REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,

REPORTER.

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DURING THE TIME OF THESE REPORTS.

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RULE OF PRACTICE

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS.

REHEARINGS—MANNER AND TIME OF APPLICATION.

RULE 83. Hereafter, the manner of applying for a rehearing shall be as follows: Within fifteen days after an opinion is filed, a party desiring a rehearing shall give notice to the opposite party of his intention to make such application, and, within thirty days after the filing of the opinion, shall place on file in the clerk's office ten printed copies of the petition, which shall be prepared in the manner directed by existing rules. No petition for a rehearing will be considered where there has not been a compliance with this rule.

NOTICE, TO WHOM, AND THE MANNER THEREOF.

NOTE BY THE REPORTER. It has been held, that the notice required by the foregoing rule must be in writing, but may be given to the opposite party *or* to his attorney. It must be shown, however, that actual notice was given—proof that notice was sent by mail will not suffice.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

SEPTEMBER TERM, 1869.

WILLIAM C. BANE *et al.*

v.

THOMAS DETRICK.

1. CONVERSION—*what constitutes.* The owner of a stock of goods which he kept for merchandizing purposes, for certain reasons left his home for parts unknown, leaving his store in charge of another person, but with no authority to dispose of the stock in any other way than as an ordinary clerk employed to sell goods. The owner not returning at the time he had appointed, the person left in charge sent for another party with whom the owner had a business connection, but entirely distinct from that of the store, and on the arrival of such third party, he was informed by the person left in charge by the owner, of all the facts, and thereupon he took possession of the goods, the two claiming the owner was indebted to them, separately, in considerable sums. The third party so assuming possession, sold from

the stock for some time, collected accounts due the store, and finally closed out the concern by selling the balance of the stock to the person left in charge by the owner. This was *held*, to be a tortious conversion of the goods by the person so disposing of them, such as would support an action of trover by the owner.

2. PARTIES IN TROVER—*joint liability of partners.* Partners may be sued in an action of trover, although there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the acts of his copartners.

3. In this case, one of two partners went to a distant place, and, under claim of securing a debt due to the firm, took possession of a stock of goods belonging to the alleged debtor, and sold them. The other partner, who remained at home, had promised to go there. The proceeds of the goods so sold were credited by him on the account of the firm against the debtor, and on the return home of the partner who had taken the goods, he told his copartner what he had done, who approved of it, and at no time expressed any dissent. It was considered they acted as one in the whole matter, which was designed for their joint benefit as partners, and they were jointly liable in trover.

4. DURESS—*what sufficient to render a contract void.* Where a party having a warrant for an arrest, threatens to execute it unless the person against whom the warrant was issued enters into a certain contract, that has been held sufficient duress to avoid the contract.

5. And even though the arrest would have been illegal, because the warrant was issued by a justice of the peace in one State for an offense committed in another State, yet the contract being executed under the threat of an arrest under it, if the threat was of such a character as to terrify a man of ordinary and reasonable firmness, duress would be established and the instrument held void.

6. ABUSE OF PROCESS—*avoids a contract.* Where a chattel mortgage was procured to be executed under a threat of arrest under a warrant, the instrument was held void, not only because it was given under duress, but because it is against public policy to permit such an abuse of process, and no person should have the aid of a court to profit by it.

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

The opinion states the case.

Messrs. SLEEPER, WHITON & DURHAM, for the appellants.

Messrs. HELM & HAWES, for the appellee.

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

This was an action of trover, brought to the Superior Court of Chicago by Thomas Detrick, for the use of C. R. Corbin, against W. C. Bane and Oscar F. Bane, for the conversion of two stocks of goods—one at Garden Prairie, in this State, the other in Marengo, Michigan, the property of the plaintiff.

The general issue was pleaded, and the jury, under instructions from the court, found a verdict for the plaintiff, assessing the damages at three thousand five hundred and thirty-six dollars, for which the court entered judgment. To reverse this judgment, the defendants appeal to this court.

It appears from the record that, in 1866, Detrick was engaged in selling goods on his own account, at a settlement in Boone county in this State, known as Garden Prairie. Early in September of that year, he increased his stock by purchases in Chicago, and, on the first of October thereafter, he entered into an agreement with William C. Bane to buy grain, not then knowing that Oscar F. Bane was in partnership with William C., who, it seems, was the father. After sending two car loads of grain to W. C. Bane, the latter wrote to plaintiff to ship to O. F. Bane & Co., which he afterwards did. Plaintiff carried on his mercantile business, in which the defendants had no interest. He shipped to defendants, on his private account, wheat and other grain, and dressed and live hogs, and also butter, eggs and hides, in which defendants had no interest. The first arrangement was, that W. C. Bane should furnish the money and plaintiff should do the buying and shipping—the profits to be equally divided between them; but when his son, Oscar F., came in, each of them was to have one-third of the profits. Somewhere about the twenty-first of the next January, plaintiff had received a remittance from defendants of twelve hundred dollars, and about that time, he got into a personal difficulty, in which he

was seriously injured, to such an extent as to obscure his faculties and render him unfit for business, added to which were some domestic troubles. He suddenly, about the 25th of that month, decamped for parts unknown, leaving his store in charge of one Goodsell, who had arrived there from Wisconsin about the time of the receipt of this money and the injury, and occupied a room with his family in the store building, a portion of which being occupied by plaintiff with his family. Goodsell was an old acquaintance of plaintiff, and had visited him the preceding year. On Sunday night, he told Goodsell he would go to Chicago and see the Banes and settle up with them and when he returned he and Goodsell would settle their business. He gave Goodsell directions what to do in his absence, and said he would return by Tuesday night. He not returning, Goodsell waited until Thursday, and then wrote to Bane & Co. On Saturday, W. C. Bane came out to Garden Prairie, to whom Goodsell stated all the facts he knew. Bane claimed that plaintiff owed them twenty-nine hundred dollars for cash advanced beyond what they had received for produce plaintiff had shipped to them. They then made a rough estimate of the property in the store, grain on hand, &c., when Bane spoke of attaching it, but claimed a right to the grain as a partner, but not in the store. On a suggestion of Goodsell, that such a course would sacrifice the property, it was abandoned, and Bane remained in the store "as though he belonged there," waiting upon customers, took the books, figured up to see what was standing out, dunned some of the debtors, and remained until his son and partner, Oscar, came out about the middle of the next week. When Oscar came, he and Goodsell invoiced the goods. Goodsell claiming he had invested some seven hundred and seventy-five dollars in the goods, and calling the whole stock $2157, of which, after deducting Goodsell's claim, and another credit in his favor standing on the books, eleven hundred and fifty-two dollars and seventy-eight cents was found to be the value of plaintiff's share of the stock, which Oscar Bane

then sold to Goodsell, taking his three notes for the same, payable in six, twelve and eighteen months from August 15, 1867, the date thereof. All these matters Oscar duly reported to his partner, W. C. Bane.

These are the prominent facts in relation to the Garden Prairie store, and the question arises, do they amount to a tortious conversion of this property by the defendants?

It is only necessary to look at the facts to arrive at a correct decision. Bane, both father and son, knew when they were at Garden city, the true position that Goodsell occupied towards these goods. They knew he had no authority to dispose of them in any other way than as an ordinary clerk employed to sell goods. There is no evidence he was a partner, or that he claimed to be. The Banes and Goodsell acted on the assumption that plaintiff had abandoned the property, and an opportunity was thereby presented by which they could make something out of it.

The weight of the evidence most decidedly is, there was no partnership between Goodsell and the plaintiff, or, probably, was designed when plaintiff so suddenly left, for he said, on leaving, he would go and settle with the Banes, and on his return would settle matters with Goodsell. In all the testimony there is nothing stronger than this to establish a partnership, and it utterly fails to do so. This question was fairly presented to the jury and they found there was no partnership, and we fully concur in the finding.

What, then, is there wanting to prove an actual conversion of these goods? We perceive nothing. If entering a man's store in his absence, taking full possession of it and of his books of account, selling from the stock month after month, collecting money of debtors, and then to close it out, selling the remainder to another, is not a conversion, and a tortious conversion, we should be at a loss to define one. Did not appellants convert this property to their own use, and exercise a dominion over it, inconsistent with the right of any other? Did they not by their acts wholly ignore appellee's rights,

and did they not do all they could do to deprive the owner of his possession? Did they not know that Goodsell was a mere bailee of the property, and that he could give no authority to them to take possession of the store? and they certainly knew the law conferred upon them no right to invade the possession of appellee in the manner they did. Here was an actual tortious conversion.

But it is said appellants are not jointly liable therefor. This point we will consider, after we have addressed ourselves to the facts in regard to the Marengo stock of goods.

It seems that, after taking possession of and selling out the stock in the Garden Prairie store, it was ascertained that appellee had settled down in Marengo, in the State of Michigan, and opened a small store there. Thither went W. C. Bane, and there he procured a warrant against appellee for his arrest, on the charge of obtaining money on false pretences, and also an attachment on his goods, claiming the appellee owed the firm twenty-one hundred and fifty-eight dollars. He entered appellee's store, with the sheriff having the papers, and accompanied by an attorney, and then declared if appellee would not comply with his terms and settle the claim, he would have him arrested. Appellee disputed the claim, declaring that, on a settlement of their business matters, he would not owe them anything. The sheriff attached the goods, and was looking around for boxes in which to remove them. It was then proposed by Bane that appellee should come to Chicago and settle by the books, to which he at once assented, and promised to pay or secure whatever should be found due from him, he all the while asserting there was nothing due. As security that appellee would do this, Bane proposed that appellee should give him a mortgage on the goods, and also give him what there was at Garden Prairie. If he would do this, he would not have the warrant executed or the goods removed—that he would do nothing until they had a settlement, and then, if the amount thus secured was not coming to him, he would relinquish it. Appellee then

told Bane he thought there was property enough at Garden Prairie, and asked him why he did not take his pay out of that. To this, Bane replied that Goodsell claimed the goods, and that he never got a dollar out of that stock.

So soon as the mortgage was executed, Bane offered the stock for sale, on which appellee remonstrated, saying that was not the agreement. Bane pointed to the mortgage, and said the goods were his, and he could do as he pleased with them, and sold them, on the spot, to one Houck, who had a prior mortgage on them, taking his note for four hundred dollars balance, which he had discounted the next day. Houck's mortgage was for more than six hundred dollars, and there was then due upon it six hundred dollars. The goods named in it had been sold and replaced from time to time. The sheriff had the keys in his possession, and he handed them to Houck who was put in possession of the goods by the sheriff and Bane's attorney.

Appellee did go to Chicago for a settlement, as he promised, but nothing came of it. He disputed the amount, and claimed all the time there was nothing due from him. Houck, who is a witness for appellants, states he heard something said about a warrant for appellee's arrest, and heard Bane say unless he paid the claim or secured it by mortgage on his goods he would be arrested. Appellee then appealed to Houck, and said, "Bane says he has a warrant. My God! what shall I do? I am ruined, and I will do anything before I am arrested." Bane told him he had a warrant for his arrest, and if he would not comply with his conditions he would order the sheriff to arrest him. Houck said, "I guess not," whereupon Bane said, "I have a warrant and the sheriff has it." Appellee was not perfectly calm when he signed the mortgage, was very much excited and scared, and seemed to be completely unmanned by the threats to arrest him. After the mortgage was executed, Bane and his attorney at once took possession of the store, and, after the sale of the goods to Houck, delivered possession to him, who received the key from the sheriff on the order of Bane and his attorney.

Richfield, the sheriff, also a witness for appellants, corroborates Houck, and says Bane directed him not to arrest appellee after the mortgage was executed. Bane had previously told him to make the arrest if the case was not setted. He heard Bane say that O. F. Bane & Co. had never received a dollar out of the Garden Prairie store—that the man appellee left in charge claimed all the goods, and that he did not know whether there was a hundred dollars worth there or not.

W. C. Bane discloses, in his testimony, the purpose for which he obtained this warrant, and that was, to coerce by it the payment of this claim. His intention was, if no settlement was made, to have the warrant executed. This he confesses. At the same time he obtained the mortgage, he got from appellee a bill of sale of the Garden Prairie goods, which his son, with his knowledge and approbation, had before sold to Goodsell. Appellee did not read the mortgage; a part of it was read to him, but he says he was in such a state of mind by reason of the warrant for his arrest, that he did not understand the nature of it.

The question presented by these facts is, was the mortgage upon these goods executed under such circumstances as to show entire freedom of action upon the part of the maker, for this is essential to the validity of such instruments. Free consent is the essence of every contract, and if there be compulsion, there is no consent, and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, has always been regarded as sufficient in law to destroy free agency. So threats made by a party having a warrant for an arrest, and threats to execute it unless his demand is complied with, were held sufficient to avoid the transaction. *Foshay* v. *Ferguson*, 5 Hill, 154. In this case, the defendant had a warrant which could not be executed, not having the endorsement required by the statute, under which he threatened to arrest the plaintiff, who, being intimidated thereby, gave up a certain number of cattle to the defendant, and afterwards brought his

action of trover for them. The action was sustained. In the case before us, the warrant was illegal, it having issued by a justice of the peace in Michigan for an offense committed in this State. An arrest under it would have been illegal, yet the mortgage was executed under the threat of an arrest under it, and if it was of such a character as to terrify a man of ordinary and reasonable firmness, duress would be established and the instrument held void.

The case cited goes to this extent, and we think modern rulings of the courts justify it. The facts show appellee was not "at himself," had not his wits about him, was scared and unmanned by the threat, and there stood the sheriff with the warrant in his hand, and the attorney of Bane, by his presence, giving the proceeding his sanction, and the sheriff about to remove the goods under the writ of attachment, all these justified the exclamation of appellee which is in evidence, and warranted the jury in finding that the mortgage was not executed with his free consent. Wanting this essential element, it was void; but it had the effect to deprive appellee of his property. Under it, appellants assumed the ownership of the goods, and transferred them for a valuable consideration to another. They exercised exclusive dominion over them, converting them to their own use.

The mortgage was void for another reason. It was executed through a perversion and abuse of criminal process. It is proved that Bane got out this process and used it to effect a settlement of a claim which there is much evidence to show was unfounded. It is against public policy that process should be thus used, and no court will allow the results flowing from it to be enjoyed by him who so uses it. It is a gross abuse of legal process, and no person should have the aid of a court of justice to profit by it. *Fay et al.* v. *Oatley et al.*, 6 Wis. 42.

To maintain the action of trover under such circumstances, a demand is not necessary to be proved. 2 Hilliard on Torts, 262.

We come now to the liability of appellants. They insist as the Garden Prairie transaction was consummated by Oscar F. Bane alone, he only is responsible; and that William C. Bane, having been the actor in the Marengo matter, he alone is responsible for that, and that jointly they are not responsible for either or both.

The proof in regard to the Garden Prairie stock is, that both participated in the transaction. It was the remnant only that O. F. Bane sold to Goodsell, and the evidence is abundant that both knew and assented to everything that was done in regard to that stock.

The rule is well established that partners may be sued in an action of trover, although there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the act of his copartners. Collyer on Part., sec. 458, referring to Story on Part., sec. 166. *Nicoll* v. *Glennie*, 1 Maule & Sel. 588.

The case cited by appellants—*Gilbert* v. *Emory*, 42 Ill. 143—was an action for a malicious arrest, a matter quite inconsistent with the partnership business. For general acts or omissions violative of law, connected with their business they alone who are guilty will be responsible.

By reference to Story on Partnership, *supra*, it will be seen that torts may arise in the course of the business of the partnership, for which all the members of the firm will be liable, although the act may not, in fact, have been assented to by all the partners. For example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have concurred in the act. But here was the concurrence of the partners.

That appellants participated in the transaction at Marengo is beyond a doubt. O. F. Bane promised his father to go there. The proceeds of the Marengo stock were credited by him on the account of the firm against appellee, and on the return home of W. C. Bane, he told Oscar what he had done,

who cordially approved of it. Oscar never, on any occasion, expressed any dissent. They acted as one in the whole matter, and it was designed for their joint benefit as partners.

We have now gone over the most prominent points in this case, but have omitted to allude to a glaring fraud practiced upon appellee, when W. C. Bane was threatening to arrest him. He then told appellee he had not realized a dollar from the Garden Prairie store; that Goodsell had claimed it all, leaving the impression that he was in possession under that claim, when the truth was, he was a purchaser from appellants of the only title he had to it. Their whole course in this matter seems to be marked by fraud and falsehood, from which they should not profit.

We have examined the instructions and find no error in them. The whole record shows a case of grievous wrong on the part of appellants. We find nothing in it that would justify this court in disturbing the judgment. Appellants ought to compensate appellee for all the damages he has sustained by reason of their unauthorized and unlawful conduct, and without pausing to make a minute examination of the pecuniary loss to him, we are content to take that as the jury have found it.

We are satisfied that justice has been done, that the evidence sustains the verdict, and there is no error in the instructions. We, therefore, affirm the judgment.

Judgment affirmed.

BUSHROD W. RANSTEAD

v.

JOSEPH E. OTIS *et al.*

1. MORTGAGOR AND MORTGAGEE—*whether the relation exists—right of redemption.* At a sale of mortgaged premises, under a power in the mortgage, a third person, a stranger to the mortgage, became the purchaser. The mortgagor and the purchaser, both being uncertain as to their rights in the premises, owing to some alleged illegality in the sale, and to settle any question in respect thereto, entered into an arrangement by which the mortgagor executed a quit-claim deed to the purchaser, for a nominal consideration, and received in return a written instrument giving him the option to re-purchase, within a given time, at a price stated. Upon bill filed by the mortgagor, after the time given him to re-purchase had expired, claiming that the sale under the mortgage was illegal and void, and that he still occupied the position of a mortgagor and was entitled to redeem from the purchaser: *Held*, that the transaction between the mortgagor and the purchaser was not a mortgage—the relation of debtor and creditor did not exist between them—and the former had no remaining rights as a mortgagor which would give him any right of redemption.

2. CONSIDERATION—*what sufficient.* The consideration of the quit-claim deed, was the contract, which gave to the mortgagor a certain right of purchase on fair terms, in place of an uncertain right of redemption, depending upon the validity or invalidity of the sale under the mortgage.

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

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

Mr. ARTHUR W. WINDETT, for the plaintiff in error.

Messrs. GOODWIN, LARNED & TOWLE, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 1st of May, 1857, Ranstead, the plaintiff in error, executed to one Marsh, a mortgage, with power of sale, on two lots in the city of Chicago, to secure the payment of his promissory note for $2592.21. The mortgage was subsequently assigned to one Noble, who, as assignee, sold the premises at auction on the 27th of December, 1861, and they were struck off to the defendant in error, Joseph E. Otis, who bid for one lot $1100, and for the other $1250. The evidence shows the property was worth, probably, double the amount paid for it, but its market value was considerably impaired by the fact that it was occupied by Ranstead's wife, who claimed in it both a dower and homestead right, which Otis soon after purchased from her, paying her a consideration in money and property equal to about nine hundred dollars. On the 31st of December, 1861, four days after the sale, Ranstead conveyed the premises to Otis by quit-claim deed, for a nominal consideration of one dollar, and at the same time Otis gave to Ranstead an instrument in writing, by which he agreed to reconvey the property upon the payment, within six months, of the sum of $2500, together with such further sums as he should expend in perfecting the title. The option was left to Ranstead whether to pay this money or not. He entered into no contract to pay it, and in fact none was ever paid by him. In 1864, Otis sold the lots to Cornwell and Elliott, and on the 2d of June, 1865, three years after the expiration of Ranstead's rights under the agreement given him by Otis, this bill was filed by him against Otis, Cornwell and Elliott, claiming that the sale by Noble under the mortgage was illegal and void, and that he occupies the position of a mortgagor and is entitled to redeem from the defendants. The case came to a final hearing upon the pleadings and proofs, and the circuit court dismissed the bill.

