. *Camp et ux.* v *Small*, 37.

IMPROPER REMARKS OF THE COURT.

8. *In the hearing of the jury.* On the trial of a cause the court remarked in the hearing of the jury, in reference to a certain statement of a witness, that "it amounted to nothing," when the evidence was proper for the consideration of the jury, and it was *held*, such a remark was error, as it would tend to exclude the evidence in reference to which it was made from the consideration of the jury. *Kennedy* v. *The People*, 283.

SENDING PROCESS TO FOREIGN COUNTY.

9. *Under amendatory act of* 1861. Under the act of 1861, amendatory of our practice act, a sole defendant cannot be sued out of the county where he resides, or may be found, unless the contract upon which the suit is brought, was *actually made* in the county where suit is brought, and the plaintiff resides in that county. *Mahony* v. *Davis et al.* 288.

10. And when a party living in La Salle county gave in that county an order to the traveling agent of a merchant residing in Cook county, for the purchase of certain goods, upon which they were sent to him, such contract cannot be sued upon in Cook county, and process sent to, and served upon, the defendant in La Salle county. Ibid. 288.

11. Such contract cannot be said to have been "*actually made*" in Cook county; as the sense in which those words are used in the act, evidently has reference to the actual presence of the parties, and not to a constructive presence, in the form of an offer by letter, or verbally transmitted Ibid. 289.

PRACTICE. *Continued.*

TIME FOR MAKING CERTAIN OBJECTIONS.

12. *Misjoinder of parties plaintiff.* Should the administrator of a deceased partner improperly join with the surviving partner in an action to recover a debt due the firm, the misjoinder should be objected to in the court in which the suit was brought,—it is too late to take the objection in a suit brought upon the judgment rendered in the action in which the misjoinder occurred. *Belton, Admx.*, v. *Fisher*, 33.

STRIKING PLEAS FROM THE FILES.

When they amount to the general issue. See PLEADING, 4.

OF RECALLING A JURY.

After they have sealed their verdict and separated. See JURY, 1 to 4.

QUESTIONS OF LAW AND FACT. See JURY, 9.

MOTION FOR NEW TRIAL.

When not necessary. See NEW TRIALS, 1, 2.

OBVIATING GROUNDS FOR NEW TRIAL.

By concessions from the opposite party. See NEW TRIALS, 15, 16.

PRACTICE IN THE SUPREME COURT.

ERROR WILL NOT ALWAYS REVERSE.

1. *Of an improper entry of a verdict.* In an action of debt the verdict was improperly entered by the clerk in damages, but in order to avoid the granting of a new trial on the motion of the plaintiff, on the ground that the verdict was too small, the defendant consented that it should be raised to a larger sum; and, the judgment being so entered, the act of the clerk in entering the original verdict in damages was not considered a sufficient reason for reversing the judgment. *James* v. *Morey*, 353.

RELEASE OF ERRORS.

2. *What constitutes.* Where a party recovering a judgment, or decree, voluntarily accepts the benefits thereof, knowing the facts, he is thereby estopped to afterward reverse such judgment or decree. The acceptance operates, and may be pleaded, as a release of errors. *Ruckman et al.* v. *Alwood et al.* 183.

REHEARING.

3. *When not granted.* Where a party brings a record to this court, assigns error thereon, and submits the cause for decision upon the transcript as it then stands, a rehearing will not be granted at his instance, after the cause is tried and a judgment rendered, upon the ground of an alleged mistake committed by the clerk below in making the transcript of the record. *McPherson* v. *Nelson et al.* 124.

ENTERING FINAL JUDGMENT THEREIN.

4. *When it will not be done.* Where, in a proceeding by distress for rent, a general judgment was rendered and execution awarded upon the finding of the jury, the Supreme Court will reverse the judgment for the error, and remand the cause with directions to the court below to enter a final order in conformity with the statute; but the final order will not be entered in the appellate court. *Storing* v. *Onley*, 123.

PRACTICE IN THE SUPREME COURT.

ENTERING FINAL JUDGMENT THEREIN. *Continued.*

5. *Former decision.* In *Alwood* v. *Mansfield*, 33 Ill. 452, which was a case of similar character, the final order was entered in the appellate court, but it is considered the better practice to remand the cause and let the final order be entered in the court below. *Storing* v. *Onley*, 123.

RENDERING FINAL DECREE THEREIN.

6. Although it be admitted that a decree was for too large a sum, the Supreme Court will not render a final decree, it having found that practice leads to inconvenience, but will remand the cause, that the proper decree may be entered in the court below. *Pidgeon* v. *Trustees of Schools*, 501.

PRE-EMPTION.

OF THE NATURE OF THE INTEREST.

1. *And of the mode of transfer.* The interest acquired by a pre-emption right is not a mere chattel interest which can be transferred by parol, but requires a written instrument to pass such right or title. *Lester et al.* v. *White's Heirs*, 464.

2. *May be taken on execution — or on death of owner, descends to the heir.* It is a right which may be taken on execution; or upon the death of the owner, it descends to the heir, and will not go to the executor or administrator. Ibid. 464.

PRESIDENT OF THE UNITED STATES.

PERSONAL LIBERTY.

Of the power of the President to deprive a citizen of his liberty, in time of peace or war. See PERSONAL LIBERTY, 1 to 10.

PRESUMPTIONS.

PRESUMPTIONS OF LAW AND FACT.

1. *Presumption in support of a judgment below, in the absence of evidence from the record.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 2, 3, 4, 6.

2. *As to sufficiency of service of process in a suit in another State.* See JUDGMENTS, 1.

3. *As to the identity of persons, where the same name occurs.* See NAMES, 4.

4. *Presumption as to identity of persons where there is a variance in the name.* See NAMES, 3.

5. *Where bill of exceptions in transcript has no seal, presumption that original had none.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 4.

6. *As to the time of the delivery of a deed.* See CONVEYANCES, 2.

7. *As to negligence, where property is lost while in the hands of a bailee.* See NEGLIGENCE, 4.

8. *Finding upon nul tiel record — when presumed correct.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 2.

PRESUMPTIONS. PRESUMPTIONS OF LAW AND FACT. *Continued.*

9. *Presumption as to authority of an agent.* See AGENCY.

10. *And as to the continuance of such authority.* Same title, 4.

11. *In support of a verdict, where the evidence does not appear.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 6.

12. *Presumption that a law was constitutionally passed.* See STATUTES, 1.

PRINCIPAL AND AGENT. See AGENCY.

PROCESS

OF THE SUMMONS

1. *Its sufficiency.* When the venue of a writ is, "State of Illinois, Jackson county," and the process was directed to "the sheriff of Jasper county," commanding him to summon the defendants "to appear before said Circuit Court, on the first day of the next term thereof, to be holden at the court house, in Murphysboro," etc.,—*held*, that in this no ambiguity existed; the place where the court was to be held, and where the defendants were summoned to appear, being certain. *Hall et al.* v. *Davis*, 494.

CITY OF AURORA.

2. *Requisites of summons for a violation of an ordinance thereof.* The charter of the city of Aurora prescribes the mode in which suits shall be brought before the police magistrates of the city for a violation of any of its ordinances, requiring to be stated in the summons the ordinance alleged to have been violated. *Gates* v. *The City of Aurora*, 121.

IN PROCEEDINGS BY QUO WARRANTO.

What process necessary to bring the respondent into court. See QUO WARRANTO, 1, 2.

SENDING PROCESS TO FOREIGN COUNTY. See PRACTICE, 9, 10, 11.

HOW FAR A PROTECTION TO AN OFFICER. See OFFICER, 1.

PURCHASERS.

REVERSAL OF JUDGMENT OR DECREE.

1. *Its effect upon the rights of the purchaser.* If a judgment or decree be reversed for error after sale of property thereunder, it is a settled principle of the common law coeval with its existence, that the defendant shall have restitution of the purchase money, and the purchaser shall hold the property sold, *except* where the plaintiff in the judgment or decree becomes purchaser and still holds the title. *Fergus et al.* v. *Woodworth et al.* 374.

2. The rule of notice *lis pendens* does not apply to a purchaser under a decree of foreclosure who is not a party to the record. The law does not require such purchaser to inspect the record, and to see that it is free from errors. He only has to see that the court has jurisdiction, and there is such a judgment or decree, unreversed, as authorizes the sale. Ibid. 374

PURCHASERS. *Continued.*

OF PURCHASE MONEY ON PRIOR SALE.

3. *Whether the subsequent purchaser liable therefor.* The assignee of a bond for the conveyance of land, incurs no personal liability for the payment of the unpaid purchase money due upon the sale to his vendor, unless he expressly assumes the payment of the outstanding lien, or its amount is allowed in the purchase money. *Hammer* v. *Johnson et al.* 192.

PURCHASERS WITHOUT NOTICE.

4. *When protected.* Where a party purchases without notice of an outstanding equity in another, he is not affected by such equity. *Pitts et al.* v. *Cable et al.* 103.

WHO MAY BECOME A PURCHASER.

Of a mortgagee or trustee, under power of sale in the deed. See MORTGAGES, 15.

PURCHASER PENDENTE LITE.

From a plaintiff in ejectment — of his rights. See EJECTMENT, 2, 3.

PURCHASER UNDER A JUNIOR MORTGAGE.

Extent of his rights. See MORTGAGES, 20.

PURCHASER FROM JUNIOR INCUMBRANCER.

Of his right to redeem from the assignee of a prior mortgage. See MORTGAGES, 23.

PURCHASER FROM MORTGAGOR.

When estopped from setting up the homestead right of his grantor against the mortgagee. See MORTGAGES, 19.

OF INSURANCE MONEY.

To whom it belongs where the insurance was obtained by a subsequent purchaser of premises. See INSURANCE, 1.

BONA FIDE PURCHASER.

At judicial sale — who is not a bona fide purchaser. See SALES, 15.

PURCHASE MONEY.

WHO LIABLE THEREFOR.

Whether the assignee of a title bond for land is liable for unpaid purchase money due the first vendor. See PURCHASERS, 3.

QUITCLAIM DEED.

SUFFICIENT CONSIDERATION.

To support a contract. See CONSIDERATION, 1.

QUO WARRANTO.

JURISDICTION OF THE PERSON OF RESPONDENT.

1. *How acquired.* Leave was granted a party to file an information in the nature of a *quo warranto*, notice of which was given the defendant, but without *further process.* A rule was entered requiring the defendant to plead, which he failed to do; and, proof of the service of the copy of the same upon him being made, his default was taken, and the court pro-

QUO WARRANTO.

JURISDICTION OF THE PERSON OF RESPONDENT. *Continued.*

nounced judgment of ouster against him. *Held*, that the court acquired no jurisdiction to enter the rule and render the judgment. *Hambleton* v. *The People ex rel. Young*, 458.

2. After leave given to a party to file an information in the nature of a *quo warranto*, the court can only acquire jurisdiction by service of a writ, under seal of the court, and running in the name of the people of the State of Illinois, or by voluntary appearance of the defendant. This was the practice under the statute of Anne, from which ours does not substantially differ. Ibid. 458.

RAILROADS.

FENCING RAILROADS.

Liability for injury to stock. Where cattle are injured upon a railroad at a place where the company are required by law to fence the road, and it had been in operation several years without that being done, the company are liable for the damages resulting from such neglect of duty. *Toledo, Peoria and Warsaw Railway Co.* v. *Wickery*, 76.

NEGLIGENCE—GENERALLY. See NEGLIGENCE.

RATIFICATION.

OF ACT OF AN AGENT.

Ratification by the principal—what constitutes. See AGENCY, 9.

REAL AND PERSONAL ESTATE.

OF WHICH CHARACTER PROPERTY PARTAKES.

Of a pre-emption right. See PRE-EMPTION, 1, 2.

ROADWAY OF A RAILROAD.

Of improvements thereon—whether real estate, for purposes of taxation. See TAXES, 12.

RECEIPT.

EXPLAINING RECEIPT.

Evidence should be clear. See EVIDENCE, 2.

RECEIVER.

WHEN APPOINTED.

In a suit by one partner for a dissolution of the partnership, for misconduct on the part of the other partners and to enjoin them from collecting debts, a receiver will be appointed to collect the debts, and be directed to make proper distribution of the sums received by him. *Maher* v. *Bull, Admx.* 98.

REDEMPTION.

AS BETWEEN MORTGAGOR AND MORTGAGEE.

When the right of redemption exists. See MORTGAGES, 1 to 5.

BY A JUNIOR INCUMBRANCER.

Or his assignee. See MORTGAGES, 23.

REDEMPTION. *Continued.*

FROM ASSIGNEE OF PRIOR MORTGAGE. See MORTGAGES, 24.

STATEMENT OF ACCOUNT.

On bill to redeem. Same title, 26 to 29.

REHEARING.

IN THE SUPREME COURT. See PRACTICE IN THE SUPREME COURT, 3.

RELEASE.

RELEASE OF ONE OF SEVERAL OBLIGORS.

1 *Its effect on the liability of the others.* Where a release is given to one of several obligors, which is to operate as an absolute discharge of such obligor, it will also operate to release his co-obligors, notwithstanding the instrument contains an express provision that such co-obligors shall not thereby be released. *Parmelee et al.* v. *Lawrence,* 405.

2. The mere fact that when a release is executed the parties are ignorant that its legal effect will be to discharge the co-obligors, will not prevent its so operating, if executed and delivered unconditionally and without reference to its bearing upon other parties. Ibid. 405.