The argument of plaintiff in error in brief is, that Noble, as assignee of the mortgage, had no power to sell and convey; that even if he had such power he proceeded illegally in selling the two lots separately when there was a house standing partly upon each lot, and that the sale being void, or at least voidable, the purchaser, Otis, became in equity merely the assignee of the mortgage debt, and the subsequent deed from Ranstead to Otis is to be considered as having been extorted from the former by an inequitable use of the power derived by the latter from his position as mortgagee and creditor, and, therefore not changing their relative positions, or affecting the right of Ranstead to redeem from the mortgage. The complainant does not seek, in this proceeding, to enforce any rights as purchaser, by virtue of his contract from Otis, but merely his alleged right of redemption as a mortgagor.

It is quite true that courts of equity watch, with considerable jealousy, such transactions between mortgagor and mortgagee as seem prejudicial to the former, and in some cases have granted relief where the alleged oppression, on the part of the mortgagee, was rather imaginary than real. But in all the cases cited by plaintiff in error where relief of the nature now sought has been granted by the courts, there has been a recognized and undisputed right of redemption which the mortgagee, or the person standing in his shoes, has undertaken to extinguish by means which the courts have considered inequitable, and an abuse of the advantages derived by the mortgagee from his position. In the case before us we can discover no such grounds of relief. Even as between the immediate parties to a mortgage, if the mortgagor chooses to relinquish his equity of redemption for a fair consideration, and no unconscionable advantage is taken by the mortgagee, the release must be held valid. But as between Ranstead and Otis there was no recognized right of redemption nor relation of debtor and creditor when the deed and contract were executed, nor does the record disclose the slightest oppression

or unfairness on the part of Otis in procuring the quit-claim deed from Ranstead.

Whether the sale by Noble under the mortgage was valid, or voidable, or void, is a question not necessary to be decided. It was at least a sale at which Otis bought as a stranger, and in good faith, and as such purchaser he claimed the title in fee. For the sake, however, of removing all doubt as to his title, he agreed with Ranstead, if the latter would execute to him a quit-claim deed, he would give to Ranstead a contract entitling him to a conveyance upon the payment, within six months, of a little more than the amount expended by Otis. It is wholly incorrect to say that in this transaction Otis was abusing his power as a creditor or mortgagee. He was not acting in either capacity, and was in no position to dictate terms to Ranstead. If the sale under the mortgage was valid, he already had Ranstead's title, and the agreement to convey to him, upon the payment of $2500, within six months, was a simple act of kindness. If, on the other hand, the sale under the mortgage was invalid, Otis was rather at the mercy of Ranstead than Ranstead in the power of Otis. The mortgage sale could be set aside by Ranstead alone, if it could be set aside at all, and it was therefore at his election to insist either that his debt had been paid *pro tanto* by the sale, or that the sale was illegal and the property still subject to redemption. But it was only by the election of Ranstead that Otis could assume towards him the position of a creditor. He had no debt which he could enforce against Ranstead. He could merely remain quiescent, trusting to whatever title he had acquired under the mortgage sale, liable to lose his purchase money if the sale was wholly void, and if merely voidable, having only the right to claim, whenever Ranstead should file his bill, that he should be substituted to the equities of the mortgagee. We can discover in this position no means of oppression, and the record discloses neither threats, nor coercion, nor unfair advantage.

The transaction was not unreasonable. Neither party knew with certainty whether Ranstead's interest had been extinguished by the sale or not. In this uncertainty they agreed to definitely settle their rights in the premises, by the execution of the deed on the one side and the contract on the other. Although there was no monied consideration for this deed, it is incorrect to say it was made without any consideration. The consideration was the contract, which gave Ranstead a certain right of purchase on reasonable terms, in place of an uncertain right of redemption, to be attended with litigation and expense.

It is true, instruments of this character, when accompanied by a loan or executed to secure a debt, are regarded as amounting only to a mortgage. But this was not the object in the present instance. Ranstead voluntarily chose to exchange his doubtful position for a certain right to purchase, within a fixed time, if he should choose so to do. But he did not bind himself to do so. He incurred no debt to Otis. The transaction was not a loan of money with a deed taken as security. It has no marks of oppression, hard dealing or fraud, and is wholly unlike the case of *Harbison* v. *Houghton*, 41 Ills. 522, cited by plaintiff in error. It is more like the case of *Taintor* v. *Keys*, 43 Ills. 334, in which relief similar to that sought in this case, was refused by the court, although there was more reason for allowing the relief in that case than in the present.

Under his contract, Ranstead acquired rights which he might have asserted within a reasonable time in a court of equity. But when he voluntarily relinquished his position of mortgagor and released whatever equity of redemption he may have had in exchange for this agreement, he lost the right to appeal to the courts for aid in his original capacity as a mortgagor, and must rest upon the rights which he acquired under his new contract, voluntarily made, and perfectly reasonable in its terms. In Hilliard on Mortgages, third edition, page 80, the case of *Endsworth* v. *Griffith* is cited from 2d Abr. Eq. Cases,

in which it was held that in a similar transaction as between the mortgagor and mortgagee, the right to redeem under the mortgage was gone, the mortgagee having entered for condition broken, and obtained a release of the equity of redemption for a further consideration, at the same time giving the mortgagor a promise to reconvey on payment of the whole money within a certain time. The case at bar is much stronger against the right of redemption, for the reasons already given. Here was no contract between the mortgagor and mortgagee, but between the mortgagor and a purchaser at the sale, claiming adversely to the mortgagor, acknowledging no right of redemption, exercising no power as a creditor, but merely entering into a reasonable contract, as a compromise of conflicting claims, and by its terms the parties must abide.

Decree affirmed.

JAMES M. WANZER *et al.*

v.

S. EDWARD BRIGHT.

1. ILLEGAL ARREST—*abuse of process—obtaining jurisdiction of the person by fraud.* No court will take jurisdiction of a party where it is obtained by fraud; nor is a defendant amenable to process unless he is in, or comes voluntarily within, the territorial jurisdiction of the court. Even a valid and lawful act can not be accomplished by such unlawful means as enticing a party by fraud to come within the jurisdiction of the court so as to subject him to its process.

2. And where a party has been fraudulently induced to come within the jurisdiction of a court so as to render him or his property amenable to its process, he may have his action therefor.

3. So where a person residing in another State was induced to come into this State by certain creditors residing here, by the latter falsely representing to him, through a telegraphic dispatch and a letter, under another

name, that the person whose name was so used desired to see him in Chicago, on a certain day, upon business not connected with the real object in view, which was to allure the party into this State for the purpose of arresting him under civil process, to compel the payment or securing of his debts, and when the party came within the jurisdiction of the courts of this State, in compliance with such request, he was arrested at the instance of the creditors, and imprisoned, it was *held*, that the creditors guilty of such fraudulent conduct and abuse of process, not only could not make them availing for the purpose intended, but were liable to an action at the suit of the party injured for the illegal arrest and imprisonment.

4. Nor would the fact that the false correspondence, by means of which the party was enticed within the jurisdiction of the court, was dictated by the attorney of the creditors in whose interest the fraud was perpetrated, at all exonerate those creditors from their liability to respond in damages, when they were previously consulted about it, and sanctioned the act, or at least afterwards approved of it, and sought to profit by it.

5. SAME—*punitive damages recoverable.* Such a fraudulent and outrageous abuse of the process of the court should be severely punished, and exemplary damages should be given.

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

The opinion states the case.

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

Mr. A. C. STORY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of trespass on the case commenced by appellee in the Cook county circuit court, against appellants. Appellee claimed damages for an illegal arrest and imprisonment on process from the superior court of Chicago, at the suit of appellants. Also, for an illegal arrest at the suit of other parties, claimed to have been induced and procured by appellants.

It appears from the evidence in the case that appellee resided in Elkhorn, in the State of Wisconsin, and was engaged

in the commission business, and in the sale of agricultural implements. That appellants were engaged in the same character of business in the city of Chicago. That appellants had furnished him with implements for sale on commission, and there was an unsettled account between them, and appellants claimed that appellee owed them $500 on their account.

Appellee claimed that he had invented an improvement in the construction of railroad car doors, for which he had obtained letters patent from the government. Appellants knew of this, and informed their attorneys of the fact; and they left their claim with them for collection, in February, 1867. On the 22d of April, 1867, an affidavit was prepared, signed and sworn to by Wanzer, and there was prepared, on the same day, and sent to appellee at his residence in Elkhorn, this dispatch:

"CHICAGO, April 22, 1867.

To S. E. BRIGHT:

Can you meet me at the Washington House on the twenty-sixth (26) inst. Answer. I want your patent car door.

J. M. MANNING."

Appellee answered, declining to come to Chicago, but asked further particulars, whereupon the following letter was sent him:

"CHICAGO, May 5, 1867.

S. E. BRIGHT, Elkhorn, Wisconsin:

SIR—Your telegram in answer to mine was forwarded to me at St. Louis, as I had left this city before the same arrived. I am engaged in the construction and building of railroad stock for southern railroads. I have heard of your patent car door, and I would like to see you and model of your invention. I would call to see you at Elkhorn, but my business engagements will not allow me the time to do so. I will be at the Washington House, Chicago, on Friday, May 10th, 1867, when I would be pleased to meet you, if convenient. If you cannot

come in person, will you please send me a circular and draft of your patent? If the thing suits I would be willing to pay a liberal figure for it. Yours respectfully,

J. M. MANNING."

"P. S. I will be at the Washington House also on Saturday, May 11th."

It seems that this was dictated by Kreamer, and was in the handwriting of Hunter, then a clerk in the law office of Kreamer's firm.

Appellee came to Chicago on the morning of the tenth of May, and went to the Washington House, and there met Kreamer, Hunter and the deputy sheriff, and was at once arrested on a capias at the suit of appellants. Being unable to procure bail he was committed to jail, where he remained for four days. Cram swears that appellants, after the arrest was made, stated to him that they had played a sharp trick on Bright to get him to Chicago. They wanted their pay and were going to get it. That they trapped him here by sending the letter to him that a man in St. Louis wanted to buy his patent right.

Appellants, it seems, offered to release appellee from custody if he would give his father's note, or endorsement, but he declined to involve his friends. He offered to secure them by placing his patent right in their hands, and secure them on his homestead. This they declined. A motion was made in the superior court, and the judge ordered the release of appellee. Appellants' attorney was present in court. This occurred on the 14th day of May, four days after his arrest and imprisonment.

Thereupon an affidavit was prepared and sworn to by Wanzer, and a capias was issued in favor of Barney & Co., who lived in Ohio, upon which appellee was again arrested and detained in custody.

Appellee was again taken into court and a motion was made for his discharge; and Story swears the judge advised his

discharge, as he could not be held legally, but Jenks, the attorney of record for plaintiff, declined, and the motion was continued until the 15th that notice of the motion might be given him under the rules of court. He says Jenks asked time to consult his clients, and refused to discharge appellee, although informed by the judge that he should discharge him. Appellee was again taken to jail, where he remained until the next day, when the motion was heard on affidavits and he was again discharged.

Thereupon this suit was brought, and a trial was had, resulting in favor of appellee, the jury finding a verdict in his favor for $1,000, upon which a judgment was rendered.

It is urged that the evidence does not implicate Cromwell in procuring the last arrest. From a careful examination of the evidence we have no hesitation in saying it fully warranted the conclusion that he took part in the proceeding. The power of attorney from Barney & Co. is to both appellants, and Wanzer swears that he and Cromwell consulted as to which of them should swear to the affidavit, and Cromwell swears that he and his partner were together when these claims were placed in the hands of their attorneys for collection, and he expected appellee to be arrested. It is true that he did not participate directly in employing Jenks, but his partner retained him at the instance of Kreamer. From a careful consideration of all the evidence on that point we fail to see how the jury could have found otherwise than they did.

It is sought to screen appellants from the consequences of their fraudulent act by placing the whole responsibility of this wanton and indefensible act in enticing appellee into the State, upon Kreamer, their attorney. It is true, he seems to have dictated the communications, and so far as we can see, caused, without authority, the name of another person to be signed to them. But this was after consultations were had between them as to the means of collecting their debt. We may readily infer that it was done as a part of a plan agreed to be adopted. If such was not the fact it is a remarkable coincidence that

the affidavit was sworn to on the same day the telegram bears date. It would hardly seem probable that it could have been accidental. And Cram swears they admitted their participation in the fraud, and he is a disinterested witness. But if it were not so, then Kreamer was their attorney, and this act was done under his retainer. They fully approved of the act by refusing his discharge after they must have known how his presence was procured, and by their admissions, if Cram is to be believed, that they had entrapped appellee into Chicago and had "played a sharp trick upon him" to get him there. These and other circumstances are strong evidence that if they did not suggest the movement, they unqualifiedly approved it. We can see no pretense for saying they were not responsible for the wanton and wrongful act, if Cram may be credited, and was for the jury to say whether they would give credit to him, or to appellants and their attorney, who were interested. The jury having believed him and disbelieved the others, we can not say they should have done otherwise.

Had these parties seized and forcibly brought appellee into the State, there is no doubt they would have been guilty of a crime, and could have been punished for its commission. That would have been a wrong which all civilized countries punish criminally. And it may be asked in what a case of procuring the presence of a person in this State by such a fraud, and then imprisoning him, differs in principle from the use of force for the purpose. It is true, the statute has not declared that such an act shall be punished criminally, but the injury to the party and the outrage to personal security is the same. It was a fraud on appellee and upon the process of the court that we presume never has or can be sanctioned by courts of justice.

It is a firmly established rule of practice that courts will never permit the fraudulent use of their process. And when it is attempted, the court will promptly interfere to prevent its process from being made the instrument for effectuating the fraud, by setting it aside. It can never be tolerated that such

process shall be debased to the purpose of fraud and oppression. The pure fountains of justice can never be so polluted. The courts were created for the administration of justice, and they and their process can never be used for the purpose of oppression and to perpetrate fraud and wrong, or their process fraudulently obtained and employed to enforce a right, however just and legal.

An examination of the English authorities in the course of centuries, so far as we can find, fails to afford us more than one or two precedents in this character of fraud and imposition. And it is to the honor of the English bar that in the many centuries of the past only these are found, where members of the profession have resorted to such practices. In the case of *Stein* v. *Valkenhuysen*, 1 Ellis, B. & E. 65, the debtor lived and the debt was created, abroad, and he was enticed, as in the present case, from his home to the residence of his creditor by the use of a letter over a fictitious name, and on his arrival he was arrested. Mr. Justice WIGHTMAN, in delivering the opinion, says :

"Having no doubt that defendant was lured to this country by the fraud of plaintiff, when he never would have come had he known the truth, it seems to me the plaintiffs are disabled from taking advantage of their own fraud. Bringing him here by fraud, has as least as much effect as if there was an express promise by plaintiffs that he should not be arrested. I proceed upon the ground that a party cannot avail himself of his own fraud." And Mr. Justice CROMPTON says : "The process of the court has been abused. * * * The case is the stronger, as the debt, debtor, residence and everything is foreign. The whole was an abuse of process, and it must be set aside;" and see *Granger* v. *Hill*, Bing. New Cases, 328.

It has been repeatedly held in this country that no court will take jurisdiction of a party where it is obtained by fraud. Nor is a defendant amenable to process unless he is in, or comes voluntarily within the territorial jurisdiction of the court.

Williams v. *Bacon*, 10 Wend. 636; *Snelling* v. *Watrous*, 2 Paige 314; *Carpenter* v. *Spooner*, 2 Sandf. N. Y., 717; *Leaver* v. *Robinson*, 3 Duer 622. No rule of law is more uniformly recognized and enforced than that a valid and lawful act cannot be accomplished by unlawful means, and in such cases, courts will restore the injured party to his rights or compensate him for the wrong. And we recognize the rule as well settled, that an action may be maintained where a party has been fraudulently induced to come within the jurisdiction of the court, so as to render himself, or his property, amenable to its process. There can be no question that an action can be maintained in such a case.

It is, however, urged that the jury were not warranted in finding punitive damages in this case. Appellants acted with a wanton recklessness of the rights of appellee. They caused him to be arrested and incarcerated in the common jail for five days. They refused to release him even after they were aware of the manner in which he was induced to come within the jurisdiction of the court, if they did not participate in procuring it. They thus manifested a degree of malice and persistence in their unlawful course that is seldom encountered among even the most perverse men. The wrong to appellee being so great, and appellants persistence in its infliction being so obstinate, we can only imagine that it was dictated by malice, and a reckless disregard for the rights of their fellow men. Such being the case it called for punishment that would teach them and others that they have no right to prostitute the process of courts to the unjustifiable purpose of gratifying their revenge. In this case there was an abuse of the process of the law to gratify malice, or to attain improper ends, we have no doubt, and if there was not actual malevolence, there was recklessness, from which malice must be inferred. This is the first instance in which the process of the courts of our State has been used in this manner, and we think the conduct of appellants and their attorney was outrageous, and deserved severe punishment, and we should have been better satisfied

had the damages been much larger than the jury have found. The principles here announced were not contravened by the court, and the judgment must be affirmed.

Judgment affirmed.

FREDERICK R. WILSON *et al.*

v.

MARGARET MCKENNA.

1. RECORDER'S COURT OF CHICAGO—*transferring causes therefrom, under act of February* 15, 1855. Under the act of 1855, requiring causes commenced in the recorder's court of the city of Chicago, where the amount in controversy shall exceed one hundred dollars, to be transferred, on the written request of the defendant, to the circuit court of Cook county, or the Cook county court of common pleas, the amount in controversy is to be determined by the specific sum claimed in the declaration, whether claimed as debt or damages.

2. So, on an application for the transfer of an action of ejectment commenced in the recorder's court, the right to such transfer depends, not upon the *value* in controversy, but upon the *amount* in controversy, which is determined by the damages claimed in the declaration.

3. EVIDENCE—*unstamped instruments.* The act of Congress, rendering invalid as evidence instruments not stamped, is applicable only when such instruments are offered as evidence in the courts of the United States; an instrument made evidence by our State laws in the courts of the State can not be invalidated for such purpose by an act of Congress.

4. PARTIES—*where feme sole plaintiff marries pending the suit.* Where, pending an action commenced by a *feme sole*, the plaintiff marries, judgment may be rendered in her favor by her original name, unless a change of name be brought, in some way, to the notice of the court.

5. TAX TITLE—*necessity and requisites of the notice to be given by the purchaser.* The notice required by section 4 of article 9, of the constitution of 1848, to be given by a purchaser at a tax sale, is a condition precedent to his right to have a deed, and when he seeks to rely upon his tax deed, as paramount title, he must show a compliance with the requirements of that section.

6. The notice in such case, should correctly state when the time of redemption will expire; so where a notice stated the day on which the right of redemption would expire to be the same as that on which it alleged the sale was made, the notice was held void.

7. SAME—*who may question a tax title.* It is not essential that a party should show he has paid all the taxes due and assessed upon land in order that he may question a tax title which is sought to be set up against him. The provision of the general revenue law requiring such payment (Rev. Stat. 1845, 448, sec. 73) has long remained a dead letter upon the statute book, and is not considered of any validity, the effect of it being to compel a man to buy justice.

APPEAL from the Recorder's Court of the city of Chicago; the Hon. WILLIAM K. MCALLISTER, Judge, presiding.

The opinion states the case.

Messrs. JONES & GARDNER, for the appellants.

Mr. ARTHUR W. WINDETT, for the appellee.

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

This was an action of ejectment in the recorder's court of the city of Chicago, brought by Margaret McKenna against Frederick R. Wilson and others, to recover the possession of lot 3, in the north part of the southeast quarter of section 20, in township 39, south range 14 east, in the city of Chicago.

There was a verdict and judgment for the plaintiff, to reverse which the defendant appeals to this court, and makes several points, which we will notice.

The first point is, that the recorder's court should have transferred the cause on the affidavit filed by the defendant, and on his motion.

The statute under which the motion was made, provides that in all cases where any suit, either in law or in chancery, shall be commenced in the recorder's court, and the amount in controversy shall exceed one hundred dollars, and the defendant

shall, at any time before the trial, file in the court a written request to have such suit transferred, either to the circuit court of Cook county, or to the Cook county court of common pleas, all further proceedings in the recorder's court shall thereupon cease, and the suit shall be transferred, agreeable to the request, and in the manner required by law in cases of change of venue.