3. But it seems, if such an instrument provides, in terms, that the obligor seeking to obtain the release shall remain subject to the right of contribution in favor of his co-obligors in case they are compelled to pay more than their share of the claim, then the provision in the release that it shall not operate to discharge such co-obligors may be given effect according to its terms. Ibid. 405.

4. But a release, like every other written instrument, must be so construed as to carry out the intention of the parties, as sought in the language of the instrument itself, when read in the light of the circumstances which surrounded the transaction. Ibid. 405.

5. So where A receives a contract from B, knowing that it was designed by B to receive a certain interpretation and only to be used for a specific purpose, A has no right to give it a different interpretation, or to use it for a different purpose, although the purpose to which it may be diverted should be consistent with the language of the instrument itself. Ibid. 405.

6. So where an obligee executes to one of the several obligors an instrument which, in form, is a release of such obligor, with a provision that it is not to operate as a discharge of his co-obligors, while the legal effect of the words used in the contract would be to release all, yet, if when read in the light of the circumstances attending its execution, it appear that the party making the contract did not intend it to have that effect, and the party receiving the contract, knowing such intent, pretends that it will not operate to discharge the co-obligors, who were, in terms, expressly excluded from the operation of the release, — then the instrument will be construed merely as a covenant not to sue, not operating as a technical release, but leaving the co-obligors still liable, and entitled to contribution from the party seeking the release. Ibid. 405.

RELEASE. *Continued.*

SALE FOR DELIVERY AT A SPECIFIED TIME.

Acceptance of part after the time — how far a release of damages for non-delivery. See SALES, 7.

RELEASE OF ERRORS. See PRACTICE IN THE SUPREME COURT, 2.

REMEDIES.

OF THE CHOICE OF REMEDIES.

Where an action brought, is found unavailing — whether a bar to another remedy. Where a party has brought an action at law upon a written instrument, and that remedy proves unavailing because of a mistake in the instrument, he may abandon his action at law and resort to a court of chancery to have the mistake corrected. *McCloskey* v. *McCormick et al.* 338.

AS TO CONTINGENT RIGHT OF DOWER.

Remedy of a purchaser of land subject thereto, from the husband. See CHANCERY, 8, 9.

LACHES OF AN ADMINISTRATOR.

In not defending a suit — remedy of the heirs. See ADMINISTRATION OF ESTATES, 3.

TO PREVENT OR ABATE A NUISANCE. See NUISANCES, 2, 3, 4.

EX TURPI CAUSA NON ORITUR ACTIO. See ACTIONS, 1, 2.

RENT.

NON-PAYMENT OF RENT.

Termination of tenancy therefor. See LANDLORD AND TENANT, 1 to 9

RENTS AND PROFITS.

WHETHER RECOVERABLE. See MEASURE OF DAMAGES, 12.

AS BETWEEN MORTGAGOR AND MORTGAGEE. See MORTGAGES, 11, 27.

RESCISSION OF CONTRACTS. See CONTRACTS, 8 to 12.

RESIDENCE.

LOSS OF RESIDENCE.

Eligibility to office — effect of a conditional removal from the State and return. See OFFICE, 1.

ATTACHMENT OF NON-RESIDENTS.

What constitutes residence, within the meaning of the attachment act. See ATTACHMENT, 1.

RESULTING TRUSTS. See TRUSTS, 1, 2, 3.

REVERSAL OF JUDGMENT OR DECREE.

EFFECT THEREOF ON RIGHTS OF PURCHASER. See PURCHASERS, 1, 2.

RIPARIAN RIGHTS.

REMEDY IN RESPECT THERETO.

Whether at law or in chancery. See CHANCERY, 1, 2.

OF THE RIGHTS OF RIPARIAN OWNERS. See GRANT, 1, 2, 3.

SALES.

SALE OF GOODS ON AN ORDER.

1. *Delivery to the carrier — effect in passing the property in the goods.* If the party of whom goods have been ordered shall ship within a reasonable time, the amount and quality ordered, and in the manner directed, the property thereupon vests in the purchaser and is thenceforth at his risk. If after such shipment a portion of the goods are abstracted and others of an inferior quality substituted so as to render the whole of an inferior quality, in that case the loss must be borne by the purchaser. As soon as such goods are delivered to the carrier the title vests in the buyer subject only to stoppage *in transitu*. *Diversy* v. *Kellogg*, 114.

2. *Notice of shipment not necessary.* A party on shipping goods on an order is not bound to give notice thereof to vest the title in the purchaser, or a failure to do so does not relieve the purchaser from the acts of his former agent, or from giving notice that the agency had ceased. Ibid. 114.

3. *Of acceptance by the purchaser.* Even if a different kind from that ordered, should be shipped, and is received by the purchaser and he appropriates it, the title thereby vests in him, and he must pay what it is reasonably worth. He would not in that case be bound to receive it, but, on learning its quality, he should in a reasonable time give notice that he declined to receive it, and thereby avoid liability. In such a case the title would vest in him until he accepted it. In such a case it is for the jury to say from all the circumstances whether he did accept it. Ibid. 114.

TENDER ON SALE OF CHATTELS.

4. *Of a tender of warehouse receipts therefor — whether sufficient.* In an action to recover damages for failure to receive and pay for a quantity of oats, sold by the plaintiff to defendant, proof of the attendance of the plaintiff at the time and place agreed upon for their delivery, but in the absence of the purchaser, for the purpose of tendering warehouse receipts for the oats, is not a sufficient tender, without the further proof, that such receipts were genuine, and that the grain was not subject to charges. *McPherson* v. *Hall*, 264.

5. But a tender of the receipts to the defendant in person would have been good, if without objection, as the failure to object would impliedly admit, that the receipts honestly represented the property. But this inference cannot be drawn, in the absence of the purchaser. Ibid. 264.

6. *What is a sufficient tender thereof — and of a plea of tender.* A contract of sale of a quantity of lumber provided that the lumber should be inspected by a particular person, and should "inspect at least twenty-five to thirty per cent better than common." In an action by the purchaser against the vendor for failing to deliver the lumber, the defendant pleaded a tender of performance, averring that the lumber tendered was inspected by the person named, but not that it was inspected "twenty-five to thirty per cent better than common." The plea was defective in failing to show that the lumber tendered was of the quality required by the contract. *Bradley et al.* v. *King et al.* 339.

SALES. *Continued.*

SALE FOR DELIVERY AT A SPECIFIED TIME.

7. *Acceptance of part after the time.* On a sale of chattels to be delivered by a certain time, if the vendor fails to make delivery within the time, an acceptance of a part afterward will operate as a release of damages for non-delivery only as to the portion accepted, there being no express waiver. *Bradley et al.* v. *King et al.* 339.

PAYMENT ON DELIVERY.

8. *Effect of refusal to pay.* And where the contract provides for payment on delivery, and the vendor fails to deliver within the time stipulated, but the purchaser accepts part afterward, such acceptance places the purchaser under the same obligation, as to payment, that he would have been under had the property been delivered and accepted within the time stipulated in the contract, and if the purchaser refuses to perform this obligation on his part, the vendor is excused from further delivery. Ibid. 339.

9. *Whether the sum due for the part thus accepted may be set off against damages for non-delivery of the residue — and how the purchaser may avail thereof.* In an action by the purchaser against the vendor for non-delivery within the stipulated time, a plea that a part was delivered and accepted afterward, but that the purchaser refused to pay for the part thus accepted, on its delivery, as required in the contract, is a good plea. If the purchaser sought at the time of the delivery of such part to pay for it by setting off the damages for non-delivery of the residue, it was incumbent on him to have made a distinct offer so to do to the vendor. Ibid. 339.

10. In order to defeat the effect of such a plea, the purchaser should either traverse the averment of refusal to pay, and prove on the trial of the issue that damages were due him equal to the value of the property delivered, and that he offered the vendor to release the damages to that amount, or he may reply these facts specially to the plea. Ibid. 339.

11. *Vendee must be ready and able to pay.* In an action for the non-delivery of goods or personal property, which were to have been paid for upon delivery, the plaintiff must not only aver, but he must also prove, not only a willingness to pay, but a readiness and ability so to do. *Cummings* v. *Tilton*, 172.

12. *What will excuse a party from offering to deliver.* And in such case, if the purchaser informs the vendor that he cannot pay the money agreed to be paid upon the delivery of the article, the vendor is excused from offering to deliver it. Ibid. 172.

DELIVERY TO ONE OF A FIRM.

13. *Whether a delivery to the firm.* Where a firm composed of two members entered into an agreement to purchase a steamboat, and a third party guaranteed the payment of the notes given therefor, and the boat was afterwards transferred by bill of sale and delivered to only one member of the firm, and on the trial the evidence tended to show that the transfer and delivery were in accordance with, and in fulfillment of, the

SALES. DELIVERY TO ONE OF A FIRM. *Continued.*

original contract of purchase, it was *held*, that this was a transfer and delivery to the firm and not to the individual, and the guarantor was liable. *Byington* v. *Gaff, Cochran & Co.* 510.

DELIVERY OF CUMBROUS ARTICLES.

14. *What is sufficient.* See DELIVERY, 1.

JUDICIAL SALES.

15. *Who is bona fide purchaser.* When a purchaser at a judicial sale combines and confederates with the officer and others to conduct the sale as secretly as possible to prevent competition, and represents to the party interested in such sale that it had been postponed, with the intention to deceive such party, to the end that he shall not be present to compete for the purchase of such property at such sale, such party is not a *bona fide* purchaser, and will not be protected against errors in the proceeding. *Dutcher et al.* v. *Leake et al.* 398.

16. *Inadequacy of the amount paid.* Although mere inadequacy of consideration, standing by itself, is not a sufficient reason for setting aside a judicial sale, yet if it exist in connection with other circumstances tending to impeach the fairness of the transaction and the good faith of the purchaser, it is entitled to great weight as determining the *bona fide* character of the purchaser and to his protection as such. Ibid. 398.

17. *Sale under a void judgment.* Where a judgment is void, as when it is confessed by an attorney without authority, a sale of land under such judgment is also void, and will pass no title. *Chase* v. *Dana*, 262.

18. *Of sale of land en masse.* A sale of property by a judicial officer ought not to be set aside, except for such irregularities as manifestly produce injustice and wrong. If, however, a sale of property in gross produces such inadequacy of price as to amount to a great wrong and oppression, a court of equity might entertain jurisdiction, even two or three years after the sale, and afford relief against the purchaser if he had not parted with the title, upon reasonable excuse being shown for the delay. *Fergus et al.* v. *Woodworth et al.* 374.

Reversal of judgment or decree — its effect upon the rights of purchasers under it. See PURCHASERS, 1, 2.

SALES UNDER DEED OF TRUST.

Whether the trustees must first enter upon the premises. **See DEED OF TRUST, 1.**

SCIRE FACIAS.

OF FORECLOSURE BY SCIRE FACIAS.

What defenses are allowable. See MORTGAGES, 22.

Where the note secured by the mortgage has been assigned. **Same title, 21.**

SEALS.

ESSENTIAL TO A BILL OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS, 5.

SET-OFF.

OF THE SUBJECT MATTER OF SET-OFF.

1. *Of a sum due for a part of goods delivered, as against damages for non-delivery of balance.* In an action by a purchaser of chattels, against his vendor, for non-delivery within the stipulated time, a plea that a part was delivered and accepted afterward, but that the purchaser refused to pay for the part thus accepted, on its delivery, is a good plea. If the purshaser seeks at the time of the delivery of such part to pay for it by setting off the damages for non-delivery of the residue, he should make a distinct offer so to do, to the vendor. *Bradley et al.* v. *King et al.* 339.

2. In order to defeat the effect of such a plea, the purchaser should either traverse the averment of refusal to pay, and prove, on the trial of the issue, that damages were due him equal to the value of the property delivered, and that he offered the vendor to release the damages to that amount, or he may reply these facts specially to the plea. Ibid. 339.

3. *Of a judgment after an appeal therefrom.* It has been held in England that a judgment may be pleaded as a set-off, notwithstanding an appeal therefrom and supersedeas; but this court is of a different opinion, though upon the facts in this case it was not necessary to decide the question. *King et al.* v. *Bradley et al.* 342.

4. *Whether the damages recovered in such judgment may be set off pending the appeal.* In an action by the vendor against his purchaser for the price of a part of the chattels sold, which had been delivered and accepted, the purchaser may set off his damages for the non-delivery of the residue of the property, although he has recovered a judgment for those same damages, there being an appeal from such judgment pending, and a consequent suspension thereof. Ibid. 342.

LIMIT OF AMOUNT OF SET-OFF.

5. *How far such set-off may be limited by the judgment recovered.* But the vendor may meet the evidence of such damages by proof of the former judgment, and insist that the amount of the judgment shall be the limit of the set-off. Ibid. 342.

SATISFACTION OF THE JUDGMENT.

By having set-off the damages for which it was rendered. See JUDGMENTS, 7.

SLANDER.

ALLEGATIONS AND PROOFS.

1. *Of the proof of the words laid.* In actions for slander, the plaintiff, to recover, must prove the language laid in the declaration, or as much at least as fully proves the charge; equivalent words in meaning will not suffice. All of the words need not be proved, if those which are proved fully establish the slander, but words proved which limit or qualify the meaning of those counted on, will defeat a recovery. If all of the words laid are necessary to constitute the slander, then all must be proved as laid. *Baker et ux.* v. *Young*, 42.