It is insisted by the appellee that the act does not apply to this case, as the amount in controversy, to be determined by the damages claimed in the declaration, did not amount to one hundred dollars. The title, not the value of the property was in question. The declaration laying the damages determines, in such case, the amount in controversy.

To remove a cause to a court of the United States, the value in controversy determines the right to a removal. By this act of the legislature, it is the amount in controversy, the specific sum, whether claimed as debt or damages. There was no error in refusing to transfer the cause. The amount in controversy was not shown to exceed one hundred dollars.

The second point made by appellant is, the court refused to allow the question to be asked appellee, who was sworn as a witness, what was the consideration for the deed.

Appellant insists the question was a proper one, on which to base an objection to the deed for want of a proper stamp. We can not perceive the affinity between the question and the proposed objection to be made. The objection would be available, if at all, no matter what the consideration may have been; but it could not be made available under repeated decisions of this court, this court holding that an instrument made evidence by our State laws in the courts of the State can not be invalidated for such purpose by an act of Congress. The party omitting the stamp, with a view to deprive the government of the tax, is amenable to a penalty, but the instrument is not invalid in our own courts. That the act, in this regard, was intended to apply only to the courts of the United States

was held in *Latham* v. *Smith*, 45 Ill. 25; *Craig* v. *Dimock et al.* 47 ib. 308; *U. S. Express Co.* v. *Haines*, 48 ib. 248.

The third point is, that plaintiff intermarried after suit was brought, and the title of the suit was not changed, but proceeded in her name as a *feme sole.* Appellant asks, after her marriage could a judgment be rendered in her favor by her original name? The answer to the question would undoubtedly be, it could, unless a change of name was brought to the notice of the court in some way, which does not appear to have been done in this case.

Another point made is, that the court ruled out the notices and affidavits presented by appellee in support of his tax deed. On this the case depends.

The constitution of the State, as well as the revenue laws, requires, before the purchaser at a tax sale shall receive a deed, he shall serve, or cause to be served, a written notice on every person in possession of the land or lot sold, three months before the expiration of the time of redemption, in which notice he shall state when he purchased, the description of the land or lot, and when the time of redemption will expire, and in like manner he shall serve on the person in whose name the land or lot is taxed, a similar written notice—if such person resides in the county where the land or lot is situate—and such purchaser is required, before he is entitled to a deed, to make an affidavit of having complied with the conditions of this section, stating the facts particularly relied on as such compliance, which affidavit must be delivered to the person authorized by law to execute the deed. Gross' Stat. 25, sec. 4.

These we deem conditions precedent to the right to have a deed. The premises in controversy were in the actual possession of one Reisig, as tenant of the owner, Dempsey, from whom appellee derived his title.

The notice, as appears by the record, is as follows:

"CHICAGO, June 1, 1859.

To ———

"Take notice, that on the 17th day of March, A. D. 1859, I purchased lot 3, subdivision of the north ¼ of the S. E. ¼ of section 20, township 39, range 14 east, in the county of Cook and State of Illinois, with buildings, if any situated thereon, at a sale of lots and lands (held in pursuance to law) for taxes and costs due the city of Chicago for general and special purposes for the municipal year, 1858, and that the time of redemption thereof will expire on the 17th day of March, 1859.

"Yrs, &c., F. R. WILSON."

H. F. Lewis, the agent of Wilson, made affidavit on the 12th of January, 1860, that he, as agent, served a notice, of which the above is a copy, on C. Reisig, whom he believed to be the occupant of the premises, and also that, on the first day of September, 1859, he served a similar notice on Charles McDowell, whom he believed to be the administrator of the estate of John Dempsey, to whom the estate was assessed.

This notice is liable to the grave objection that, if it truly stated the time when the redemption expired, which is required by the constitution to be stated in the notice, that time was the day the notice alleged the sale to have been made.

That the time of redemption was not truly stated, is apparent, for if the lot was sold on the 17th of March, 1859, the time of redemption would expire on the 17th of March, 1861. By the notice, the person on whom it was served would gain no valuable information. It is not such a notice as required by the constitution. The proof is, that Reisig cultivated this lot as a garden from 1858, paying rent to Dempsey up to his death in January, 1859, and afterwards to McDowell, the executor, for some time, and then to Joseph Dempsey up to the time he quit the possession in 1864. The notice served on McDowell, the executor, Lewis swears was similar to that served on Reisig, and, of course, void. Reisig swears that no

notice of any kind was ever served upon him, or any member of his family, in relation to these premises.

This is a case where the true owner of the premises, from all that appears in the record, was a resident of the county in which the tax sale was made, or if not an actual resident, had a tenant in possession of the premises. The notice, such as required by the constitution, should have been served upon him.

There is sufficient evidence in the record that the owner of the premises was a resident of the city of Chicago at the time of the sale for taxes, and so continued, and could have been found upon reasonable inquiry. A notice, then, should have been served upon him. A publication in the newspaper, to the deceased Dempsey, amounted to nothing, a living Dempsey being resident, on whom the notice could have been served as the owner. This provision of the constitution was intended for wise purposes—to prevent owners of land from being deprived of their titles, except upon actual notice, if practicable to give it, or by constructive notice in some newspaper if he be an absentee. The officer authorized to make this deed had no right to dispense with this requirement of the constitution, nor can the purchaser at the sale claim any rights, or obtain a deed, until he shall show, when challenged, that the notice, either actual or constructive, was given. Appellant was claiming a paramount title, and to make it out, he must show a strict compliance with all the requirements of the constitution and laws.

This he has failed to do.

It is further objected by appellant, that the defendant had no right to question the deed without first showing that he had paid all the taxes due and assessed upon the lot; that such is the requirement of the ordinances of the city, and of the revenue law of the State.

That provision of the general revenue law has long remained a dead letter upon the statute book, and is not considered of any validity, the effect of it being to compel a man to buy

justice. This no one can be compelled to do under our organic law. By that it is declared, that every person in this State ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws. Should justice be denied to him who has not wherewithal to pay for it? The conditions imposed by this act deprive a poor man of justice, and has no sanction in the constitution.

Appellant failing to make out title, the judgment against him was correct, and it must be affirmed.

Judgment affirmed.

CHARLES BALLANCE

v.

MICHAEL FLOOD.

1. POSSESSION—*whether it extends to newly purchased adjoining lands.* The principle that when a party purchases land adjoining a tract of which he was already in the occupancy, he will be considered as at once, in point of law, in possession of the newly acquired tract, is true only when the latter tract is vacant, or at least not held under an adverse possession.

2. EJECTMENT—*effect of the plaintiff showing an outstanding title, upon his right of recovery.* A defendant may protect his possession, in an action of ejectment, by showing an outstanding title. And so, if a plaintiff introduces proof of a title in a third person, with which he fails to connect himself, such proof will be fatal to a recovery.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

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

Mr. CHARLES BALLANCE *pro se.*

Mr. D. McCULLOCK, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of ejectment. The declaration contained two counts—one in the name of Langworthy, the other in that of Ballance. Langworthy died pending the suit, and his heirs were made parties. The verdict and judgment were for the defendant, and Ballance appealed.

On the trial, the plaintiffs introduced a patent from the United States to Langworthy, issued in 1840. Ballance did not connect himself in any mode with this patent, but relied on proof of a possession prior to that of defendants for recovery on the count in his own name. The defendant relied upon the twenty years statute of limitation as a defense against the heirs of Langworthy, and also upon evidence of a prior possession in the Bartons, under whom he held, as against Ballance. The evidence upon the question of possession is very contradictory, and it would answer no useful purpose to review it. It is sufficient to say, it is so conflicting as clearly to make it improper for us to set aside the verdict because unsustained by the testimony. It is certain that the heirs of Barton, under whom the defendant held, obtained a deed from the United States Marshal in December, 1844, reciting a judgment and *alias fi. fa.* against the patentee, Langworthy, and although, in the absence of the judgment and execution, this deed was, in itself, no evidence of title, it defined the character and extent of their possession. The conflict in the evidence is in regard to the fact of possession during the requisite time, and on that point we must accept the finding of the jury.

It is claimed, however, that the court erred in refusing the following instructions asked by the plaintiff:

"1. It is a principle of law that when a man owns and has actual possession, by occupancy, of a tract of land, and buys

another adjoining tract, the newly purchased tract becomes attached to the original tract, and he is at once, in point of law, in possession of the newly acquired tract, without any inclosure put upon it.

"1½. Prior possession is evidence of a fee; and if the jury believe said Ballance was in possession when said Leonard, under Bartons, took possession as detailed, plaintiff is entitled to recover.

"2. If the jury believe from the evidence, that the witness Rouse occupied the northwest quarter of section 23, and the south half of the S. W. quarter of sec. 14, in T. 9 N. of R. 8 E. of the 4th principal meridian, and conveyed them both to plaintiff Ballance, by the deed given in evidence, and there were then inclosures and a house on said N. W. quarter of sec. 23, which Ballance took possession of and held up to the time when he commenced this suit, then he was in the legal possession of said S. ½ of the S. W. quarter of sec. 14."

The first of the foregoing instructions was properly refused, because too general. The principle therein announced is true only where the newly purchased tract is vacant, or at least not held under an adverse possession. Here that was the very point in dispute.

The next instruction was also too general. It directed a verdict for the plaintiff, Ballance, in case he was in possession at a particular date, without reference to the question whether the Bartons, under whom the defendant held, had had a prior possession, as claimed by the defendant.

The last instruction, if given, would have tended to mislead the jury by declaring the possession of Ballance in a certain contingency, the "legal" possession. Whether it would have been the legal possession depended on other matters besides those enumerated in the instruction.

The instruction asked in regard to the marshal's deed was given in another form.

The appellant also objects to the third instruction given for the defendant, which was as follows:

3. The jury are further instructed that the plaintiffs have, by the introduction of the patent, shown a title in fee simple, in Augustus Langworthy; and unless the plaintiff, Ballance, has shown himself in some way connected with the title so shown in Langworthy, or unless he has shown himself, or those under whom he claims, to have been in the open and exclusive possession of the same for a period of twenty years, he can not recover any portion of the premises in his own name."

The appellant has no right to complain of the foregoing instruction. It is a proper application of the general rule, that the defendant may protect his possession, in an action of ejectment, by showing an outstanding title. Whether a mere trespasser upon the possession of another can make this defense has been sometimes denied, as in *Jackson* v. *Hardee*, 4 Johns. 20. It is unnecessary here to consider whether the rule should be thus qualified, as, in this case, the appellant himself introduced the patent for the purpose of recovering under his first count, and having thus introduced it as proof of a title still subsisting in the heirs of the patentee, he can not complain of the court for accepting his own proof as fatal to a recovery on the count in his own name.

Moreover, it is apparent this instruction worked the appellant no prejudice, for the jury found not only against Ballance on the count in his own name, but also against the heirs of the patentee on the first count. Yet they had been instructed by the court to find for the heirs on that count, unless they believed there had been an adverse possession by the defendant, and by the persons under whom he claimed, for twenty years prior to the commencement of the suit. This was the only defense to that count, and the jury, by finding for the defendants on that count, of course, found there had been

such adverse possession, and this finding necessarily disposed, also, of the second count, independently of the question of an outstanding title.

The judgment must be affirmed.

Judgment affirmed.

THE COMMERCIAL INSURANCE COMPANY

v.

ANNA SPANKNEBLE.

1. INSURANCE—*whether a married woman is the absolute owner of her own realty.* A married woman may insure a building which she owns, and which is situate upon ground to which she holds the title in fee, and she will be regarded as being the absolute owner of such property, and within the requirement in a policy thereon, which provides that if the interest of the assured be not an absolute ownership, it should be so stated in writing, with the true title of the assured, although her husband may have acquired an estate by the curtesy in the premises before the passage of the married woman's act of 1861.

2. SAME—*of the description of an interest in a trustee.* A policy issued to the owner of property, contained, in the body of it, this clause: "Loss, if any, payable to Elias Greenebaum, trustee, as his interest may appear." This was held to be a sufficient description of the interest of Greenebaum, who held a deed of trust upon the property, and a compliance with a condition in the policy that an interest in the premises less than an absolute estate must be stated therein.

3. SAME—*effect of notice to an agent—and of omissions by him.* Notice to an insurance agent who issues a policy, of facts relating to the subject matter of the insurance, is notice to the company, and if he fails to properly state them in the policy when relied upon and trusted to do so, the company should not be permitted to escape liability on that ground.

4. So, where the conditions of a policy required the interest of the assured to be stated therein, if it was less than an absolute ownership of the premises, the company can not avail of an omission of the agent to

state such lesser estate, if he knew the fact in respect thereto at the time he wrote the policy. The case of *The Illinois Mut. Fire Ins. Co.* v. *The Marseilles Manufg. Co.* 1 Gilm. 236, is not in conflict with this doctrine.

5. Nor is it essential, as was said in the case in 1 Gilm. 236, that the information should be contained in the application, as the case of *Atlantic Ins. Co.* v. *Wright*, 22 Ill. 463, holds that if the facts were known to the agent who made the survey and filled up the application, and they were omitted by him, the insurer could not avoid paying the loss for that reason.

6. SAME—*prohibition of a sale of the property insured.* A policy upon a building occupied as a brewery, covered, also, a steam boiler and connections, vats, tubs, &c., contained in the building, and stated, as one of the conditions, that "in case of any sale, alienation, transfer, conveyance or change of title in the property insured," the insurance should be void. This was held to relate alone to the real estate, and did not operate as a prohibition of the sale of the articles of personal property covered by the policy.

7. But the various articles were separately insured, the risk on each being specified, and if the condition prohibiting the sale did relate to the personalty, it would be a fair and reasonable construction to say that the sale named in the condition referred to each item of separate insurance, and that the sale of one class separately insured would not affect the others.

8. And where the assured was a married woman, a sale of property, even if within the prohibition, made by her husband, without her procurement or consent, would not affect her rights under the policy.

9. Nor would a mortgage upon the realty constitute a sale or transfer thereof, within such a prohibitory clause. And in this case, especially, such a construction would be excluded by an explanatory clause in the policy, which was, that "an entry for foreclosure of mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property."

10. SAME—*as to a continued occupancy of the premises insured.* Under a clause in a policy upon a brewery, which provided that if the premises should be vacant or without occupant during the term of insurance, the policy should become void, if the premises were in the same condition in that respect at the time of the loss they were when the policy was issued, and such condition was known to the agent at the time, the right of recovery by the assured will not be affected by the fact that the premises were without an occupant at the time of the loss.

11. But where the building insured was used as a brewery, and was not occupied as a residence when insured, it can not be said it had become vacant, because no one resided in the brewery when it was destroyed.

Statement of the case.

Appeal from the Superior Court of Chicago; the Hon. William A Porter, Judge, presiding.

This was an action of assumpsit, brought in the court below by Anna Spankneble against the Commercial Insurance Company, to recover upon a policy upon premises occupied as a brewery.

The following are the conditions in the policy, referred to in the opinion of the court:

"And it is further agreed that in case the above mentioned premises, at any time after the making of and during the time this policy would otherwise continue in force, shall from any cause be vacant or without occupant, unless notice of the same shall first have been given this company, and mentioned in or indorsed upon this policy, this insurance shall be void and of no effect.

"And that this policy is made and accepted upon and in reference to the application, plan, description or survey filed in this office, and the terms and conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for.

"If the premises insured are held upon lease, or upon leased ground, or the interest of the assured is not one of absolute ownership, or if it be equitable, it must be so stated to the company in writing with the true title of the assured and the extent of his interest, and so expressed in this policy in writing, otherwise the insurance shall be void.

"And in case of any sale, alienation, transfer, conveyance, or change of title in the property insured by this company or of any interest therein, such insurance shall be void and cease. And an entry for foreclosure of mortgage, or the levy of an execution, or an assignment for the benefit of creditors shall be deemed an alienation of the property."

A trial resulted in a verdict and judgment for the plaintiff. The company appealed.

Mr. O. B. SANSUM, for the appellants.

Messrs. ROSENTHAL & PENCE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee in the Superior Court of Chicago, against appellants, to recover on a policy of insurance for a loss of the insured property by fire. The policy covered a three story frame building, occupied as a brewery, a steam boiler and connections, vats, tubs, coolers, barrels of malt, barley and hops, all contained in the building, "loss, if any, payable to Elias Greenebaum, trustee, as interest may appear," for the period of one year from the twenty-first of November, 1866. The policy contained a number of conditions. They provided that if after making the policy and during its continuance, the property should become vacant or ceased to be occupied, unless notice should be given the company and mentioned in or endorsed upon it, the policy should become void.

Another provided that if the premises were held by lease, or upon leased grounds, or the interest of the assured was not an absolute ownership, it should be so stated in writing, with the true title of the assured. And also, that in case of any sale, alienation, transfer, conveyance or change of title to the property insured, such insurance should be void. And an entry under a foreclosure of mortgage, or the levy of an execution, or an assignment for the benefit of creditors should be regarded an alienation of the property. It appears that a fire occurred on the twenty-seventh of July, after the policy was issued, and destroyed the property.

It is first urged that notwithstanding appellee owned the fee to the premises, before her marriage, her estate in the

premises was not absolute, because by the marriage and the birth of a child the husband had become entitled at her death, to hold as a tenant by the curtesy, and entitled to a joint occupancy during their lives. We are at a loss to see how such facts could render her title or estate contingent. She held the title in fee simple absolute. And although the husband had the right during marriage to occupy the property jointly with her, that did not render her absolute estate contingent. No one would say that under such a provision in a policy issued to a married man he could not recover, because his wife had a contingent right to dower in the premises.

Again, it appears that the agents of the company were apprised of the fact that appellee was a married woman when the policy was issued. The husband of appellee went to appellants' business office with Mr. Foreman, and said to the secretary of the company that they wanted the policy changed to his wife's name, and her name was written in the policy by the agent of the company. Knowing the fact when he filled up the policy, if the company deemed it important, he should have so stated the title. To permit the company, when the omission was by their own agent, to now avoid the payment of the loss for the neglect of their agent would amount to a fraud. Those unskilled in the technical terms of the law should only be required to state facts to the agent, and if he fails to properly state them in the policy when relied upon and trusted to do so, the company should not be permitted to escape liability on that ground.

This was the rule announced in the case of *Atlantic Insurance Co.* v. *Wright*, 22 Ill. 463. It would be a fraud to permit the company to receive the premium, when they knew that the policy was not binding, and which they never intended to pay. Such bodies act through officers or agents only, and notice to the agent is the only knowledge the company could have, and his knowledge in regard to the transaction must bind the company.

As to the objection that Greenebaum held a deed of trust on the property and therefore the condition was violated, it is a sufficient answer to say that it was not only known to the agent, but he in effect so stated the fact in the body of the policy. There was inserted in writing in the body of the policy this language: "Loss, if any, payable to Elias Greenebaum, trustee, as his interest may appear."

From this language, can there be any doubt that he was stated to be a trustee of the property? We presume all persons would so understand the clause, and that it would be difficult to give it any other interpretation. It asserts that he was a trustee and had an interest, and if a loss occurred payment was to be made to him as his interest should appear. It may not be as formal and artistically drawn as if it had been done by counsel, but nevertheless it must be regarded as sufficiently expressed in the policy under the condition imposed.

Nor does the case of *The Ill. Mut. Fire Ins. Co.* v. *The Marseilles Manuf'g Co.*, 1 Gilm. 236, conflict with the views here expressed. That case holds that where the assured has a less estate than an unincumbered fee in the premises, it is his duty to disclose the fact to the insurer. In this case all the facts were sufficiently disclosed.

That the information should be contained in the application - as is there said, is not always true, as the case of the *Atlantic Ins. Co.* v. *Wright*, *supra*, holds that if the facts were known to the agent who made the survey and filled up the application, and they were omitted by him, the insurer could not avoid paying the loss for that reason.

It was next insisted that the policy was rendered void by the sale of the boiler and building to Klausen. An examination of the evidence shows that although appellee says in her examination after the fire, by the attorney of the company, that her husband sold the property, still, she, at the same time, says they owed Klausen, and the house was never moved; and she further says that Klausen paid no money. That was an examination, without any cross examination, and

when those conducting it are under no obligation to reduce it all to writing it is not entitled to be read in evidence unless signed by the party, and it is then to be regarded of less weight than an examination regularly conducted in court, where a cross examination is had. A party examined as appellee was, may be, and generally is, not fully apprised of the importance of many facts that might be stated in explanation that would give a very different force to the statement.

It nowhere appears that a valid sale of the house was made. It does not appear that such an instrument was executed as would pass the title, nor was it severed from the freehold, of which it was a part. Again, from an examination of the testimony of the husband, although he admitted it to be a sale, still, taking his testimony altogether, we are satisfied that the bill of sale, as he calls it, was only intended as a mere security. This is rendered more apparent because he says Klausen came to him afterwards and asked him how much he must have for the boiler, and on being informed, Klausen sold it. If it had been his, why ask the former owner how much he must have on the sale? Again, the policy was to the appellee, and there is no pretense that she ever sold or authorized the property to be sold. And surely a policy containing such a condition can not be defeated by a stranger to the transaction. Nor should it be by a husband, whose right to sell and dispose of the wife's realty is not recognized.

It will be observed that the various articles of property were separately insured; and on this boiler there was five hundred dollars risk, named and separately specified. Under such a policy, even if the condition related to the personalty, it would but be a fair and reasonable construction to say that the sale named in the condition referred to each item of separate insurance, and that the sale of one class separately insured would not affect the others. But the clause under consideration obviously relates alone to the real estate. It refers to sale, conveyance, alienation, transfer or change of title, in the property insured. But if such is not the true

construction, as the boiler was alone sold, it only rendered the insurance on it void.

If a mortgage was given on the house, that would not be a sale, alienation, conveyance, transfer, or change of title, such as was prohibited by this clause. The explanatory clause would exclude such a construction. It says an entry for a foreclosure of a mortgage, or a levy on execution, or assignment for the benefit of creditors, shall be deemed an alienation of the property. But it does not say that a mortgage shall be so regarded. See *Smith* v. *Mut. F. Ins. Co.* 50 Maine, 96; *Masters* v. *Madison Ins. Co.* 11 Barb. 624; *Rollins* v. *Columbian Ins. Co.* 5 Foster, 204; *Ayers* v. *Hartford Fire Ins. Co.* 17 Iowa, 180. These authorities hold that a mortgage does not operate as such a sale or transfer of property as to bring a policy within such a prohibitory clause. A party claiming such a forfeiture is *stricti juris*, and must bring himself strictly within the clause of forfeiture to defeat the right.

As to the objection that the premises were unoccupied when the fire occurred, it is a sufficient answer to say that the brewery was in the same condition when the fire occurred that it was when the policy was issued, and the agent of the company was informed of its condition when he issued the policy. The company took the premium, knowing the condition of the premises, and their condition being the same when destroyed by the fire, they should not be permitted to escape liability on that ground. The premises were no more vacant or unoccupied at the time of the fire than when the insurance was effected. They were not occupied as a residence when insured, and it surely cannot be said that they had become vacant because no one resided in the brewery when it was destroyed. The policy used was no doubt a blank intended for the insurance of a residence, and although this clause was not strictly applicable to a brewery in which no one lived, it was not stricken out at the time the blanks were filled, and the policy was delivered.

Appellee, although a married woman, could insure her property. It seems to have been her property, as well the land as the improvements. In *Emerson* v. *Clayton*, 32 Ill. 493, it was held that a married woman has the sole control of her separate property. And this being true, and the statute has so declared, she necessarily has the undoubted right to insure it, although owned by her before her marriage, and although her husband acquired a life estate in it before the adoption of the act known as the married woman's law.

The evidence fails to show that the husband of appellee burnt the property. It is true his son swears he did. But it appears the young man had been guilty of repeated larcenies, and was impeached by a large number of witnesses acquainted with his character for truth and veracity, who swear it was bad, and they could not believe him under oath. We think he was effectually impeached and that his testimony was unworthy of belief, and the jury did right in disregarding it. To give it credit would be to blot out all distinction between character for virtue, honesty and veracity, and character for crime, immorality and falsehood.

We have been unable to perceive any error in this record, after a careful examination of all the points presented and urged by appellants' counsel, and the judgment must be affirmed.

Judgment affirmed.

Syllabus.

SAMUEL RAWSON *et al.*

v.

MARY ANN RAWSON *et al.* Executors.

1. WILLS—*of a bequest "to my heirs at law according to the statute"—who shall take under the will.* A will containing no specific devises or bequests, but simply appointing the executors to administer the estate, and directing the payment of the debts of the testator, provided as follows: "And the remainder or balance of my interest of every kind whatsoever, may be distributed to my heirs at law according to the statute of Illinois for such case made and provided:" *Held*, that such a direction is equivalent to a devise or bequest to those who would take the estate under our statute of distributions if the estate were intestate.

2. The rule is, if there be no words in any part of a will to control, the words or terms used must be interpreted according to their strict and technical import. So construing them, the persons appointed by law to succeed to an estate, as in case of intestacy, are the persons designated.

3. An estate left in such a condition, as to the disposition of it, is to all intents and purposes an intestate estate.

4. DESCENTS—*whether a widow will inherit personal property from her husband, under the 46th section of the statute of wills.* Where a will leaves the property of the testator, which consisted of personalty alone, to be distributed to his heirs at law according to the statute of descents, thereby leaving his estate intestate, and the testator died, leaving a widow, but no child or children, or descendants of a child or children, the widow will take the entire estate, as the heir of her husband, under the 46th section of the statute of wills.

5. SAME—*effect of the act of* 1847 *upon the rights of the widow in that respect.* The act of February 11, 1847, entitled, "An act to amend an act concerning wills," was not intended to abridge the rights of the widow as an heir under the statute of descents, but to enlarge her dower rights, and did not operate to repeal the 46th section of the statute of wills, which prescribes the contingencies upon which the widow may become the heir of her husband.

6. Merely because there may be an inconsistency between the act of 1847, in its provisions respecting the widow, and the statute of descents of 1845, will not authorize the construction that the latter was repealed by the former by implication, inasmuch as the two acts are not on the same subject, the subject of the act of 1847 being the widow's dower, while that of the act of 1845 is not dower, but inheritance.

7. REPEAL OF STATUTES—*by implication.* If the rule be, as it undoubtedly is, that a subsequent act on the same subject, will not be held to repeal a former act by implication, unless the new act contains provisions contrary to, or irreconcilable with, those of the former act, with much more force and propriety may it be argued that a subsequent act, not on the same subject, shall not be construed to repeal a former act by mere implication.

WRIT OF ERROR to the Superior Court of Chicago.

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

Messrs. BATES & TOWSLEE, for the plaintiffs in error.

Messrs. SPAFFORD & MCDAID and Messrs. BECKWITH, AYER & KALES, for the defendants in error.

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

This was a bill in chancery in the Superior Court of the city of Chicago, filed by the plaintiffs in error against the defendants in error, executors of the last will and testament of Erastus Rawson, deceased, alleging that he died in July, 1863, leaving a last will and testament, and leaving the defendant, Mary Ann Rawson, his widow, but leaving no children, or descendants of a child or children, and leaving Samuel Rawson, his father, Lydia Rawson, his mother, and the others named complainants in the bill, his brothers and sisters. Rawson died leaving personal property only. It is alleged in the bill that the will was admitted to probate, and that the executors named in it, the defendants in the bill, were duly appointed, and entered upon the discharge of their duties as such.

It is further alleged that the widow of the testator did not renounce the provisions of the will made in her favor, but claims to take under it, and assumes to have the right according to law, to receive the whole of the personal property, after the payment of the debts.

It is claimed by the bill that after the payment of his debts and funeral expenses, the remainder and balance of his interest of every kind whatsoever should be distributed to his heirs at law, according to the statute of this State, in such case made and provided, and then alleges, that according to the laws of this State, in such case, the widow is only entitled to one-third of the personalty, and that the remaining two-thirds thereof belong to the complainants.

And the bill further claims, that whether the deceased died testate or intestate, the defendant, Mary Ann Rawson, his widow, is only entitled to one-third of the personal estate after the payment of the debts.

The defendants interposed a general demurrer to the bill, which was sustained and the bill dismissed.

To reverse this decree the complainants bring the record here by writ of error.

The case presents for our consideration the construction of the will in question, and the construction of the statute respecting the distribution of estates.

The will was made an exhibit, and was, after the introductory recitals, as follows: "To the end that all equitable demands against, and all claims on my estate, may be settled in equity and justice, and the remainder or balance of my interest of every kind whatsoever, may be distributed to my heirs at law according to the statute of Illinois for such case made and provided, do hereby, with the consent of the persons named, appoint my beloved wife, Mary Ann Rawson, and Edward K. Rogers, of the said city of Chicago, my executors, and hereby delegate all powers whatsoever, which may be necessary to carry out the intentions and objects above expressed, and which has directed me in this last will and testament, and I further remit and avoid the necessity of said executors to procure or give bail or security, or bonds as ordinarily required of executors and administrators in the law for such case made and provided."

The plaintiffs in error rely for support of the view they have taken of the rights of the contesting parties, upon the cases of *Sturgis* v. *Ewing*, 18 *Ill.* 176, and *Tyson* v. *Postlewaite*, 13 ib. 731, in the former of which cases it was said the provisions of the forty-sixth (46th) section of the statute of wills, was confined to cases of intestacy only, and in the latter, where it is held that it was by virtue of this section that the widow is made heir of her husband, that when there is no will and the estate intestate, then, and then only, the widow inherits as heir at law one-half of the real estate, and the whole of the personal estate, if her husband dies childless.

And they place reliance also, upon the case of *McMurphy* v. *Boyles et al.*, 49 ib. 110, where it was held that the renunciation by the widow of her rights under the will, did not make the estate intestate even as to her; that in no manner could a testate estate, devised and bequeathed by will, ever become an intestate estate, so that the widow, as heir under the 46th section of the statute could take one-half of the real estate and all the personal estate.

Let us for a moment consider those cases in the order cited. In *Sturgis* v. *Ewing* the testator made provision in his will for his widow, who was childless, and also separate demises to his relations. The widow renounced, claiming the benefit of the statute.

In *Tyson* v. *Postlewaite*, Tyson died intestate, leaving a widow, but leaving neither children nor descendants of children. His widow died intestate, leaving the complainants her only heirs at law. They claimed that the widow did not in her life time, elect to take her dower in the lands of which her husband died seized, nor did she relinquish her inheritance therein, but elected to take the inheritance, claiming that she did, on the death of her husband, inherit one-half the real estate and the whole of the personal estate of her husband. Complainants claimed as heirs at law of the widow, and demanded a partition of the real estate.

The court, under the 46th section of the statute of wills, established the widow as heir to one-half of the real estate; that the title, on the death of the husband, vested immediately in her, to the same extent as did the other half in his heirs general, without any act or volition on her part.

In both these cases the disposition of real estate was involved. In one, there was a renunciation under the will; the other was a case of intestacy; in neither was presented the question raised in this case, who are heirs at law to personal estate? In McMurphy's case, the estate had been disposed of by the will.

The rule is, if there be no words in any part of a will to control, the words or terms used must be interpreted according to their strict and technical import. So construing them, the persons appointed by law to succeed to an estate, as in case of intestacy, are the persons designated. 2 Jarman on Wills 2; 2 Williams on Exrs. 808, 809; *Corbitt* v. *Corbitt*, 1 Jones' (N. C.) Eq. Rep. 114; *Ferguson and wife* v. *Stuart, Exr.* 14 Ohio 140; *Baskins' Appeal*, 3 Penn. 304, this last case holding that in a will making a bequest to all the testator's heirs equally, meant such of his heirs as could only be ascertained by resorting to the statute of distribution.

The case in 14 Ohio was based upon a statute of that State, not differing materially from ours. The provision of the Ohio statute is, when a deceased person shall have no legitimate child, heir of his body, the widow shall be entitled to the whole residue of the personal property after the debts, funeral charges and other incidental expenses shall have been paid.

The will of the testator directed his executors to sell his real estate and deposit the proceeds in some good bank, to accumulate interest on the deposit; that a legacy should be paid to a certain church; that his widow, the complainant in the bill, should draw one-third of all the interest annually accruing on that fund, and that "the money aforesaid should go to his heirs."

The executors sold the real estate, paid off the debts, and made a settlement of their accounts with the proper court, by which it appeared there remained in their hands upwards of thirty-six hundred dollars to be distributed agreeably to the will. His widow having subsequently married, a bill was filed by her and her husband against the executors, claiming therein a right to the entire fund. And the court so held. The words of the will were, "it is my will that the money aforesaid go to my heirs," and the court said the law determines who are a man's heirs, and this left that portion of the estate not specifically disposed of by the will, to the statute of descents and distribution to designate the heirship, precisely as though no will had been made. The fact that a provision had been made for the wife by the will did not prevent her from being an heir.

In the case before us, no provision was made for the widow, nor was there any specific devises or bequests contained in it. The testator directed his debts to be paid, and the remainder to be distributed to his heirs at law according to the statute of this State.

These cases are in point, and go to show that such a direction as that contained in this will is equivalent to a devise or bequest to those who would take the estate under our statute of distributions if the estate was intestate.

It seems to us quite evident, from the will itself, that such was the intention of the testator. Leaving, besides his wife, a father, mother, brothers and sisters, he did not wish to create causes of dissatisfaction by specific devises or bequests, and believing the statute made a fair disposition of an estate situated as his was, he determined that it should be disposed of by the statute, and in this view he could have had no other object in making the will than the designation of persons who should administer the estate without giving the bond required under statutory appointment. The estate, so far as the disposition of it is concerned, is intestate. This, evidently, was the intent of the testator. He had no purpose to make a testamentary

disposition of his estate. That he intended should be distributed as if it were intestate estate, and being so, there can be no dispute, that under the statute the widow succeeded to the whole of it. There being no provision in the will for her benefit, there was nothing she could renounce. It is to all intents and purposes, an intestate estate.

But it is urged by the plaintiffs in error that this section is repealed by the act of February 11, 1847, entitled, "an act to amend an act concerning wills."

They claim not that it is in terms repealed, but by implication only.

That act consists of six sections, the first of which provides for widows, living in this State, of persons whose estates are administered upon in this State, that they shall be allowed in all cases in exclusion of creditors, as their sole and exclusive property forever, necessary beds, etc., enumerating various kinds of property useful in the maintenance of a family.

The second section provides, in addition to the above, widows of persons who have or may die intestate, shall be entitled to one-third of the personal estate of their deceased husbands, after the payment of debts, as their property forever. The third section provides the duties of the appraisers, in regard to each article of specific property.

The fourth section gives the widow the option to take other property in lieu of that specified in the first section. Section five repeals certain sections of other acts, and section six is as follows: The word "dower," as used in the forty-sixth section of the one hundred and ninth chapter of the Revised Statutes, entitled "Wills," shall be construed to include a saving to the widows of persons dying intestate, of one-third of the personal estate forever, after the payment of debts. Sess. Laws, 168.

It is very apparent, we think, that this act is treating of a widow entitled to dower, not as an heir under the forty-sixth section, under which the claim in question is presented. The only subject before the legislature, when this amendatory act

was passed, was, the rights of a widow as such. It was not designed to abridge her rights as an heir under the statute of descents, but to enlarge her dower rights. The reference in the sixth section to the word "dower," as used in the forty-sixth section, goes to show, that it was the widow's dower the legislature was providing for, and not an attempt to deprive her of an inheritance as provided in that section. To say this is done, not directly, but by fair implication, is saying what the acts themselves, when the subject matter of them is considered, will not justify. The acts are not upon the same subject, and if the rule be, as it undoubtedly is, that a subsequent act on the same subject, will not be held to repeal a former act by implication, unless the new act contains provisions contrary to, or irreconcilable with, those of the former act, with much more force and propriety may it be argued that a subsequent act, not on the same subject, shall not be construed to repeal a former act by mere implication. The subject of the act of 1847, is the widow's dower. The subject of the act of 1845, is not dower, but inheritance, subjects having no connection with each other. To say, therefore, because there may be an inconsistency between such acts, one repeals the other, would be going further than the canons on construction of statutes allow.

But this court, in the cases cited, of *Sturgis* v. *Ewing*, *Tyson* v. *Postlewaite*, and *McMurphy* v. *Boyles*, all decided since the passage of the act of 1847, have determined the forty-sixth section to be in full force and effect, and its repeal is not now an open question. No intention is manifested in that act, to interfere in any way with the law of descents.

We have not deemed it necessary to go over the ground so ably and so fully explored by counsel in the cause, contenting ourselves with an examination of cases cited in which the principal question has been discussed and decided.

Our conclusion is, that as there is nothing in the will calling for a particular or special construction to be placed upon the term "heirs at law," as used in the will, it must be interpreted according to its strict, technical import; that heirs at

law are such as are made so by the statute, and are the person or persons on whom the law casts the estate in case of intestacy; that the widow of the testator is within the contingencies specified in the statute, and is the heir at law to this estate; that the estate in question is an intestate estate, and that the forty-sixth section of the act making the widow heir to the whole personalty has not been repealed.

The decree of the circuit court is affirmed.

Decree affirmed.

CHARLES A. HILL

v.

EDWARD W. CRANDALL.

1. CONTEMPT—*what constitutes.* While a justice of the peace was hearing a motion for a continuance of a cause pending before him, an attorney in the cause, in resisting the motion, addressed to the justice this language: "You can fine and be damned." The attorney was held to have been guilty of contempt in open court, for which the justice should punish him.

2. SAME—*to whom the warrant should be addressed.* A proceeding for a contempt is in the nature of a criminal proceeding, and when a person is guilty of contempt in open court, before a justice of the peace, the justice may direct his warrant for the arrest of the offender to the sheriff of the county.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

This was an action of trespass, brought in the court below by Hill against Crandall. The first count in the declaration alleged that on the 21st day of August, A. D. 1868, at the county of Will aforesaid, the said Edward W. Crandall, then and there being a justice of the peace in and for said Will

county, then and there, without any authority of law, issued a certain writ against the body of said plaintiff, as follows:

STATE OF ILLINOIS, } ss.
WILL COUNTY. }

The People of the State of Illinois to the Sheriff of said county:

Whereas, on the 19th day of August, A. D. 1868, while Edward W. Crandall, one of the justices of the peace in and for said county, was engaged listening to a motion made before him for a continuance of a cause then pending at his office in Joliet, wherein Jacob Powles was the plaintiff, and Isaac Noabes the defendant, Charles A. Hill, attorney for the said plaintiff, did wilfully and contemptuously resist said motion after the court had given him, the said Charles A. Hill, notice that the said motion had been granted, and being ordered by the said justice to cease, refused to do so, and said that the said justice could "fine and be damned." And whereas, the said Charles A. Hill was forthwith called upon by the said justice, and required to answer for said contempt, and to show cause why he should not be convicted thereof, but did not make any defense except to deny the jurisdiction of the said justice, and did not make any apology for his said conduct, and whereas the said justice did thereupon convict the said Charles A. Hill of said contempt, and adjudge and determine that he pay a fine of five dollars, and that he be committed to the common jail of said county until he pay the said fine, or until he be discharged by due course of law: We therefore command you, the said sheriff, to take the said Charles A. Hill and deliver him to the keeper of the common jail of said county, together with this warrant; and you, the said keeper, are hereby required to receive him into your custody in the said jail, and him there safely keep until he pay the said fine, or until he shall be discharged by due course of law. Hereof fail not at your peril.

Given under my hand and seal this 21st day of August, A. D. 1868.

E. W. CRANDALL J. P. [SEAL.]

Statement of the case.