SLANDER. ALLEGATIONS AND PROOFS. *Continued.*

2. *Of the charge of fornication.* Where the words charged were that plaintiff "was in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off," — *held,* that proof that defendants said that plaintiff "was in the family way by Tom Beal" sustained the averment. The declaration proceeds for a slander in charging the plaintiff with fornication, and the language proved proves enough of the words to make out the slander. *Held,* that the additional words laid in the declaration, or those proved, did not alter or modify the charge of fornication. Also held that there was no variance. *Baker et ux.* v. *Young,* 42.

WORDS SPOKEN BY THE WIFE.

3. *Liability of the husband.* Where a married woman speaks the slanderous words, the action should be against the husband and wife jointly, and the recovery must be against both. Ibid. 43.

OF THE VERDICT.

4. *Its requisites.* A verdict in an action for slander which finds the defendants guilty, is sufficient without stating that they were found "guilty in manner and form as alleged in the declaration." Ibid. 43.

SPECIAL ASSESSMENTS.

LEGISLATIVE POWER.

1. *To authorize the assessment of benefits.* Under section 5, article 9, of the Constitution, the legislature may confer upon the corporate authorities of a city the power in cases of public improvement, which concern the whole public, to assess each lot the especial benefit it will derive from the improvement, charging such benefit on the lots, the residue of the cost to be paid by equal and uniform taxation. *Bedard* v. *Hall et al.* 91.

SUFFICIENCY OF CITY ORDINANCE.

2. *In applying the principle of uniformity.* In this case a city ordinance was passed, providing for public improvements, and that the public should pay the cost of them, on the principle of charging the owners of property specially benefited with the amount of such benefits, if any there should be, and that the deficiency should be paid out of moneys in the city treasury not otherwise appropriated. This was deemed a substantial compliance with the constitutional rule of uniformity, it being presumed the moneys in the city treasury out of which the deficiency was to be paid, were the avails of equal and uniform taxation. Ibid. 91.

SPECIFIC PERFORMANCE. See CHANCERY, 8, 9, 10.

STATE RIGHTS AND FEDERAL POWERS.

POWER OF CONGRESS.

Over rights and remedies in the State courts. See CONFLICT OF LAWS, 1, 2.

STATEMENT OF ACCOUNTS.

AS BETWEEN PARTNERS.

Of the basis thereof — upon bill in chancery for dissolution. See PARTNERSHIP, 4, 5, 6.

STATUTES.

OF THE PASSAGE OF LAWS.

1. *Presumption that a statute was constitutionally passed.* Where an act is found among the public laws, bearing the approval of the governor, this court will presume that such act was constitutionally passed, the record disclosing no proof to the contrary. The journals of the legislature will not be examined here for the first time, to impeach it. *Bedard* v. *Hall et al.* 91.

REPEAL OF STATUTES.

2. *By implication.* The repeal of statutes by implication is not favored in the law. If statutes are seemingly repugnant, they should, if possible, be so construed that the latest one shall not operate as a repeal, by implication, of the former ones. *The People ex rel.* v. *Barr*, 198.

CONSTITUTIONALITY.

3. *What laws are constitutional, and of the rules of construction.* See CONSTITUTIONAL LAW, 1, 2.

STATUTES CONSTRUED.

4. The several acts in relation to the rights of the widow, upon renouncing the will of her husband, construed in *Lessley et al.* v. *Lessley*, 527. See WIDOW, 1.

5. Statute of wills, and the act of 1861, securing to married women their separate property, construed in reference to the right of the husband, as administrator of the wife, to retain the assets. *Townsend et al.* v. *Radcliffe*, 446. See ADMINISTRATION OF ESTATES, 4, 5.

6. Act of 1861, concerning the separate property of married women, construed in *Cole* v. *Van Riper*, 58. See MARRIED WOMEN, 1, 2, 3. Also in *Manny* v. *Rixford*, 132. See same title, 4.

7. The homestead acts construed, as to the character of judgments embraced therein. *Conroy* v. *Sullivan et al.* 451. See HOMESTEAD, 3.

8. Act of 1863, "to enable counties owing debts to liquidate the same," construed in *Allen* v. *Peoria and Bureau Valley R. R. Co.* 85. See TAXES, 1.

9. The statute authorizing garnishee process to issue, construed in *Gilcreest* v. *Savage*, 56. See GARNISHMENT, 1.

10. Act of 1849, concerning a right of action by an elector for a refusal of his vote, at an election, construed in *Mills et al.* v. *McCabe*, 194. See ELECTIONS, 1.

11. *Act of* 1861 *allowing one party to call the other as a witness*, construed in *Alexander* v. *Crosthwaite*, 359. See WITNESS, 2.

12. The 25th section of the chapter on ejectment, which provides that no recovery shall be had if the plaintiff's title expires pending the suit, construed in *Mills* v. *Graves*, 50. See EJECTMENT, 3.

13. Amended charter of 1863, of the city of Chicago, in reference to the proper specification of the purposes of a tax, construed in *Clayton* v. *City of Chicago*, 280. See TAXES, 13.

STATUTES. STATUTES CONSTRUED. *Continued.*

14. Charter of city of Chicago, as to notice by collector, that he will levy on personal property, construed. Ibid. 280. See TAXES, 15.

15. Act of 1861, in relation to sending process to foreign county, construed in *Mahony* v. *Davis et al.* 288. See PRACTICE, 9, 10, 11.

16. *Act of congress concerning naturalization*, construed in *Mills et al.* v. *McCabe*, 194. See NATURALIZATION, 1, 2.

17. Act of 1867, in relation to the twenty-sixth judicial circuit, construed in *The People ex rel.* v. *Barr*, 198. See JUDICIAL CIRCUITS, 1.

18. Act of 1865, in relation to terminating a tenancy for non-payment of rent, construed in *Chadwick* v. *Parker*, 327. See LANDLORD AND TENANT, 5 to 9.

19. Act of 1867, in regard to deducting usury paid, from the principal, and taking away the three-fold forfeiture, construed in *Parmelee et al.* v. *Lawrence*, 406. See USURY, 3, 4.

STATUTE OF FRAUDS.

PAROL SALE OF LAND.

1. *What required to take a case out of the statute.* A verbal contract for the sale of real estate may be taken out of the statute of frauds, by a payment of the purchase money, being let into possession, and the making of lasting and valuable improvements. *Holmes* v. *Holmes*, 168.

2. While all of these acts may not be required to take a case out of the statute, yet payment of the purchase money is regarded as essential to have such effect. Ibid. 168.

PAROL AGREEMENT IN REGARD TO LAND.

3. *Where mortgagee acquires outstanding title by consent of mortgagor.* See MORTGAGES.

WHERE A PAROL PROMISE HAS BEEN PERFORMED.

4. *Money cannot be recovered back.* Where one party made a verbal promise to give another a certain sum of money if the latter would marry within a year, and upon his marrying the money was voluntarily paid, it cannot be recovered back, whether this promise was originally within the statute of frauds or not. *James* v. *Morey*, 352.

HOW TO AVAIL OF THE STATUTE.

5. *On motion to exclude evidence.* In this case, the party who made the promise to give the sum of money to the other, if he would marry, brought suit against him to recover a debt, and on the trial the defendant set up a credit which he had entered in his favor on the plaintiff's books, as he alleged, with the plaintiff's consent, of a residue of the sum which the plaintiff had promised to give him, he having married within the time stipulated. The plaintiff, to raise the question whether his promise to the defendant was not within the statute of frauds, moved to exclude all the evidence on that subject. This was held not to be the proper mode of presenting that question; the proper course was to ask the court to

STATUTE OF FRAUDS. How to avail of the statute. *Continued.*
instruct the jury that they were to disregard all evidence touching the promise of the plaintiff, unless they believed from the testimony that he had authorized the defendant to enter the credit, or had assented to such entry after it was made, and they were not to allow the amount thus credited merely because it had been promised. *James* v. *Morey*, 352.

SUPERIOR COURT OF CHICAGO.
Practice therein.
Construction of the thirty-fourth rule. See PRACTICE, 6.

SUPERSEDEAS BOND.
Liability of sureties therein.
Its extent. See MEASURE OF DAMAGES, 10, 11, 12.

SURETY.
Assignees of bank of Illinois.
1. *Liability of their sureties — and how affected by the act extending the time for winding up the affairs of the bank.* The same questions are presented in this case as in the case of *The Governor for use of Thomas* v. *Lagow*, 43 Ill. 134, and that case is taken as decisive of this. *The Governor for use of Thomas* v. *Bowman*, 499.

On supersedeas bond.
2. *Extent of the undertaking of the surety.* See MEASURE OF DAMAGES, 10, 11, 12.

SWORN ANSWERS IN CHANCERY. See CHANCERY, 13.

TAXES AND TAX TITLES.
Of power to levy a special tax.
1. *Cannot be exercised for a purpose not specified.* The levy of a special tax for purposes not authorized by the legislature is void. Thus, after the passage of the act of 1863, authorizing "County Courts, for county business in counties without township organization, and the board of supervisors of counties under township organization in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed, in any one year, one per cent, upon the taxable property of any such county, to be assessed and collected in the same manner, and at the same time and rate of compensation, as other county taxes; and when collected, to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court, or board of supervisors, as the case may be, in liquidation of such indebtedness," the supervisors of Bureau county passed a resolution levying among other taxes a special tax "for the purpose of liquidating the interest on any loan made, *or to be made*, and to provide for paying the indebtedness of Bureau county, for war purposes, one dollar on one hundred dollars of valuation;" and payment thereof was resisted, on the ground that the

TAXES AND TAX TITLES.

OF POWER TO LEVY A SPECIAL TAX. *Continued.*

supervisors had no authority to levy a tax to liquidate interest on *loans to be made. Held*, that the levy was unauthorized, and void to the extent of *future loans. Allen* v. *Peoria and Bureau Valley R. R. Co.* 85.

INVALIDITY OF PART.

2. *Whether it renders the whole levy illegal.* The board of supervisors having authority to levy a tax to pay existing indebtedness, the levying of a tax, in connection therewith, to pay a non-existing indebtedness, does not render the entire levy void, if the authorized can be separated from the unauthorized. Ibid. 85.

LEGALITY OF AN ASSESSMENT.

3. *Prerequisites of the law must be observed.* Where a law which authorizes a tax to be levied for a specified purpose, requires certain acts to be performed in taking steps to make the levy, the performance of such acts is generally essential to the validity of the tax. *Vieley* v. *Thompson et al.* 9.

4. So under the act of 1865, authorizing the towns in the county of Livingston, and certain other counties, to levy a tax to pay bounty to soldiers, upon its being so determined by a vote of the proper electors of the respective towns, at a special election to be called for that purpose, the requirement of ten days' notice of such election is imperative, and the giving of such notice is indispensable to the legal exercise of the power to levy the tax. Ibid. 9.

OF THE RULE OF UNIFORMITY.

5. *Its application where property is assessed at less than its value.* One portion of the tax payers of a county, owning taxable property, shall not be required to pay more taxes in proportion to its value, no matter how that may be ascertained, than another portion in the same county. *Board of Supervisors of Bureau Co.* v. *Chi. Burlington and Quincy R. R. Co.* 230; *Chi. and North W. Railway Co.* v. *Board of Supervisors of Boone Co.* 240.

6. So if the assessors, regardless of the strict injunctions of the law, shall place a value upon property far below its real cash value, and such a practice goes on unchallenged, and is recognized by the authorities having special charge of the revenue of the State, that misconduct must also contain within itself the great and cardinal principle of uniformity. Ibid. 230, 240.

7. *Corporations stand on the same footing with individuals.* If the law is not strictly observed in the case of individuals, and their property is not assessed at its actual value, the property of a corporation, situate in the same county, should not be assessed at a greater proportional value than that of individuals, even though the enhanced assessment is not on the actual cash value of the property of such corporation. Ibid. 230, 240.

8. *The rule does not apply as between counties.* But one county does not furnish a rule for another, in regard to the proportion of the value of property which shall be taken as the basis for assessment. *Chi. and N. W. Railway Co.* v *Board of Supervisors of Boone County*, 240.

TAXES AND TAX TITLES. OF THE RULE OF UNIFORMITY. *Continued.*

9. So that, on the trial of an appeal in the Circuit Court of one county, from the decision of the board of supervisors increasing the valuation upon property beyond that fixed in the schedule returned by the owner, it is not competent to give in evidence a schedule returned by the same owner, of property of the same character, situate in another county, and which placed a higher value upon it. *Chicago and N. W. Railway Co.* v. *Board of Supervisors of Boone County*, 240.

ASCERTAINMENT OF VALUE.

10. *Of the rule therefor.* The cost of an article is no evidence of its value on any certain day; and upon such a trial, the proof should be confined to its value at the time of the assessment, and the court should not permit evidence to be given of the first cost of the property. Ibid. 240.

11. And upon the trial of such an issue it is improper to admit evidence of an advance in the rate of freights upon the railroad. That has nothing to do with the value of the property to be taxed. Ibid. 241.

12. *Roadway of a railroad company must be valued as real estate, including improvements.* The improvements made upon the real estate belonging to a railroad company, occupied and fitted for use as a roadway, must be taken into account, in fixing its value for the purposes of taxation. *Chi. and N. W. Railway Co.* v. *Board of Supervisors of Lee County*, 248.