The count then averred that this writ was delivered to the sheriff, who arrested Hill, and detained him in his custody for the space of two hours, and until Hill paid the fine imposed upon him by the justice.

The second count alleged the arrest and imprisonment of the plaintiff by the defendant without authority of law.

A demurrer was sustained to the first count. To the second count the defendant pleaded specially, justifying the issuing of the writ, and the arrest and imprisonment under it, averring that while the defendant, as a justice of the peace, was hearing a motion for the continuance of a cause pending before him, and upon announcing his decision upon such motion, the plaintiff, who was acting as one of the attorneys in the case, resisted the said motion in a rude, unmanly and contumacious manner, and continued to resist the motion in a contemptuous manner, after the justice had announced his decision thereof, addressing to the justice improper and profane language, as follows: "You can fine and be damned," and other unbecoming and contemptuous language. A demurrer to this plea was overruled, and the plaintiff electing to stand by his declaration, his suit was dismissed with costs.

The plaintiff thereupon sued out this writ of error, and now insists the ruling of the court upon the demurrer was erroneous. First, because the defendant, though a justice of the peace, had no authority under the law to fine for contempt, unless he was sitting or acting in a judicial capacity as a court at the time the alleged offense arose, and that this fact that he was so acting must appear affirmatively in any justification of the case; and, secondly, even admitting the conviction to be regular, the defendant had no power or authority under the law to issue a warrant of commitment thereon to the sheriff of the county, commanding him to arrest the plaintiff in error, and that when he did so, and an arrest was made in pursuance of that writ, he became a trespasser under the law, for want of jurisdiction of the process used.

Mr. CHARLES A. HILL, *pro se.*

Messrs. URI OSGOOD, E. C. FELLOWS, T. L. BRECKENRIDGE and HENRY SNAPP, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

That the plaintiff in this case, as it is presented by the record, was guilty of contempt in open court, admits of no controversy, and the magistrate would have himself been censurable if he had failed to punish. The use of such indecorous language to a court as is set forth in this record would be inexcusable in any one, and is least excusable in an attorney at law, whose profession should be a sufficient guaranty of respectful deportment to even the humblest judicial tribunal.

The only question in this record admitting of debate is, whether the justice had the power to direct his warrant to the sheriff, and authorize him to make the arrest. Our conclusion is, he had such power. The 207th section of the Criminal Code, Gross' Stat. p. 210, provides that a justice of the peace may issue his warrant directed to all sheriffs, coroners, and constables, for the arrest of any person charged upon oath with the commission of a criminal offense. It thus appears that although, in civil proceedings, a justice must direct his process to a constable, he is not thus restricted when exercising a criminal jurisdiction. How the warrant shall be addressed in a proceeding of this character is not specially provided by the statute, and we are left to its analogies for guidance. It was held in *Clark* v. *The People*, Breese 340, and in *Stuart* v. *The People*, 3 Scam. 403, that a proceeding for contempt was in the nature of a criminal proceeding, and such being the fact, we can perceive no reason why the magistrate should not direct his warrant immediately to the sheriff of the county, who, as keeper of the jail would have

the custody of the offender. There can be no possible objection to such a practice, and there is nothing in the statute conflicting with it, even by remote implication.

Judgment affirmed.

CHARLES B. CHANDLER

v.

LUCIUS A. LINCOLN.

1. PLEADING IN REPLEVIN—*to authorize a return of the property.* In replevin, neither the plea of *non cepit* nor *non detinet* denies property in the plaintiff, and though the defendant succeed on either of them, he will not be entitled to a return of the property. To entitle the defendant to a return, he must, by a proper mode of pleading, contest the plaintiff's right.

2. SAME—*in what mode the title may be put in issue.* The right of the plaintiff can only be put in issue by formally traversing his allegation of title, or by specially pleading that the right of property is in some other person than the plaintiff. If the defendant succeed upon such a state of pleading, he will be entitled to a return of the property.

3. SAME—*and herein, of the burden of proof as to title.* Where the defendant pleads property in himself or a third person, and traverses the plaintiff's right, the averment of property in the defendant or third person is only inducement to the traverse, and the plaintiff must take issue on the traverse and not on the inducement.

4. Under such a plea, traversing the plaintiff's right, the burden of proof as to the title to the property is upon him.

5. But where the plea is property in the defendant or a third person, without a traverse of the plaintiff's right, it leaves the burden of proof upon the defendant to establish the truth of his plea.

6. PARTNERSHIP—*sale of one partner's interest under execution—relations of the purchaser with the other partner.* The interest of one partner in the partnership property may be sold under execution against him for his individual debt, and that interest, whatever it may be, will pass to the purchaser, to be held, however, subject to all the rights of the other partner, so that if, upon a settlement of the partnership affairs, the debtor partner

would have been entitled to nothing had no sale taken place, then the purchaser will take nothing by his purchase.

7. SAME—*in what proceedings such rights may be adjusted.* But in an action of replevin, where the title of a part of the property, alleged to be in a third person as a partner, is in issue, no settlement could be made between such partner and a purchaser under execution against his co-partner, and an instruction on that subject would be irrelevant.

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

The opinion states the case.

Messrs. KILGOUR & MANAHAN and Mr. D. P. JONES, for the appellant.

Messrs. SACKETT & MCPHERRAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of replevin for the recovery of a brick kiln supposed to contain two hundred thousand bricks, and a quantity of boards used for the purpose of covering the brick in the yard. Defendant filed pleas of *non cepit*, *non detinet*, property in defendant, as to one-eighth of the goods property in Hezekiah Brink, and *non cepit* as to the other seven-eighths, and an avowry as to one-eighth of the property seized on an execution against Brink, and *non cepit* as to the other seven-eighths. A demurrer was filed to the second, fourth and fifth pleas. It was overruled as to the second, but sustained as to the fourth and fifth, the last of which was amended, and issues were formed, and a trial was had by the court and a jury, which resulted in a verdict in favor of the defendant. A motion for a new trial was entered and overruled, and judgment rendered on the verdict. The record is brought to this court on appeal, and a reversal is asked.

The errors assigned question the action of the court below in giving appellee's, and modifying appellant's, instructions. It is first insisted that the modification of appellant's first instruction was erroneous. In this form of action, neither the plea of *non cepit* nor *non detinet* denies property in the plaintiff, and if the defendant succeed on either of them, he will not be entitled to a return of the property. If he desire a return of the property, he must contest plaintiff's right. This he may do by formally traversing the plaintiff's allegation of right, or by specially pleading that the right of property is in some other person than the plaintiff. A defendant is bound to take this course before he can contest the plaintiff's right. The object of these averments by defendant is to procure a return of the property, and to impose on the plaintiff the necessity of proving title to sustain his action. These averments, when made, require the plaintiff to prove his title. If the defendant pleads property in himself or a third person, he must, in the same plea, traverse the plaintiff's allegation of title. In such a case, the averment of property in the defendant, or a third person, is only inducement to the traverse of the plaintiff's right, and the plaintiff must take issue on the traverse, and not on the inducement.

On such an issue, the material question in dispute is, the right of the plaintiff to the property. The plaintiff holds the affirmative of the issue, and must sustain his right or fail in his action. What the plaintiff must prove, the defendant may disprove. *Anderson* v. *Talcott*, 1 Gilm. 345. It will be observed that to put the plaintiff on proof of his ownership on the trial, the defendant must traverse his right, and when such an issue is formed, it devolves upon the plaintiff to prove it, or fail in his action. Where the plea is property in the defendant or a third person, without a traverse of the plaintiff's right, it leaves the burden of proof upon the defendant to establish the truth of his plea.

In this case, the plea of property in the defendant also traversed the plaintiff's right. This, then, imposed the burden

of proving property in himself upon the appellant, as we have seen by the case of *Anderson* v. *Talcott*, *supra*. The fifth plea, as amended, averred the taking of one-eighth of the property, and averred that the title to that eighth was in Brink, and traversed the plaintiff's title to the same. And issue having been joined on that traverse, the burden of proving ownership in the plaintiff to that part devolved upon him. He averred ownership in his declaration, and it having been traversed, he must, to succeed, prove the averment. It, then, follows that appellant suffered no wrong by the modification of his first instruction. As modified, it required him to prove property *prima facie* in himself, before appellee was put upon proof to rebut it. From what has already been said, it will be seen that the second of appellant's instructions was properly refused, as it, if given, would have imposed the burden of proving property in Brink, in the first instance, on appellee. The third was also properly refused, as a partner's interest in the firm property may be sold under an execution, and that interest, whatever it may be, will pass by such a sale to the purchaser. But he takes it precisely as it was held by the defendant in the execution. If, on a settlement of the partnership affairs, defendant in execution is entitled to nothing, the purchaser would obtain nothing by his purchase. Such a purchaser would be compelled to settle with the other partner precisely as would the defendant in execution had his interest not been sold. On a trial of this character, such a settlement could not be made, and hence this instruction was irrelevant, and properly refused.

The fourth instruction was properly refused, inasmuch as it was immaterial how much capital was put in by Brink, or how he became a partner, provided he was a partner, and entitled to an eighth interest in the property in dispute.

From what has been said, it results that appellee's instructions do not accurately state the law, as the pleas of property in defendant and in a third person were accompanied with a traverse of plaintiff's right. But in this case it could not

mislead the jury, as the ownership of the property in the third and fifth pleas was an inducement to the traverse, and the issue was on appellant's ownership, and imposed the burden of proving that fact on him. We see no objection to the third and fourth of appellee's instructions. We perceive no error in this record of which appellant can complain, and the judgment of the court below must be affirmed.

Judgment affirmed.

CHRISTINA TRICKEY

v.

MATTHIAS SCHLADER *et al.*

1. DEDICATION—*for a public highway—what constitutes.* Where the owner of land joined in a petition to open a road, which was to run in part through his land, and such owner, as one of the commissioners of highways, acted upon the petition, and granted the order to establish the road, and afterward executed a release of all claim to damages, under seal, and for a valuable consideration, and such road was opened, used and worked: *it was held*, that these acts amount to a dedication of the land for the purposes of this easement, and estop him, and all persons claiming under him, from averring anything against them.

2. Nor can it be objected, that all the requirements of the statute were not observed, when the owner himself instituted the proceedings, and every act done was with his knowledge and consent, and the question of the want of power can not arise.

3. HOMESTEAD—*in an easement.* Where an easement, or right of way, was granted by the owner of premises who occupied them as a homestead, the fee still remaining in the grantor, the question of a homestead right in the land by the surviving widow can not arise.

WRIT OF ERROR to the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

This was a bill in chancery, exhibited in the court below by Schlader and Schultz against Christina Trickey, praying that she be enjoined from closing up a certain public road running through certain land of which her husband died seized. The court below granted the injunction, and this writ of error is prosecuted to reverse that decree. The facts fully appear in the opinion of the court.

Mr. D. W. JACKSON, for the plaintiff in error.

Mr. E. A. SMALL, for the defendants in error.

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

We are unable to perceive from this record that any right which the plaintiff in error has in the land over which this road runs, has been invaded.

The facts are, that the road was petitioned for at the instance of the owner of the land over which it was to run in part; that he, as one of the commissioners of highways, acted upon the petition, and granted the order to establish the road; that he executed a release under seal, for a valuable consideration, as expressed in the instrument, of all claim to damages sustained by him by reason of laying out and opening the road through his land; that the road was opened, used and worked up to the time of the owner's death, he assisting in building bridges upon it.

These acts amount to a dedication of the land for the purposes of this easement, and estop him, and all others claiming under him, from averring anything against them. They manifest an intention, on his part, to appropriate this land occupied by the road to the purposes to which it was appropriated. The objection, that all the requirements of the statute were not observed can have no weight, when the owner himself initiated the proceeding, and that every act done was with his knowledge and consent.

It is too late for the plaintiff in error now to deny there was a road legally established.

As this road was only an easement, and did not dispose of the fee, the question of a homestead right in the land by the surviving widow can not arise.

As this road was not established against the will of the owner of the land, but at his instance and request, no question of power can arise.

We decide the case on the acts of the owner, which, in our judgment, amount to a dedication of the land.

The decree of the circuit court is affirmed.

Decree affirmed.

JAMES GALLAGHER *et al.*

v.

DAVID R. BRANDT *et al.*

1. BILL OF EXCEPTIONS—*its requisites.* Where the error assigned is, that the verdict is against the evidence, but the bill of exceptions in the case does not purport to embody all the evidence, this court will not regard such assignment of error as properly before it.

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

The opinion states the case.

Mr. H. M. CHASE, for the appellants.

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

Mr. Justice Lawrence delivered the opinion of the Court:

This was an action of trespass, in which the plaintiff recovered a verdict and judgment for one hundred dollars, and the defendants appealed. It is urged by appellees' counsel that the verdict is not sustained by the evidence. That question, however, is not before us, for the bill of exceptions does not purport to embody all the evidence. No objection is urged by counsel to the ruling of the court upon the instructions, and we discover no error in regard to them.

Judgment affirmed.

Chicago & Rock Island Railroad Co.

v.

Thomas Fahey.

1. Railroads—*must carry the baggage of passengers.* The price paid for a passenger ticket upon a railroad includes the carrying of his baggage, and the recognition by the road over which the passenger is entitled to travel, of the validity of the ticket, is an admission that the check given for the baggage is equally binding.

2. Same—*where the line of transit is over the roads of different companies—liability of each for loss of baggage.* Where a passenger ticket entitles the holder to travel over different lines of road to his place of destination, and to which his baggage is checked, all of them recognizing the validity of the ticket when presented by the passenger, each company to whose possession the baggage may come will be liable to the owner for its loss while in the possession of such company.

3. Same—*of whom tickets may be purchased.* Where a passenger seeks to hold one of several roads in his line of transit, liable for the loss of his baggage, the recognition of his ticket purchased at the beginning of his trip, by the conductor of such road, is, in effect, an admission that it was issued by some person having competent authority to bind the company, and in such case it is immaterial whether the ticket was issued by a special agent of the company sought to be held liable, or by the ticket agent of some other company.

Appeal from the Circuit Court of Peoria county; Samuel Caldwell, Esq., acting Judge, by agreement of parties.

The opinion states the case.

Messrs. Ingersoll & McCune and Mr. Sabin D. Puterbaugh, for the appellants.

Mr. W. W. O'Brien and Mr. H. W. Wells, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

This was a suit brought before a justice of the peace of Peoria county, to recover for the loss of a carpet sack and its contents, claimed to have been lost by appellants. A trial was had before the justice, which resulted in a verdict and judgment against the company for $70 and costs. The case was removed by appeal to the circuit court, where there was another trial, and the jury found a verdict for $68.90 against appellants. A motion for a new trial was entered, but was overruled by the court, and judgment entered on the verdict. The record is brought to this court, and a reversal is asked, because the court gave appellee's first instruction, and for overruling the motion for a new trial.

The instruction informed the jury that if appellee purchased a ticket for passage from New York to Peoria, and his baggage was so checked, and that the ticket entitled him to travel over appellants' road as a part of the line from the former to the latter place; and that appellants transported appellee and a part of his baggage over their road on his ticket and checks, and that a part of appellee's baggage so checked was lost, or was not delivered to him, then appellee had the right to recover for such loss against the part of the line upon which the loss occurred. Had it not been for this last qualification, this instruction might have been erroneous, but taken altogether, it appears to be unobjectionable. In case a ticket is given to

a person for a passage over several roads, and it is recognized as valid by the several roads when presented, there can be no doubt that either of them must be liable for injury sustained by the passenger through the negligence of such road. And the same is manifestly true in reference to the loss of baggage checked on such a ticket. The uniform usage is, that upon the purchase of a ticket, the price paid includes the undertaking, on the part of the roads over which the ticket entitles the holder thereof to travel, to also carry his baggage, if not exceeding a limited weight. And the recognition of the validity of the ticket is an admission that the check given for the baggage is equally binding.

When the ticket was presented, and recognized as good by the conductor, it was, in effect, an admission that it had been issued by an agent or other person having competent authority to bind the road, and it matters not whether the ticket issued in New York was by a person who had been appointed a special agent of appellants, or by the ticket agent of another road, as by treating it as binding, they recognized the authority of the person who issued it, and the check for the baggage. And if the baggage came into their possession and they lost it, every principle of reason and justice requires that the company should pay for it, as such a neglect of duty should render, and ever has rendered, railroad corporations liable. And this instruction announces this rule. It told the jury that if either company over whose road the baggage was checked had lost it, then that company was liable, and left the jury to determine whether it was lost by appellants.

It is urged that the evidence fails to show that the baggage was lost by appellants. It appears from the evidence that when passengers arrive in Chicago on the Michigan Central, upon which appellee came, and their baggage is checked over appellants' road, it is delivered to an omnibus line, which receipts for it, and it is then taken to the depot of appellants in Chicago, and then sent forward. In this case, the freight agent says there is no entry of appellee's baggage on their

books. He also says, that if the baggage arrived in the morning, it might lie over until evening before going forward, and in such an event it would lie in the baggage room, and although persons were employed to guard it, still it might be stolen. And we think there is not evidence to warrant the conclusion that the lost baggage ever came to the hands of the employés of appellants' road. It appears that his other baggage, checked at the same time, came through, but that affords no more evidence that it was lost by appellants than by either of the other roads over which it was checked. There is nothing in the evidence to show that appellants' agents were more negligent of their duty than those of other lines over which it was checked.

So far as we can see, either of the other transfer agencies between Chicago and New York was as liable to lose the baggage as this company. There is no evidence tending to show that it ever left New York, or to trace it into the possession of appellants. The giving of the check by the baggage master at the depot of the Harlem road proved that it went into its possession, but nowise tended to prove that it had come into the possession of appellants. In the absence of such proof, the jury were not warranted in finding that appellants had received and lost this baggage, and the judgment must be reversed and the cause remanded.

Judgment reversed.

WILLIAM T. CUTTER *et al.*

v.

STEVENS S. JONES.

1. LIMITATIONS—*by whom the statute to be invoked—and under what circumstances.* A mortgagee obtained a decree of strict foreclosure, a subsequent purchaser from the mortgagor not having been made a party to the

suit. Afterwards, the purchaser, who held as trustee for certain creditors of the mortgagor, sought, by bill, to have the premises sold in execution of the trust, and the mortgagee decreed to have no right therein, on the ground that the statute of limitations, if pleaded in the suit to foreclose, would have barred a foreclosure, and was not pleaded: *Held*, that the statute of limitations could not thus be set up to deprive the mortgagee of his rights under the decree of foreclosure, which must stand, subject only to the right of the subsequent purchaser to redeem.

2. PARTIES TO A FORECLOSURE—*of a subsequent purchaser from the mortgagor.* A subsequent purchaser from a mortgagor ought to be made a party to a suit to foreclose the mortgage; but if he be not made a party, the decree of foreclosure will not, for that reason, be void—it will be, as to him, a mere nullity, leaving to him the right which he acquired by his purchase—that of redemption—in full force, and which he may still exercise, even though the decree was for a strict foreclosure.

WRIT OF ERROR to the Circuit Court of Du Page county; the Hon. SILVANUS WILCOX, Judge, presiding.

The opinion states the case.

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

Mr. W. D. BARRY, for the defendant in error.

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

The leading facts on which this case depends are, substantially, these: William R. Thompson, being indebted to Peter R. Bouchell on two notes, each for the sum of nineteen hundred and thirty-five dollars, thirty-nine cents, one due on the 1st of January, 1851, the other on the 1st of July of the same year, and both dated January 5, 1850, to secure them did, on that day, execute and deliver to Bouchell two mortgages, one mortgage as security for both notes, the other as security for the note first due. The first mortgage was duly recorded in the proper office January 18, 1850, and the other February 4, 1850. The mortgagee paid the taxes on the land up to and

including the year 1866—the notes being endorsed by Bouchell to Stevens S. Jones and David L. Eastman, and by Eastman his interest released to Jones. Thompson, the maker of the notes, died September 1, 1851, and William T. Cutter was appointed administrator on his estate on the 14th of May, 1853. Thompson was a member of the firm of L. C. Hall and Company, and involved in debt, and on the 14th of August, 1850, he conveyed this land in controversy to Robert Sedgwick, by deed duly recorded January 13, 1852. The lands were vacant and unoccupied. On the 10th of October, 1850, Sedgwick and wife conveyed the lands to William T. Cutter in trust, to pay certain creditors of L. C. Hall and Company, which deed was recorded on the 14th of October, 1850.