TAXATION IN CHICAGO.

13. *Specification of purpose of a tax — what is sufficient.* Under section 4, chapter 9, of the revised charter of 1863, of the city of Chicago, which requires the object of the tax to be specified, an ordinance was passed imposing a tax of one mill on the dollar for permanent improvements. *Held*, that this was a sufficient specification of the purpose of the tax. *Clayton* v. *City of Chicago*, 280.

14. *What irregularities are cured by the city charter.* An ordinance levying taxes, and passed before the tax lists were completed by the clerk and signed by the assessors, does not vitiate the tax thereby imposed, every thing having been done that was necessary to authorize the levy. It is such an informality in the procedure as the charter expressly provides shall not vitiate the tax. Ibid. 280.

15. *Notice by tax collector that he would levy on personal property — when not required.* The charter of the city of Chicago requires that the collector, when he receives a warrant for the collection of taxes, shall give notice, that, after the expiration of sixty days, he will levy on the personal property of all persons who have failed to pay. On an application for judgment against the land assessed, whether the collector did or did not give notice that he would levy on personal property in default of payment, is wholly immaterial; so, in such proceeding, the sufficiency of the collector's notice in that regard cannot be questioned. Ibid. 280.

EQUALIZING ASSESSMENTS IN CHICAGO.

16. *Power of the assessors in that regard.* Under the second section of the revised charter of 1863, of the city of Chicago, the board of assessors at the joint meeting therein provided for, raised the valuation of the property in the south division of the city, forty per cent above the value which

TAXES AND TAX TITLES.

EQUALIZING ASSESSMENTS IN CHICAGO. *Continued.*

had been fixed by the assessor for that division; the board considering the property *en masse*, and without determining the value of separate parcels. *Held*, that this action of the board was authorized; it being clearly within its power to adopt the valuation of property in any one of the divisions as a standard, and either raise or fall, on the valuation fixed by the respective assessors in the other divisions, in order to equalize the several assessments. *Scammon et al.* v. *The City of Chicago*, 269.

17. *Notice not required to be given to property owners of such action.* And in such case, it is no objection, that notice was not given to the property owners of such addition of forty per cent, as the law requires no notice of such subsequent action to be given. Ibid. 269.

PENALTY FOR NON-PAYMENT OF TAXES.

18. *Of the power to impose it.* The provision contained in section 11, of this charter, providing for a penalty of five per cent, to be imposed for delay in the payment of taxes after a certain day, is void, being in conflict with that provision of the Constitution requiring uniformity of taxation. Ibid. 269.

19. The legislature may authorize the courts to impose and render a judgment for such a penalty, but the power cannot be conferred upon a mere ministerial officer, without any opportunity of being heard by the tax payer. Ibid. 279.

TAXATION TO PAY SOLDIERS' BOUNTIES.

When not authorized. See INJUNCTIONS, 8.

RESTRAINING THE COLLECTION OF TAXES.

By injunction. See INJUNCTIONS, 1, 2.

WHO MAY ACQUIRE TAX TITLE.

As between mortgagor and mortgagee. See MORTGAGES, 12.

WHO SHOULD PAY TAXES.

As between mortgagor and mortgagee. See MORTGAGES, 13.

TENDER.

TENDER OF MONEY — IN EQUITY.

1. *By what rule governed.* Courts of equity are not bound by any fixed rules in relation to the tender of money, but they will not allow the ends of justice to be perverted or defeated, by the omission of an unimportant or useless act, which nothing but a mere technicality would require. *Owen, Exr.*, v. *Blake, Exr.* 136.

ON BILL TO REDEEM, BY A MORTGAGOR.

2. *Tender not required.* The law does not require a mortgagor to make a tender before he can compel a redemption. He is only required to pay the sum found due by the court, within the time limited by the decree. Ibid. 136.

ON A SALE OF GRAIN.

Of a tender of warehouse receipts by the vendor — whether sufficient. See SALES, 4, 5.

TENDER. *Continued.*

SALE OF LUMBER OF A SPECIFIED QUALITY.

What is a sufficient tender thereof. See SALES, 6.

ON A PURCHASE OF GOODS.

When a tender by the seller not necessary. See CONTRACTS, 13.

PROOF OF TENDER.

When not necessary, under the pleadings. See PLEADING AND EVIDENCE, 7.

TITLE.

SALE UNDER A VOID JUDGMENT.

Will pass no title. See SALES, 17.

TRESPASS.

TRESPASS FOR PERSONAL INJURIES.

Of the measure of damages. See MEASURE OF DAMAGES, 1.

TRESPASS AGAINST AN OFFICER.

How far process a protection. See OFFICER, 1.

TRUSTS.

OF RESULTING OR IMPLIED TRUSTS.

1. *How created.* A resulting or implied trust is usually created by the purchase of land with the money of one person in the name of another without the consent of the owner of the means. Such trust is never created by agreement, but always by implication of law, from acts independent of the agreement of the parties. *Sheldon* v. *Harding et al.* 68.

2. A resulting trust cannot be created, unless the money of the *cestui que trust* was used in the purchase of the property in which the trust is claimed to exist; it cannot be created by contract. *Holmes* v. *Holmes,* 168.

3. So where A, a minor, purchased his time from his father, and afterward by his own labor, and during his minority, earned a land warrant, with which he entered 160 acres of land in his own name. In a suit in chancery, brought by his father, to compel a conveyance to him of one-half of the land, upon an alleged verbal agreement, made with A before the entry of the land, that the same should be entered in A's name, but that when he arrived at majority he should convey to him one-half of the tract, the bill alleging that at the time of such entry complainant was entitled to the services of A, and therefore owned the warrant with which the land was entered, — *held,* that the land belonged to A, the proof showing that complainant was not entitled to A's services at the time he earned and obtained the warrant with which the entry was made. Ibid. 168.

WHEN A TRUST ARISES.

On a sale by a subsequent purchaser of premises of machinery belonging thereto — of a prior vendor's lien. See LIEN, 2.

DEED OF TRUST TO SECURE A DEBT.

Whether the trustee must enter upon the premises before he can sell. See DEED OF TRUST, 1.

RIGHTS OF A CESTUI QUE TRUST.

To pursue the trust fund, as against third persons. See GUARDIAN AND WARD, 1, 2.

USURY.

CANNOT BE RECOVERED BACK.

1. *When voluntarily paid.* A party cannot recover back, either at law, or by bill in equity, usurious interest which he has paid. *Pitts et al.* v. *Cable et al.* 103.

WHEN ALLOWED AS A CREDIT ON PRINCIPAL.

2. *Where paid voluntarily.* After a transaction has been closed, usurious interest cannot be recovered back. But if the transaction is yet open and the debt unpaid, a court of chancery, in stating the account, will allow as a credit upon the principal whatever usurious interest may have been paid. *Parmelee et al.* v. *Lawrence,* 406.

3. *Construction of act of* 1867. The act of 1867, which provides that in suits upon written contracts made while the interest law of 1849 was in force, and before that of 1857 was passed, no portion of the usurious interest which the debtor may have voluntarily paid shall be deducted from the principal, can be given only a prospective operation in that regard, and cannot apply to usurious interest paid before its passage, because, as to such interest, under the law as it then existed, there was a vested right to have it deducted from the principal. Ibid. 406.

4. But that portion of the act of 1867 which takes away the three-fold forfeiture given by the act of 1845, may operate upon contracts made before its passage, as the law recognizes no vested right in a penalty which the legislature may not take away. Ibid. 406.

ON FORECLOSURE BY SCIRE FACIAS.

Usury not pleadable. See MORTGAGES, 22.

VARIANCE.

VARIANCE IN NAMES. See NAMES.

VENDOR'S LIEN. See LIEN, 1, 2.

VENDOR AND PURCHASER.

SALE FOR PAYMENT ON DELIVERY.

Vendee must be ready and willing to pay. See SALES, 11.

OF A CONTINGENT RIGHT OF DOWER.

Rights and remedies in respect thereto, as between the husband and his vendee of the land. See CHANCERY, 8, 9.

VERDICT.

VERDICT IN DEBT.

1. *The proper form thereof.* In an action of debt to recover rent due upon a lease, the jury returned a verdict for the plaintiff for a given sum, specifying neither debt nor damages, and the clerk improperly recorded it as a verdict for damages; it should have been treated as a finding for the debt. *James* v. *Morey,* 353.

AMENDING A VERDICT.

2. *Where the verdict was sealed and the jury separated.* Where the parties agree that a jury trying a party on charge of larceny may seal their verdict and separate, and if the verdict is defective it should be amended unless otherwise expressed, this could only be held to apply to matter of form, and not to substance, — and the value of the property

VERDICT. AMENDING A VERDICT. *Continued.*
stolen is substance, as upon it depends the grade of the offense and the punishment. *Williams et al.* v. *The People*, 478.
IN ACTION FOR SLANDER.
Requisites of the verdict. See SLANDER, 4.

VOID AND VOIDABLE.
OF A VOID JUDGMENT.
When confessed without authority. See **JUDGMENTS, 6.**
OF A SALE UNDER A VOID JUDGMENT.
No title passes. See SALES, 17.

WAIVER.
FILING AMENDED PLEA.
When a waiver of a former plea to which a demurrer has been sustained. See PLEADING, 5.
WAIVER OF DEMURRER.
By pleading over. See PRACTICE, 7.
MULTIFARIOUSNESS.
In a bill in chancery — when waived. See **CHANCERY, 6.**

WAREHOUSE RECEIPTS.
TENDER THEREOF.
By a vendor of grain — whether tender sufficient. See SALES, 4.

WATER COURSES.
OF A GRANT UPON A WATER COURSE.
Of boundaries and riparian rights. See GRANT, 1, 2, 3.

WIDOW.
RENUNCIATION OF WILL.
What the widow will take. Under the fifteenth section of the dower act, the widow of a person dying testate and leaving no children or descendants of children, upon renouncing the will, is entitled to one-half the estate in fee, and to the specific articles enumerated in the statute; but she is not entitled to dower in the remainder of the real estate or to the whole of the personal property. *Lessley et al.* v. *Lessley*, 527.

WILLS.
CONSTRUCTION OF WILLS.
1. *Intention of testator controls.* The principle is well established, that, in construing a will, the intention of the testator, to be ascertained from its language, must govern. *The People for use of Jennings* v. *Jennings*, 488.
WILLS CONSTRUED.
2. *Where real estate is to be converted into money — when the right vests.* Where, by the terms of a will, the testator directed the executor to sell all of his real estate, and, after the payment of his debts, to divide the remainder of the proceeds of such sale equally among his four children, and, in event any of them died, the deceased's portion to go to his child or children equally, — *held*, that the interests of the several children did not vest until the real estate had been converted into money as directed by the will; and that, one of them having died intestate before such

WILLS. WILLS CONSTRUED. *Continued.*

conversion, leaving issue, his portion should be paid over to his administrator to be held in trust for his children. *The People for use of Jennings* v. *Jennings*, 488.

3. *Whether distribution shall be made per stirpes or per capita.* The will of Aaron Pitney, after directing the conversion of his property into money, and the payment of an annuity to his wife, and certain legacies to other persons, provided as follows as to the residue: "The balance remaining of said fund I hereby direct shall be equally divided between the children of my late brother, Mahlon Pitney, and my brother-in-law, William H. Brown, of the city of Chicago, a large portion of my property having been received through his father and the father of my late wife, Betsey H. Pitney." There were three children of Mahlon Pitney, and it is *held*, as between them and Brown, the distribution should be made *per capita*, and not *per stirpes*. *Pitney et al.* v. *Brown*, 363.

WISCONSIN, STATE OF.

WHO ARE JUSTICES OF THE PEACE. See JUSTICES OF THE PEACE, 1.

WITNESS.

COMPETENCY.

1. *Interest.* A grantor in a deed, who has made general covenants of warranty, and that he had power to sell, and that the land was free from incumbrances, is an incompetent witness, without a release, for his grantee, in a suit where the plaintiff claims title through another channel. *Lester et al.* v. *White's Heirs*, 464.

2. *Interest — of partners as witnesses.* A co-defendant sued as a partner, and suffering default, is disqualified by interest from being a witness, as against his co-defendant, to prove the partnership; and he is not made competent by the act of 1861, allowing parties to be called as witnesses. *Alexander* v. *Crosthwaite*, 359.

CREDIBILITY OF WITNESS.

3. *Evidence in respect thereto.* Statements made by a person in the employment of another as to the amount his employer owes another, are not binding upon his principal, but are proper evidence to contradict the witness and to show whether he is disposed to testify fairly. *Davis* v. *Hoeppner*, 306.

4. In a proceeding upon an indictment for an assault with intent to commit a rape, the prisoner, in his rebutting testimony, showed, that the prosecuting witness had stated, before the trial, to others, that it was a person other than the accused who had made the assault upon her, and had described such person to them, and that the description then given was different from that given on the trial by her, which evidence the court excluded by remarking in the presence of the jury, after reciting it, "that it amounted to nothing." *Held*, that the remarks of the court, in assuming to determine the weight of the evidence, were erroneous, being calculated to exclude from the consideration of the jury testimony which was proper, and should have been admitted. *Kennedy* v. *The People*, 283.

WRIT OF ERROR. See APPEALS AND WRITS OF ERROR, 1