On the 2d of December, 1866, Jones exhibited his bill in chancery in the McHenry circuit court, where the lands are situate, to foreclose these mortgages, making Harvey M. Thompson, Emily M. Hall, Lamberton C. Hall, William T. Cutter, administrator of William R. Thompson, deceased, Peter R. Bouchell and others, defendants, omitting therefrom Roland Sedgwick and his wife, and William T. Cutter in his own right, or as trustee for the creditors of L. C. Hall and Company.

The venue in the cause having been changed to Kane county, such proceedings were there had at the May term, 1867, that a decree of strict foreclosure was entered, if the amount found due by the mortgages was not paid in ninety days.

At the February term, 1868, of the McHenry circuit court, William T. Cutter filed his bill in chancery, setting up this trust arrangement, and averring that Jones was about to take possession of the land under his decree, and to take legal proceedings to eject complainant therefrom. He also alleged in the bill, the notes executed by Thompson to Bouchell, secured by the mortgages, were barred by the statute of limitations.

The bill prays for an answer without oath, and for an account of the amount due the several creditors under the trust, that the premises might be sold in execution of the trust, and the amount realized paid to William T. Cutter, junior, the owner of the indebtedness of L. C. Hall and Company; that Jones be decreed to have no lien, charge or incumbrance, or title or estate in the lands, and that he be enjoined and restrained from taking or attempting any legal proceedings to take possession of them, and that the injunction be made perpetual, and for general relief. The bill made Jones, Sedgwick and others parties.

Jones answered, setting up the proceedings above recited in his bill to foreclose. Replication was put in, and the cause heard. The court dismissed the bill without prejudice. To reverse this decree, complainants bring the record here by writ of error, and make the point that the lien under the mortgage to Bouchell should have been held barred by the statute of limitations.

Reference is made, in support of this proposition, to *Collins* v. *Tony*, 7 Johns. R. 278. That was an action of dower, by a widow of one who had mortgaged the land, she not having joined in the deed. The court said, as they had held the estate of the mortgagor is the real estate at law, it must be so held when the widow comes to ask her dower of the heirs, or of the grantee of her husband. The court further held, that the mortgage set up was not a subsisting title, as the mortgagee never entered, and there had been no foreclosure, nor had interest been paid on it within twenty years. *Jackson* v. *Hudson*, 3 ib. 386, decides nothing further on this point. *Jackson* v. *Piatt*, 10 ib. 381, is to the same effect as *Collins* v. *Tony*, *supra*. Why, in that case, was not the mortgage a subsisting title? The answer is given by the court—the mortgagee never entered, and there had been no foreclosure. Here, there was a strict foreclosure by the decree of a court of competent jurisdiction, and it must stand until set aside by some direct proceeding. This bill contains no such

prayer, and if it did, and the only fact upon which to ground it was that the statute of limitations, if pleaded in the Knox circuit court, would have defeated the action, and was not pleaded, the court having jurisdiction of the cause properly exercised it by the decree rendered, and no court could thereafter interfere and set it aside. In the absence of fraud, the decree must stand.

The point made most important by the plaintiff in error is, that inasmuch as he, as trustee for the creditors of Hall and Company, and their creditors were not made parties to Jones' bill of foreclosure, the decree is void as to them.

What right did Sedgwick acquire by Thompson's deed to him, executed subsequent to his mortgage to Bouchell, under which Jones foreclosed? Certainly nothing more than the equity of redemption remaining in Thompson, and this equity was conveyed to plaintiff in trust.

On general principles, frequently recognized by this court, Sedgwick, and plaintiff as trustee, should have been parties to the foreclosure suit, but the question arises, as they were not, was the decree of foreclosure a void decree? In the case referred to by plaintiff—*Ohling et al.* v. *Luitjens*, 32 Ill. 23—which, in some of the facts, is like this case, it was held, that the complainant there could not be affected by a suit and decree to which he was not a party; that he was still the owner of the equity of redemption, and entitled to claim all the advantages belonging to his position; that the decree as to him was a mere nullity, he losing nothing by the decree. The court had no jurisdiction over him in the suit, and his rights remain unaffected by it. The same doctrine was held in *Dunlap* v. *Wilson*, ib. 517.

Testing this case by them, plaintiff lost no rights he possessed, by the decree of foreclosure; that right was simply a right to redeem. The foreclosure did not bar him of that right, and it now exists, so far as we can see, in full force. But the bill does not ask to redeem. He seeks, by his bill, to enforce no such right; it was, therefore, properly dismissed

without prejudice. The equities of appellant remain the same as they were when the foreclosure decree was rendered.

The decree is affirmed.

Decree affirmed.

Toledo, Peoria & Warsaw Railway Co.

v.

John Darst.

1. Pleading—*declaration in an action against a railroad for injury to stock.* In an action against a railroad company for killing stock, the declaration averred that the company had failed to fence the road at the place where the animal was killed, or where it got upon the track, and that it was not killed, nor did it get upon the track, at any of the excepted places. Upon the objection, that it was not directly averred that the injury was the result of the company's failure to fence, it was *held*, the facts averred would raise a *prima facie* presumption that the injury resulted from that cause, and at least after verdict, on motion in arrest, the declaration would be held sufficient.

Appeal from the Circuit Court of Woodford county; the Hon. S. L. Richmond, Judge, presiding.

This was an action on the case, brought in the court below by John Darst against the Toledo, Peoria & Warsaw Railway Company, to recover for the alleged killing of a horse belonging to the plaintiff, by one of the company's trains.

After alleging the killing of the animal by the defendants' trains, and that the road had been open for more than six months prior to the accident, it was averred in the declaration as follows:

"And plaintiff further avers that the said defendants never have, at any time since they have so owned, run and used the

said railroad within the said county, nor since the same has been so open for use, at the place where the said animal was so injured and killed, nor where the same got upon the track or road, erected and thereafter maintained fences on the sides of their said road suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad.

"And plaintiff further avers that the said horse did not get upon said railroad, and was not so hit and killed at the crossing of any public road or highway, nor within the limits of any town, city or village.

"And plaintiff further avers that at the point upon said road where the said horse was so injured and killed, and where the same got upon said railroad, fences were necessary along the sides of said road to prevent horses, cattle, sheep and hogs from getting on the track of said railroad from the lands adjoining the same.

"And plaintiff further avers that the said horse was not so struck, injured and killed, and did not get upon said railroad at any place where the said railroad runs through uninclosed lands lying at a greater distance than five miles from any settlement.

"And plaintiff further avers that said horse did not get upon said track or road, and was not so hit and killed at any point on said railroad where the proprietors of the lands through which the said railroad runs had already erected fences, or agreed with said company so to do: to-wit, at the County of Woodford aforesaid, — whereby the plaintiff has sustained damage in the sum of two hundred dollars."

The general issue was pleaded, and a trial resulted in a verdict for the plaintiff, whereupon the defendants moved in arrest of judgment, insisting the declaration was defective in not averring directly that the injury was the result of the defendant's failure to fence; but the court overruled the motion, and rendered judgment upon the verdict. The defendants appeal.

Messrs. BRYAN & COCHRAN, for the appellants.

Mr. H. B. HOPKINS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

In this case, as in the other between the same parties decided by us at the present term (51 Ill., 365), the appellant relies on the alleged insufficiency of the declaration. In the other the question was raised by demurrer by which the defendant abided; in this it is presented by a motion in arrest of judgment. We find, however, this declaration to be free from the objections we held fatal in the other. It is urged, however, that it is defective in not averring directly that the injury was the result of the defendant's failure to fence. But it does, in an inartificial way, aver facts which raise a *prima facie* presumption that the injury resulted from the neglect to fence, and at least after verdict the declaration in this respect must be held sufficient.

Objections are also taken to the sufficiency of the evidence, but we find it ample to support the verdict.

Judgment affirmed.

T. JUDSON HALE

v.

LEVI GLADFELDER *et al.*

1. LIMITATION ACT OF 1839—*when the bar of the statute can be made availing to recover possession.* When the bar of the statute has become complete, under the second section of the act of 1839, by the concurrence of claim and color of title acquired in good faith, payment of taxes for seven successive years under such color of title, and the actual taking of possession of

the premises, such bar cannot only be invoked as a shield to protect the holder of such color of title in his possession against every one; but if his possession be invaded, or the premises again become vacant and another shall make entry, even if the latter hold the paramount title, the holder of the color of title may sue, and recover his lost possession.

2. The bar of the statute having become complete, the right of the person entitled to its benefits to have and enjoy the possession is as perfect as though he were actually invested with the title, and, as against him, the holder of the paramount title can not use it for the purpose either of recovery or defense, until he shall have destroyed the bar, by purchase, limitation, or by some other mode equally effectual.

3. And as respects the right of the person in whose favor the bar of the statute, under the act of 1839, has accrued, to sue for and recover his lost possession, in an appropriate action, even against the holder of the paramount title, there is no difference in the construction to be given to the first and second sections of that act. Although there may be a difference in the manner of acquiring the bar under the two sections, yet, when acquired under either, the rights resulting therefrom are the same.

4. SAME—*in whom the elements of the bar of the statute may concur.* It is not essential that the three elements of the bar of the statute, under the second section of the act, as, the color of title, payment of taxes, and taking possession, should all concur through the same person; but, as in this case, one may acquire the color of title and pay the taxes for the required period and then make conveyance to another, to whom all the rights of the grantor will pass, and a third person may, under a contract of purchase from such grantee, enter into possession, and thus the bar of the statute will become complete.

5. SAME—*of an abandonment of the possession by a purchaser—rights of his vendor.* Where a person acquires color of title to vacant and unoccupied land, and has paid the taxes for the period required by the statute, and then conveys the premises by deed, neither the grantor nor grantee having yet taken possession, if a third person, under a contract of purchase from such grantee, enter into possession, such possession of the purchaser, for the purposes of the statute, will be deemed to be that of the vendor, and his occupancy subordinate to the title of the vendor, so that if the purchaser subsequently abandons the premises, with the intention not to return, but without the knowledge or consent of his vendor, the rights of the latter, with respect to the bar of the statute, will not be at all affected by such abandonment, and if any one, even the holder of the paramount title, subsequently enters into possession, such vendor, by virtue of the concurrence, in that manner, of all the elements of the bar of the statute, may, by an action of ejectment, recover the possession to which he had become entitled.

6. SAME—*who may pay the taxes, so as to be availing to a subsequent grantee.* A person having acquired color of title to vacant and unoccupied land, made conveyance thereof the same year, but continued to pay the taxes even longer than the seven years, and then made another conveyance to a different person, who had no notice of the former conveyance: *Held*, that the second grantee, being an innocent purchaser, would be protected under the statute, and the payment of taxes by his grantor would inure to his benefit as the subsequent holder of the color of title.

7. FORMER DECISION. This ruling is not in conflict with the case of *Fell* v. *Cessford*, 26 Ill. 522.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Mr. L. DOUGLAS, for the appellant.

Messrs. FROST & TUNNICLIFF, Mr. P. H. SANFORD and Mr. M. SHALLENBERGE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by appellant in the Knox circuit court, against appellees, to recover the southeast quarter of section fourteen, in township twelve north, of range four east. A trial was had before the court and a jury, where the issues were found for the defendants. On the trial below, appellant produced evidence of claim and color of title in the name of James Stewart, and payment of taxes by him from the year 1838 to 1853 inclusive, and that the land was vacant and unoccupied during that time. He also read in evidence a deed from Stewart to himself for the land, dated the 17th day of January, 1856. It was agreed by the parties that appellant sold the premises to one David Swickard, by a written agreement, and that he took possession of the land and commenced its improvement in the fall of 1857, and remained in possession until the fall of 1858. That he enclosed it with

a fence; that he then abandoned the contract and removed the improvements without the knowledge or consent of appellant; that prior to the fall of 1857 the quarter had always been vacant and unimproved; that after Swickard left the place it remained vacant until appellee took possession.

Appellant urges a reversal upon the grounds that he showed a right to recover under the claim and color of title, with payment of taxes for the required period, united with his possession by Swickard, and that the court erred in the instructions given and in overruling a motion for a new trial; that he brought himself within the second section of the limitation act of 1839, and should have had a judgment in his favor.

The second section of that act declares, "That whenever a person having claim and color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title. All persons holding under such tax payer, by purchase, devise or descent, before the said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of taxes for the time aforesaid, shall be entitled to the benefit of this section."

Under this provision of the law, it is perfectly obvious that Stewart had fully entitled himself to its benefits, unless he acted in bad faith. He held claim and color of title, and paid all taxes legally assessed, for fifteen years, more than double the statutory period. The land was vacant and unoccupied during that period. Under the decisions of this court he had only to reduce the property to possession to render his color of title and payment of taxes availing. Had he entered into possession and been sued for the land, it is apparent that he could have invoked the statute as a complete bar to a recovery, unless he held the color in bad faith. This being his right, any person having purchased of him his claim and color of

title succeeded to his rights under the statute. Appellant, then, having acquired a conveyance from him, succeeded to all of his rights.

After this purchase, appellant, through Swickard, with whom he had contracted to sell the land, acquired the possession and held it for one year. And Swickard having entered and held under and in subordination to appellant's title, had he been sued before he abandoned the premises, could have invoked the aid of the statute with effect. The bar of the statute was then complete, and had vested in appellant by reason of his possession by his vendee.

In the case of *Hinchman* v. *Whetstone*, 23 Ill. 185, it was held, where a party had been in possession under the first section of this act, so as to obtain the bar of the statute, and permitted the improvements to decay, or be removed, and the premises to become vacant, and the owner of the adverse title, which had been barred, regained possession, the person who acquired the bar by his possession under claim and color of title, and the payment of taxes, may recover, unless the owner of the adverse title has in like manner held possession, and paid taxes until he has acquired the bar of the statute. In that case there was an extensive review of the authorities, and it was held that whilst the statute did not confer the absolute title, still it did confer a right to hold and enjoy the possession precisely as if he was invested with the title, and that if his possession was invaded, or the premises become vacant, and another should make entry, even if he held the paramount title, he might sue and recover upon his former possession. In that case it was said that when the bar becomes complete, the former owner is prohibited from asserting his title against the occupant, and those claiming under him, and relying upon the bar, whether he be in or out of possession of the premises. As against such occupant and those claiming under him, he can neither use his title for the purpose of recovery or defense, until he shall have destroyed the bar, by purchase, limitation, or by some other mode equally effectual.

The case at bar is in all respects similar in principle with that. In this, as in that, the bar became complete under color of title. Here, as there, the occupant was fully empowered to plead and rely upon the bar as a complete defense. And here, as there, the lands had become vacant, and the holder of the adverse title, without purchase from appellant, or by limitation, or in any other manner, had not removed the bar, but had simply entered upon appellant's right of possession conferred by the statute. He, then, was liable to be ejected by appellant, who held the right of possession, unless there be a distinction between the first and second sections of the statute, as contended by appellee.

In *Hinchman* v. *Whetstone*, *supra*, it was said, in regard to this question, that the language of both sections adopted by the general assembly, to declare the effect that shall be produced by the bar, was held to be the same in the case of *Newland* v. *Marsh*, 19 Ill. 376. And it was also said, it would seem that no distinction can be justly taken when the bar is relied upon to prevent a recovery by the former owner, whether under one or the other of these sections. Although a difference of construction may obtain in the manner of acquiring the bar of the statute, it is perfectly obvious that it was the legislative intention, when the bar is acquired under either section, that the result should be the same. To hold otherwise would do violence to the language of the law. We are, therefore, clearly of the opinion that no distinction can be reasonably taken in this respect between the two sections. This is the construction given to the second section in the case of *Pauline* v. *Hale*, 40 Ill. 274. We do not intend to be understood, by anything here said, to limit what we have held in former cases, where it has been said that the holder of color of title and payment of taxes under the second section of this act, cannot recover before he has acquired possession of the premises.

It is, however, urged that when Swickard abandoned his contract, and the possession of the place, with the intention never to return, the bar was thereby abandoned, and became

nugatory. The relation of vendor and purchaser is such that when the latter enters into possession under the contract to purchase, the possession is that of the vendor; by the purchase he recognized the vendor's title, and like a tenant, in all proceedings for the recovery of possession by the vendor, he is estopped from disputing his title. He enters and holds under the title of the vendor, and his occupancy is subservient and subordinate to that title. And from this relation, and for the same reason, his possession becomes as fully that of the vendor, as does that of a tenant become that of the landlord. This, then, being virtually the possession of appellant, upon what principle of reason or justice could Swickard dispose of the benefits appellant had acquired by the possession? He could abandon his own, but not the rights of his vendor. Appellant had no notice, nor did he consent to this abandonment, and hence the question urged by counsel is not presented. Had appellant declared he would never resume possession, then it would have been before us for decision; but as this record does not present it, we have no inclination to discuss the results, if any, that it would have produced.

It is, however, urged that the conveyance of Stewart to Bogardus, in 1838, prevented him from claiming color of title, or from paying taxes so as to become availing under the statute. This deed was recorded in October, 1864. In this case, appellant, when he purchased, found a deed on record purporting to convey the title to Stewart, and that he had paid the taxes for more than double the required period, and could find no deed or record conveying title from Stewart. It would be a fraud upon appellant, who purchased in good faith, with no accessible means of learning that Stewart had previously sold, to permit the unrecorded deed to Bogardus to defeat his right to rely upon the bar of the statute. He, then, was an innocent purchaser, and is, in justice, entitled to protect himself under the provisions of the statute. He acted in good faith, although Stewart may not have paid taxes in good faith, knowing that he had sold to Bogardus. There can be no pretense that

appellant should be charged with notice by the record of the deed in October, 1864, more than a quarter of a century after it was executed, and eight years after appellant had purchased.

Nor is the case of *Fell* v. *Cessford*, 26 Ill. 522, opposed to the views here expressed. In that case, to make out seven years payment of taxes, it was necessary to count one year in which the taxes had been paid by a person not having the color of title. In this case, however, Stewart paid all taxes for fifteen years under his color of title. Had Bogardus paid a portion of the time, and Stewart another portion, then this case would have been like that, in principle. There, neither of the tax-payers had paid for seven years, whilst, in this case, only one party has paid, and he, successively, for more than the statutory period.

The disposition of the questions here discussed is all that is material, as presented by this record. The instructions of the court below are not in accordance with the views here expressed, and were calculated to mislead the jury, and the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

SOPHIA C. NEWMAN *et al.*

v.

WELLS WILLETTS.

1. CREDITOR'S BILL—*what constitutes, and when it may be maintained.* A creditor's bill, strictly, is a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to a levy and sale under an execution at law.

2. To maintain such a bill, the creditor must have exhausted his remedy at law, by obtaining judgment and getting an execution returned *nulla bona*,

this being necessary to give the court jurisdiction, for otherwise it would not appear but that the party has a complete remedy at law.*

3. SAME—*and herein, of a bill to set aside a fraudulent conveyance.*—But there is another sort of creditor's bill very nearly allied to the former, by means of which a party seeks to remove a fraudulent conveyance out of the way of his execution. This he may file so soon as he obtains his judgment, and is not required to show that he could not obtain satisfaction out of other property of the defendant.

4. But a naked bill to set aside a fraudulent deed, which seeks no discovery of any property, *chose in action*, or other thing alleged to belong to the defendant, and which ought to be subjected to the payment of his judgment, is not a creditor's bill in the sense in which that term is understood and accepted, and provision for which is made by sections thirty-six and thirty-seven of our chancery code.

5. And in order to maintain a bill to set aside a fraudulent conveyance, as an obstacle in the way of collecting the complainant's judgment, it must appear the judgment was an existing lien on the property conveyed, so that where the judgment was obtained more than a year before the filing of the bill, and it did not appear that an execution had issued thereon within that time, the bill cannot be maintained.

6. WILLS—*executed and proved in other States—when admissible in evidence in this State.* Where a will executed in another State, and probated there, and the record and proceedings in respect thereto are authenticated in conformity with the act of congress of May 26, 1790, providing for the authentication of the public acts, records and judicial proceedings in each State so as to take effect in every other State, such will is admissible in evidence in the courts of this State without having been probated here.

7. Nor is it essential to support a title to land lying in this State, claimed under such a will, that the will should be recorded in the county where the land is situate.

8. SAME—*of an estate for life.* The owner in fee of a tract of land in this State devised his property as follows: "I leave and bequeath all the property, movable and immovable, of which I may die possessed, to my said wife; this legacy is made in *usufruct* and during the lifetime of my said wife, at her death the whole of which will revert to the children, which I have or may have from said marriage." *Held*, that on the death of the testator, the widow took under this devise a life estate in the land—a freehold, and under our statute subject to execution.

*See also, *McNab* v. *Heald et al.* 41 Ill. 326; *Heacock et al.* v. *Durand*, 42 ib. 230; *McConnel* v. *Dickson et al.* 43 ib. 100; *Horner* v. *Zimmerman et al.* 45 ib. 14. But there is an exception to the rule that an execution must issue before a creditor's bill will be entertained, in the case of proceedings against an insolvent estate. See *Steere et al.* v. *Hoagland et al.* 39 ib. 264.

APPEAL from the Circuit Court of Mercer county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Mr. B. C. TALIAFERRO, for the appellants.

Mr. T. G. FROST, Mr. J. J. TUNNICLIFFE, and Mr. J. C. PEPPER, for the appellee.

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

This was a bill in chancery, exhibited in the Mercer county circuit court by Wells Willetts, and against Sophia C. Newman, Jay Martin and Martha A. Newman, to set aside a deed made by Sophia C. to J. Martin, bearing date February 11, 1861, and a deed from Jay Martin to Martha A. Newman, dated March 16, 1861, on the allegation they were made for the purpose of hindering and delaying the creditors of Sophia C. Newman in the collection of their debts, the complainant claiming to be a creditor by force of a judgment obtained by him against Sophia C. in the Mercer circuit court, at the April term thereof, 1861.

It is also charged in the bill that complainant had caused an execution to be issued on his judgment on the 5th day of October, 1861, which was returned, "no property found," on the 1st day of January, 1862; that he had caused an *alias* writ of execution to be issued on the 12th of August, 1864, which was returned on the 26th of September following, "no property found."

The defendants, severally, not under oath, answered the bill, denying all fraud, and replications were duly filed, and the cause proceeded to a hearing on the bill, answers, replications and proofs, and the court decreed that the deeds be set aside; that Sophia C. Newman had a life estate in the premises, and also a homestead right of the value of one thousand

dollars, and directing the sale of her interest in the land to pay the judgment, and that the sheriff should set off the homestead in pursuance of law.

To reverse this decree, the defendants have appealed to this court.

This bill, in the court below, was denominated a creditor's bill, and it is contended, the complainant must show he has exhausted his legal remedies before it can be sustained, and it was with that idea, on the part of the pleader, the allegation was introduced in the bill, of the issuing of an execution.

It is not a creditor's bill in the sense in which that term is understood and accepted, and provision for which is made by sections thirty-six and thirty-seven of our Chancery Code. No discovery is sought of any property, *chose in action*, or other thing alleged to belong to the defendants, and which ought to be subjected to the payment of his judgment. It is a naked bill to set aside deeds executed before the judgment was obtained, so that they shall not operate as an obstruction to an execution, on the allegation, that they were executed with a fraudulent intent.

This court said, in the case of *Weightman et al.* v. *Hatch*, 17 Ill. 281, where a party seeks to remove a fraudulent conveyance or incumbrance, out of the way of his execution, he may file his bill for that purpose so soon as he has obtained his judgment, and before he has made any effort to satisfy his judgment out of other property of the defendant.

The court then quotes what was said in *Miller et al.* v. *Davidson*, 3 Gilm. 518, where it was held, when a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to a levy and sale under an execution at law, that he must exhaust his remedy at law by obtaining judgment and getting an execution returned *nulla bona*, before he can come into a court of equity for the purpose of reaching the equitable estate of the defendant, this being necessary to give the court jurisdiction, for otherwise, it would not appear but that the party has a complete remedy

at law. This is what may be strictly termed a creditor's bill. But the court say, there is another sort of creditor's bill, very nearly allied to this, yet where the plaintiff is not bound to go quite so far before he comes into this court, and that is, where he seeks to remove a fraudulent incumbrance out of the way of his execution. Then, he may file his bill so soon as he obtains his judgment. The court proceed—whether our statute, which subjects equitable interests in land to sale on execution, has done away with this distinction, it is unnecessary now to inquire. It is enough for this case, that it came strictly within the rule that prevailed before the statute allowing the party to file his bill to remove a fraudulent conveyance, without showing that he could not obtain satisfaction out of other property of the defendant. As to him, the conveyance being void, the creditor has a right to place himself in the same position which he would have occupied had it never been made, and first seek satisfaction out of this land. The grantee's title being tainted by fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he could be disturbed in his title.

These views were expressed in a case where the judgment was an existing lien on the property, and they must be understood as applying to such cases only. If a party has no lien, and the land alleged to be fraudulently conveyed, such conveyance can do him no injury, The record, in this case, fails to show that complainant had a lien on this land, no execution having issued on the judgment within one year from its date. The presumption of law is, that the judgment was paid, and to enable the complainant to issue an execution, the judgment would necessarily have to be revived by *scire facias.*

But it is desired, by both parties, that the interest of Sophia C. Newman in this land should be definitely ascertained, so that, should the complainant, on another hearing, show he had a lien upon it, it may be subjected to that lien.

It appears the land in question was the property and farm of Erastus Newman, the husband of Sophia C. He was a

branch pilot, following his vocation at the Balize, in the State of Louisiana, in the parish of Plaquemine, and was drowned in the Gulf of Mexico, from the upsetting of a boat, on the 21st of January, 1855. On the 20th day of October, 1850, he made his last will and testament, which was duly proved before the second judicial district court of the parish of Plaquemine, on the 14th of May, 1855. He was married to the defendant, Sophia C., in 1837, and had by her four children, living at the time of his death, Martha A. being the eldest, and the others being those named in this cause. Sophia C. was left by the will "natural tutor" of the children, and there was bequeathed to her all his property, movable and immovable, of which he died possessed, in *usufruct* during her life, and at her death, to such children as he had, or might have, from the marriage. His wife was appointed executrix, and power was given her to sell all his property at public auction, to pay his debts, and place the balance or net amount at interest for the benefit of his children.

After the will was proved, and she had procured letters testamentary, she presented her petition to the same court for an order for an inventory and appraisement of all the property belonging to the succession, and to the "community" which had existed between her and her deceased husband. The order was granted, and an inventory and appraisement filed on the 4th of June, 1855, by which it appears that the deceased Newman, was the owner, at the time of his death, of a lot of ground on the right bank of the Balize bayou, in the parish of Plaquemine, which, with the buildings and improvements thereon, was valued at six hundred dollars, and it appearing the deceased was a member of the Louisiana Pilots' Association, there was found on its books the amount of thirteen hundred and thirty dollars and ninety-two cents to his credit, amounting, in all, to nineteen hundred and thirty dollars and ninety-two cents.

This record comes certified to us as the record of the court of the second judicial district of the parish of Plaquemine,

in the State of Louisiana, and certified by the clerk of that court, under the seal of that court, on the 29th of October, 1867, and accompanied by the certificate of the presiding judge of that court, of the official character of the clerk signing the same; that his signature thereto was genuine, to which full faith and credit were due, and that his attestation was in due form, and is in entire conformity with the act of congress of May 26, 1790, entitled, "An act to prescribe the mode in which the public acts, records and judicial proceedings in each State shall be authenticated, so as to take effect in every other State."

By this act, such records and judicial proceedings authenticated, as by the act required, shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the State whence the records are taken. The clerk certifies that the will was proved and admitted to record in accordance with the laws of the State of Louisiana in force at the time.

This record imports absolute verity, and, by the act of congress, being properly authenticated, is evidence in the courts of all the States in the Union, and by it the fact appears that Sophia C. Newman had devised to her a life estate in all the movable and immovable property of the testator wheresoever situate. It is conceded he died seized in fee of the land in question. It is said by appellants' counsel, when this cause was before us at the April term, 1866 (48 Ill. 534), this will was held to be inadmissible in evidence, it never having been admitted to probate in this State, and that, consequently, no rights could be claimed under it. The evidence presented at that term, showed only an instrument purporting to be a will. No record of any court was offered, as now, to its execution and proceedings under it. In this case, the proof of the execution of the will is, substantially, the same as that in the case of *Shephard* v. *Carriel*, 19 Ill. 313, which was there held to be sufficient. In that case, the will was not recorded in the proper county until after the commencement of the suit in

which it was used as evidence. It is true, the will in question was not recorded in Mercer county, at the time of this trial, but it is capable of being recorded, having all the elements prescribed by section 8 of our statute of wills.

The question now is, did Sophia C. Newman take under this will? The evidence on this point is inferential only. She had the property in Louisiana inventoried and appraised, and as she was the beneficiary in that, a fair presumption is, she appropriated it. She then removed to this farm in Mercer county, where she has ever since resided, exercising exclusive dominion over it, offering to sell it, and using its avails as means of support for herself and family, and there is no pretense she ever renounced the provisions of the will for her benefit, or made any claim to dower in the land. All the circumstances conspire to show she accepted the bequests of the will, claiming the estate as bequeathed.

What was this estate? Clearly a freehold, and under our statute subject to execution, subject, however, to her homestead right, to which she is clearly entitled.

The next question is, did Sophia C. Newman convey this estate to Martin with the intent and purpose of hindering and delaying her creditors?

There is no proof there was any other creditor but the complainant, at the time the deed to Martin was made, and the proof is clear that it was made to hinder and delay him in the collection of his debt. This seems to have been the principal object of that conveyance. Martin paid no money, but gave his notes on time. He occupied the farm about one year, paying rent to Mrs. Newman, and then, on ascertaining her title was doubtful, conveyed it, at her request, to her daughter Martha, on the consideration she would furnish her mother support during her life, she, herself, however, having no means of doing so, save by the income which might be derived from the farm. It is also proved that Mrs. Newman had refused to accept her own propositions for the sale of the land, coming from parties able and willing to comply with

them. The great body of the evidence shows that this conveyance from Mrs. Newman to Martin, and from him to Martha Newman, were made with the intent to hinder and delay complainant in the collection of his debt.

Upon the point raised by appellant that there was no proof Mrs. Newman was insolvent at the time she executed this deed, it is sufficient to say the evidence is ample, that she had no available means sufficient to pay a debt exceeding eight hundred dollars, which was the extent of complainant's claim. About this there can be no dispute.

As, however, the record fails to show the judgment in question was a lien on the land, there was error in removing the obstruction created by the deed, and subjecting the land to the payment and satisfaction of the judgment. On another trial, complainant may be able to show the judgment was a subsisting lien, by showing an execution issued within one year. There was no error in directing the sheriff to set off to Mrs. Newman a homestead in the premises, in pursuance of the statute, and not exceeding in value one thousand dollars.

For the reasons given, the decree must be reversed and the cause remanded.

Decree reversed.

Chicago, Rock Island & Pacific R. R. Co.

v.

William H. Fairclough.

1. Railroads—*of their liability as warehousemen for baggage of passengers.* When a passenger upon a railroad purchases his ticket and checks his baggage to the place of his destination, and such baggage arrived at its destination, and is not, from any cause, delivered to such passenger, or to his

agent, *it was held* that it was the duty of the company to deposit such baggage in their baggage room, in which event their responsibility becomes that of warehousemen, and they must respond in damages for any neglect in that capacity.

2. It is not necessary that such place of deposit should be absolutely fire-proof, or burglar-proof, but such a place as a man of ordinary prudence would use for the storage of his own goods.

Appeal from the Circuit Court of Rock Island county; the Hon. Geo. W. Pleasants, Judge, presiding.

The opinion states the case.

Messrs. Glover, Cook & Campbell, for the appellants.

Mr. William H. Gest, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

The appellee purchased a ticket entitling him to passage upon the railroad of appellants from Chicago to Moline, and checked his baggage to the same station.

On arriving at Geneseo, he procured a lay-over ticket, and stopped there from the 13th to the 15th of February.

The baggage was allowed to go on to Moline, arriving at 5.25 p. m. of the 13th, and no one being on hand to receive it, the baggage master of appellants placed it in the depot building, where baggage was ordinarily kept. He remained in the building until 11:45 p. m., then locked all the doors and fastened all the windows, and left the station, for the night. At 7½ the next morning, he went to the depot and found that burglars had broken into the depot, broken open the trunks, and rifled their contents. This action was brought against the company to recover the value of the property stolen, and the jury found a verdict for $92.50. The court instructed the jury as follows:

"The responsibility of the defendant as a common carrier, lasted until the plaintiff's baggage reached Moline, and was delivered to the plaintiff or his authorized agent, or was by the defendant stored in a safe warehouse of itself or some one else.

"If the jury believe, from the evidence, that the goods of the plaintiff were carried to their destination and not then and there delivered to the plaintiff, either by reason of his not being there to receive them, or for other causes, not the fault of the plaintiff, it was then the duty of the defendant to store the goods in a safe warehouse; and if the jury further believe from the evidence, that the defendant retained possession of the goods after so arriving at their destination, then it was in the capacity of warehousemen, or keepers of goods for hire, and as such warehousemen, the defendants were bound to use ordinary diligence in the care of the same.

"Ordinary diligence or care which a warehouseman is bound to use, is that degree of care or attention which, under the actual circumstances, a man of ordinary prudence and discretion would use in reference to the particular goods if they were his own property."

It is objected that these instructions impose too large a responsibility upon the company, but we can see no objection to them. It certainly would not be contended that a railway company can leave the baggage of its passengers on the platform, utterly uncared for. If the owner of the baggage fails to call for it on the arrival of the train, it is the duty of the company to deposit it in their baggage room, in which event, as in the case of freight, their responsibility becomes that of warehousemen. The baggage room should be reasonably secure.

Objection is taken to the use of the phrase, "safe warehouse," in one of the instructions. But the jury would understand, from all the instructions, that by this phrase was meant, not a warehouse absolutely fire-proof or burglar-proof,

but such an one as a man of ordinary prudence would use for the storage of his own goods.

The evidence discloses great negligence on the part of the company. The baggage was stored in the ordinary waiting room, the windows of which were within four feet of the platform, without blinds, and one large pane of glass, 12 inches by 22 (by removing which the burglar made his entry), was fastened only by tacks, and there was no watchman about the building at night.

Judgment affirmed.

HENRY C. DENT

v.

EZRA D. DAVISON.

1. ACTION ON PENAL BOND—*of assigning successive breaches.* The 18th section of the practice act, which provides that in actions upon penal bonds, successive breaches may be assigned and recovery had, after a trial and judgment in the same action, is not confined in its operation to actions on official bonds, but applies as well to other penal bonds, conditioned for the performance of covenants, where the non-performance of the condition is not necessarily embraced in a single breach.

2. So where one partner purchased his co-partner's interest in the firm, agreeing to pay the partnership debts, and gave a penal bond conditioned for their payment within a specified time, upon a breach of such condition by the neglect of the obligor to pay the firm debts, as he had agreed, a right of action upon the bond accrued to the obligee, but if the latter had not himself paid the debts, or some portion of them, he could recover only nominal damages, and the judgment for the penalty would stand as security for such other breaches as might afterwards happen by reason of the obligee paying the debts, or any portion of them.

3. BILL OF EXCEPTIONS—*when it should be signed.* While it is for the judge trying a cause to determine, in the first instance, whether the requirements of the law have been so far complied with as to make it his duty to sign a bill of exceptions, yet where that has not been done, the bill should

not be signed. In this case, the bill was signed two years after the trial to which it related, and from the memory of the judge, without minutes, and without any exceptions having been taken at the time. The signing of the bill was disapproved.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

The opinion states the case.

Messrs. BANGS & SHAW and Messrs. BURNS & BARNES, for the appellant.

Messrs. JOHNSON & HOPKINS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears from the record in this case that appellee brought an action of debt to the August term, 1867, of the Woodford circuit court, against appellant and Addis, on a penal bond. It was conditioned that the obligors should, before the 26th day of August, 1866, pay, or cause to be paid, all debts contracted by the firm of E. D. Davison & Co., or that might have stood charged to E. D. Davison for goods had to the use of the firm obtained in the name of A. D. Addis & Co., and all collections made by Davison & Addis, or Addis & Co.; and it was further provided that, should default be made in the payments, or any part thereof, on the day named, and the same should remain in arrear for the space of ten days, then the aforesaid sum of three thousand dollars should, at the option of Ezra D. Davison, become payable immediately thereafter. At the December term, 1867, a trial was had by the court and a jury, when a recovery was had for the amount of the penalty of the bond and one cent damages.

Afterwards, appellee filed suggestions of further breaches, which occurred after the recovery of the judgment, under the 18th section of the practice act. To this assignment of

breaches, appellant filed a demurrer, which was overruled by the court, and a trial was had resulting in a judgment of $476.81 in favor of appellee.

It seems that Addis & Davison had been partners in business, and the former purchased of the latter his interest in the business of the firm, and to secure him, gave the bond sued upon, that he would pay the firm debts which he had assumed. Addis failed to pay them within the limited time, and left the country. At the first trial, appellee having failed to prove that he had paid and discharged any portion of the indebtedness which Addis had bound himself to pay, the jury only assessed nominal damages; and the present controversy grows out of the question, whether moneys paid by appellee on the firm debts after the judgment on the bond can be recovered under the assignment of new breaches.

It is not controverted that this is a penal bond, but it is urged that the damages growing out of its breach are of such a character that they should all have been assessed on the first trial; that the damages are entire, and cannot be divided or split up into several recoveries.

It is apparent that appellee should have introduced evidence of the payment by him of debts prior to bringing the suit, on the first trial, to recover more than nominal damages. And failing then to introduce evidence to prove he had paid any portion of the debts, the jury could but find one cent damages, having no proof of anything more than the mere fact that Addis had failed to pay the debts of the firm. And failing to prove such payments, appellee had a right to recover for the technical breach, and nothing more.

The 18th section of the practice act declares that in actions brought on penal bonds conditioned for the performance of covenants, the plaintiff may assign as many breaches as he may choose, and the jury, whether on the trial of the issue or of inquiry, shall assess the damages for so many breaches as the plaintiff may prove, and the judgment for the penalty shall stand as security for such other breaches as may

afterwards happen, and the plaintiff is authorized at any time afterwards to sue out a writ of inquiry to assess damages for the breach of any covenant contained in the bond, subsequent to the former trial or inquiry.

This being a penal bond, it falls within the provisions of the statute. It is true, the cases which most usually arise are on official bonds, where a breach of duty to different persons, and at various times, at the common law rendered a multiplicity of suits necessary to the attainment of justice, and to avoid litigation, delay and expense, the statute changed the practice so as to enable any party aggrieved, simply by suing out a *scire facias* against the defendant, and the suggestion of new breaches, have his damages assessed. But the statute is broader and embraces all penal bonds, and that upon which this suit was brought being of that character, it falls within the enactment. Appellee, then, had the right to assign further breaches, under the statute, for any damage sustained after the suit was brought. Had he paid any portion of the debts against the firm before suit was brought, and not recovered the amount as damages, then that portion of his claim would have been barred.

The breach by a failure of Addis to pay only, in contemplation of law, produced a nominal injury. Appellee only sustained substantial damage when he paid the debts. It was then, and only then, that he had a right to recover more than for a technical breach. And on each payment made by appellee on the debts against the firm, a new breach occurred, and a new cause of action arose, and a right of recovery, equal to the amount paid. On the first recovery, appellee had not been damnified, and until he was, he could not recover substantial damages. The first recovery was therefore correct, and under the statute the judgment stood as a security for any sums appellee might subsequently pay on the debts of the firm which Addis had covenanted to pay and discharge.

From the evidence introduced on the assessment, it appears that all of the payments made by appellee were after the suit

was brought, and hence no portion of the amount found on the assessment of damages, was barred by the first recovery. The suit was brought to the August term, 1867, and the proof shows that the first payment by appellee was made in the following month of November. It follows that the finding in the court below was correct, and the judgment of the circuit court must be affirmed.

The question raised by the cross errors are unimportant, as the only question arising on this record is presented outside of the bill of exceptions, signed by the judge some two years after the first trial. We are at a loss to see why the judge should have signed it as he did. It, he states, was made simply from memory, without minutes, and, so far as we can see, without any exceptions having been taken at the time. It is for the judge to determine in the first place whether, under the law, he is bound to sign a bill of exceptions; whether the party demanding it has conformed to the law in preserving the exceptions, and has made up and presented his bill as required by the law, and has, in other respects, a legal right to demand his signature to the bill. The signing of the bill is a solemn official act, which should never be performed unless required by law, and is calculated to produce injury to the opposite party, at least to the extent of contesting it in this court, when improperly signed.

Judgment affirmed.

JOHN KARNES

v.

MAHLON B. LLOYD *et al.*

1. EXECUTION—*confession of judgment for the purpose of enabling a creditor to redeem—not fraudulent as against purchaser.* The fact that a judgment debtor confesses judgment in favor of a creditor for the *express*

purpose of enabling such creditor to redeem from a sale under a prior judgment, in no wise invalidates it, there being no fraud as to the consideration for the judgment. Such confession is not fraudulent as against the purchaser.

2. SAME—*redemptions—law encourages.* It is the policy of the law to encourage redemptions, in order that the property of the debtor may discharge as many of his liabilities as possible.

3. A creditor by note and mortgage may obtain judgment on the note, and subject other property of his debtor to its payment.

4. SAME—*redemption—amount paid for—less than sum due.* The objection, that the amount of money paid to the sheriff for the purpose of redemption was less than the actual sum due, comes too late when made after the amount so paid has been accepted from the officer. A party, to avail himself of such objection, must urge it at the time the deficient sum is tendered him.

APPEAL from the Circuit Court of Henry county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

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

Messrs. SHAW & CRAWFORD, for the appellant.

Mr. O. E. PAGE, for the appellees.

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

The rights of the parties to this record were discussed and settled in the case of *Lloyd* v. *Karnes*, 45 Ill. 62, and are not now open to further contest.

On a petition for a rehearing, the opinion was so modified, on the suggestion of fraud in the rendition of the judgment under which the redemption was effected, the cause was remanded to the circuit court, with leave to appellant here to make such motion as he might deem advisable, on which the circuit court might make the proper order.

Accordingly, on the remand, at the term next ensuing, it being the October term, 1868, the appellant entered his motion

for leave to file an amended and supplemental bill, which motion was granted at the March term, 1869, following.

In the amended and supplemental bill, fraud was alleged in the confession of the judgment by Davenport, under which the redemption had been made by appellee, and questioning, also, the consideration of the judgment and irregularity in issuing and levying the execution, it appearing to have issued before the court had adjourned the term at which the judgment was rendered.

To this amended bill, Davenport and Lloyd were made defendants. Davenport answered, alleging the execution was issued on the affidavit of counsel, made for that purpose before the court adjourned; he denied all fraud in confessing the judgment, affirming it was confessed in good faith, and that it was upon a good and valid consideration, setting out in what it consisted.

Lloyd's answer embraced in it all the matters with which he was connected in the original bill, and to which he had filed a cross-bill, alleging that appellant was in possession of the premises, holding them against his rights, and prayed possession thereof. He also amended the cross-bill with a view to restrain the tenants in possession under the appellant from paying rent to him, and made them parties to the suit. In this amended cross-bill, there appears no charge against appellant which was not in the record when before us on Lloyd's appeal. No relief was sought against appellant in that amended cross-bill, nor was any answer demanded from him, the only object appearing to be to get the tenants in possession before the court, so that their rights might be adjudicated.

The tenants made an appearance by answers filed, in which they disclaimed any interest, except as tenants of appellant.

Appellant, also, without being called upon to do so, put in an answer to the cross-bill, reiterating the statements in his own amended and supplemental bill, and setting up as a defense, that the redemption money paid by appellee was less

than the amount, by a few cents, that was due and should have been paid.

Leave was given appellant to examine as witnesses the defendants Lloyd and Davenport, and also Elizabeth, his wife. The two first named were fully examined—the latter was not—and upon the hearing, the court held, there was no fraud in confessing the judgment by Davenport, on which the redemption was made, and entered a decree dismissing the bill, and awarding possession to Lloyd on his cross-bill.

To reverse this decree, the record is brought here by appeal, assigning as errors, in rendering a decree for the defendant in the original and amended bills, in finding the redemption of Lloyd to have been made in good faith, and in finding the same regular and valid.

Appellant insists that the redemption was void, because contrived for dishonest purposes.

The fact is very apparent, that Davenport, the judgment debtor, was largely indebted to Lloyd, on honest transactions, at the time he confessed the judgment in his favor, and enabled Lloyd to redeem the land claimed by appellant as holder of a certificate of purchase of the same land on a prior judgment. All the questions arising upon this branch of the case were fully discussed and decided in the former opinion, and we will consume no time about them. It is sufficient to say, Lloyd was lawfully in a position entitling him to redeem, if there was no fraud on his part, colluding with Davenport, to confess a judgment, no debt being in fact due. The record furnishes no proof of fraud, so far as the consideration for the judgment is concerned, and the fact that the judgment was confessed for the avowed purpose of enabling Lloyd to redeem from appellant's purchase, in no wise invalidates it, as this court has said in *Phillips* v. *Demoss et al.* 14 Ill. 412. It is the policy of the law to encourage redemptions, in order that the property of the debtor may discharge as many of his liabilities as possible.

Although Lloyd had security by mortgage for a portion of his claim on Davenport, that did not prevent him from obtaining a judgment on the note, and subjecting other property of his debtor to its payment. *Vansant* v. *Allmon*, 23 ib. 33. As this security held by Lloyd was on the property of Mrs. Davenport, and placed upon it by the husband, it was his duty, if he could do so, to relieve it by incumbering his own, or by requiring his own property to pay a debt he owed, and had secured upon the property of his wife. We see no injustice or wrong in this. It was equitable and right.

As we have said, the rights of appellant were disposed of in the opinion delivered when the case was under consideration at a previous term. The only question to be raised in the circuit court, on remanding the cause, was that of fraud in the confession of the judgment. As we are unable to perceive any indications of fraud, but only a desire to protect Lloyd and pay his debt, we are bound to uphold the transaction as fair and honest.

An objection is made, that the execution issued before the term of the court had ended at which the judgment was confessed. It is stated in the answers of Lloyd and Davenport, that the *fi. fa.* was issued on an affidavit of plaintiff, but no affidavit appears in the record.

The question arises, who is the party to take advantage of this on the ground of irregularity? Usually the debtor, it being presumed he desires to put off the evil day as long as possible. In this case, he makes no objection to the irregularity. We have no statute upon the subject, but only that a judgment shall be a lien from and after the last day of the term at which it was rendered. But it is not held to be necessary a judgment should be a lien, to entitle the owner of it to redeem. *Sweezy* v. *Chandler*, 11 Ill. 445. Any judgment debtor may redeem. Ch. 57 R. S. sec. 14.

It is further insisted by appellant, the redemption was not legal, inasmuch as the amount paid the sheriff for such purpose lacked four cents of the full amount due.

We agree with appellant, that great strictness is required in the exercise of all these statutory privileges. Had he known the objection in time, when the redemption money was tendered him by the officer, it might have availed, but he chose rather to accept the amount, and it is now too late to urge a deficiency. But the appellant has nowhere in the original bill, or in the amendment filed on remanding the cause, alleged this as invalidating the redemption, nor does it legitimately come within the scope of the ground on which the remand was made. That was done to eviscerate the alleged fraud, and for no other purpose.

On a careful examination of the record, no error is discovered. The debt for which the judgment was confessed by Davenport was due Lloyd, and he but exercised a right given him by statute to redeem the land. The judgment must be affirmed.

Judgment affirmed.

SAMUEL E. BARRETT *et al.*

v.

ELIJAH S. ALEXANDER.

1. NEW TRIAL—*verdict against the evidence.* In this case the preponderance of the testimony was considered to be in favor of the appellee, and the judgment was affirmed.

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

The opinion states the case.

Mr. J. V. LEMOYNE and Mr. JESSE O. NORTON, for the appellants.

Messrs. HITCHCOCK, DUPEE & EVARTS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This case has been already before this court, and is reported in 46 Ill. 226. We there stated the facts as then presented by the record, and our conclusion in regard to them. The case has since been re-tried, the parties having become witnesses since the former trial. They contradict each other in their testimony, and in other respects the record presents substantially the same facts as in the former trial. The court, a jury having been waived, found for the plaintiff, and we can not say that the finding is against the evidence. The case for the plaintiff is not as clear as it was before, but we are still of opinion the preponderance of the testimony is in his favor, or at least that it is so nearly balanced as not to justify us in disturbing the finding of the court.

Judgment affirmed.

COOPER & MOSS

v.

WILLIAM R. HAMILTON.

1. CONTRACTS—*who shall prepare them.* A party residing in this State, having obtained a divorce from his wife in Indiana, proposed a settlement with her in order to prevent her attacking the divorce. An agreement was entered into, in writing, the effect of which was to create a lien on the real estate of the former husband, to secure the payment of money to the wife: *Held*, that in the absence of any understanding on the subject, the contract should be prepared at the expense of the party whose lands were to become encumbered by it.

2. ATTORNEY AND CLIENT—*when the relation exists.* In this case, the attorney who prepared the written contract, did so at the request of the former husband, and though at the same time he was acting, in respect to

the subject matter of the agreement, as the attorney of the divorced wife, yet his relations to her did not prohibit him from preparing the contract at the instance of the other party, for which the latter could be compelled to pay him.

3. SAME—*of the mode of retaining counsel.* It is not essential to the right of recovery by an attorney against his client for professional services, that there should be shown an express request, but if the services were rendered under such circumstances, as will reasonably imply, that they were performed with the assent and upon the request of such party, a recovery therefor may be had.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

The opinion states the case.

Mr. H. GROVE, for the appellants.

Messrs. ROBINSON & CALDWELL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action commenced by appellants before a justice of the peace of Peoria county, against appellee, to recover for professional services, to the amount of fifty dollars. On a trial before the justice, the jury found for the defendant, and a judgment was rendered in his favor. The case was removed to the circuit court by appeal, where a trial was had before the court and a jury, with a similar result. A motion for a new trial was entered and overruled, and the record brought to this court on appeal, and various errors are assigned.

It appears that appellee had resided in the city of Peoria for a long period of time, but had been absent for two or three years. On his return he called on McCoy, an attorney in the city, and requested him see Mrs. Hamilton, from whom appellee claimed to have obtained a divorce in a court in

Indiana, and to see whether she could be induced to settle with appellee, and not attack the divorce. After seeing her, McCoy informed appellee what she said, and he then requested McCoy to see Cooper, who was Mrs. Hamilton's legal adviser, and get him to co-operate with McCoy in effecting an arrangement with her. McCoy called on Cooper, and they together made many visits to Mrs. Hamilton in reference to the settlement. She made larger claims than was finally agreed upon. McCoy says that Cooper considered himself Mrs. Hamilton's attorney, and manifested no want of a disposition to protect her interest. As a result of these interviews, a settlement was agreed upon, papers drawn and executed, and delivered.

After the terms of the agreement had been settled, appellee was very anxious that the papers should be so drawn as to be free from all doubt as to their validity. Appellee and Cooper talked the matter over, and it was arranged that Cooper should write to Washington and learn the requisite amount of stamps necessary to attach to the instrument, which he did. Cooper testifies that after the terms were agreed upon, appellee expressed a desire that the papers should be so drawn as to be binding, to which he assented, and suggested that the agreement should embrace every point, to which appellant assented, and suggested that, as Cooper was familiar with the matter, he could draw up the agreement better than any one else, which Cooper did, but having submitted the first draft to his attorney, appellee returned the paper with objections, and Cooper re-wrote the agreement and obviated the objections, and it was executed.

Appellants claim that appellee is bound to pay for the service rendered in drawing the agreement. On the other side, it is urged that Robinson was appellee's attorney, and Cooper was Mrs. Hamilton's, and that he, therefore, necessarily acted for her, and not for appellee, in what he did in the matter.

In *Buckmaster* v. *Grundy*, 1 Scam. 310, it was held that the purchaser was not bound to prepare and tender a deed to the vendor for him to execute, unless such an obligation is imposed by the contract of sale. It then follows, that the vendor of lands or a mortgagor is bound to prepare the deed or mortgage at his own expense, unless it is otherwise stipulated by the parties. When he agrees to make and deliver it, the duty and expense devolves upon him, and not the grantee. It was then, so far as the evidence discloses in this case, the duty of appellee to have this agreement, which, as we understand it, operated as a lien on his real estate, drawn and executed, as we find no evidence that Mrs. Hamilton did agree to incur the expense. If, then, it was his duty to have it done, and to pay for it, and he intimated that Cooper should be the draftsman, we can see no reason why appellee should not pay him for it.

It does not follow that because Cooper was Mrs. Hamilton's attorney, he should therefore draw the deed, or that she should pay for it. Unless otherwise agreed, that became the duty of appellee. Nor was it incompatible with Cooper's engagements with his client to draw the instrument, but still, in every particular, he was bound to protect her rights. He was, of course, bound in all things to make it conform to the agreement. But the terms having been first arranged, he could draw the instrument in conformity thereto, and look to appellee to pay him therefor, on either an express or an implied request. Whilst the position of Cooper was a delicate one, still it was not prohibited by his relation to Mrs. Hamilton. But, under such circumstances, an attorney must act with the utmost good faith towards his client. A portion of the instructions asked by appellants and refused by the court were in accordance with the views here expressed, and should have been given. The instruction given by the court in lieu of them, was not sufficiently comprehensive, as it seems to limit appellee's liability to an express request, and seems to exclude an implied promise to pay for preparing the mortgage.

Appellee's instructions go upon the theory that there must be an express and formal retainer before an attorney can recover. The contract of retainer may be made like any other. It may be express or implied. And whilst no one would expect an attorney would so far forget the duty he owes to his profession as to volunteer without the knowledge or consent of a party, to render for him professional services, and then charge for them, still, when he renders services under such circumstances as reasonably imply that they were performed with the assent and on the request of a party, he must be held liable. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Toledo, Peoria & Warsaw Railway Co.

v.

Amos L. Merriman.

1. Railroads—*of their liability for non-delivery of freight beyond their own lines.* A box of goods was delivered to a railway company, marked to a point beyond their own line of road. The bill of lading given therefor was called by the company their "through freight contract," acknowledged the receipt of the goods, and proceeded thus: "Which we promise to transport over the line of this railway, to the company's freight station at its terminus, and deliver to the consignee or owner, or to such company (if the same are to be forwarded beyond the limits of this railway,) whose line may be considered a part of the route to the place of destination of said goods, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such persons or carrier." And among the conditions printed in the bill of lading was this: "The responsibility of this company as a common carrier, under this bill of lading, to commence on the removal of the goods from the depot on the cars of the company, and to terminate when unloaded from the cars at the place of delivery." It appeared that freight received by this company as through freight, was never unloaded or delivered at

their terminus, but proceeded on to its place of destination in the cars in which it was received: *Held*, that this was a "through freight contract," and the company were liable beyond the terminus of their own road.

Appeal from the Circuit Court of Peoria county; the Hon. S. D. Puterbaugh, Judge, presiding.

This was an action of assumpsit, brought in the court below, by Merriman against the railroad company, to recover the value of a box of goods belonging to the plaintiff, shipped on the company's road at Peoria, in this State, to be carried to Washington, in the District of Columbia.

On the delivery of the goods to the agent of the company at Peoria, they being marked to the place of destination, a bill of lading was given, which, in its terms, was as follows:

TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY'S
THROUGH FREIGHT CONTRACT.

Wm. E. Main, General Freight Agent, Peoria, Illinois.

Freight Office, ———, 18—.

Received of ——— the following described packages in apparent good order (condition and contents not known), consigned as marked and numbered in the margin, which we promise to transport (subject to the exceptions below,) over the line of this railway to the company's freight station at its terminus, and deliver in like good order to the consignee or owner, or to such company (if the same are to be forwarded beyond the limits of this railway), whose line may be considered a part of the route to the place of destination of said goods or packages, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such persons or carrier; but it guarantees on its part and on the part of other companies that the rate of freight for the transportation of said packages from the place of shipment to ——— shall not exceed —— per 100 lbs. or —— per barrel, and $—— charges advanced by this company. *Provided*, That no carrier or company forming a part of the line over which said freight is to be transported will be responsible for demurrage or detention at its terminus or beyond on any part of the line, arising from any accumulation or over-pressure of business upon the following

CONDITIONS:

The owner or consignee to pay freight or charges as per specified rates upon the goods as they arrive by car loads.

Statement of the case.

Freight carried by this company must be removed from the station during business hours, on the day of its arrival, or it will be stored at the owner's risk and expense; in the event of its destruction or damage, from any cause, while in the depot of the company, it is agreed that said company shall not be liable to pay any damages therefor.

It is agreed and is a part of the consideration of this contract, that the company will not be responsible for leakage of liquors, breakage of glass or queensware, the injury or breakage of looking glasses, glass show-cases, picture frames, stoves, castings or hollow-ware, nor for injury to hidden contents or packages, nor for the loss of weight or otherwise of grain or coffee in bags, or rice in tierces, nor for the decay of perishable articles, nor for damages arising to articles carried, from the effects of heat or cold, nor for the loss of nuts in bags, or lemons or oranges in boxes, unless covered by canvass, or loss or damage to goods occasioned by Providential causes, or by fire from any cause whatever while in transit or at stations, or for loss or damage to articles or packages, the bulk of which renders it necessary to forward them in open cars.

Freight to be paid upon the weight by the company's scales, or according to table of weights in local tariff. All packages subject to charge for necessary cooperage.

The company not responsible for accidents or delays from unavoidable causes. The responsibility of this company as a common carrier, under this bill of lading, to commence on the removal of goods from the depot on the cars of the company, and to terminate when unloaded from the cars at the place of delivery.

In the event of the loss of any property, for which the carriers may be responsible under this bill of lading, the value or cost of the same at the point and time of shipment, is to govern the settlement of the same, and in case of loss or damage of any of the goods named in this bill of lading for which this company may be liable, it is agreed and understood that they may have the benefits of any insurance effected by or on account of the said owner of said goods.

Bills of lading will only be issued by this company after the actual loading of property into cars, and will not be considered valid unless the initial and number of each car containing the same is noted upon the bill.

On the trial, the superintendent of the defendants' road testified that the eastern terminus of their road was the State line between the States of Illinois and Indiana; that the company never undertook to carry goods beyond the terminus of their road at the State line—beyond that point it only agreed to deliver to the next connecting line. He testified the company had never given receipts for through freight other

than in the form mentioned. The defendants' locomotives did not go beyond the State line; the through cars were put on a side track for the locomotives of the next connecting line to take on to their destination. On cross-examination, the witness stated that, at the time the goods in question were shipped, the company were engaged in the business of shipping goods to points east of the State line; that in shipping through freight they generally sent it through in the same cars; did not change at the State line.

The trial resulted in a verdict and judgment for the plaintiff. The defendants appealed, and now insist they were not liable as common carriers beyond the terminus of their road at the State line, and it not being shown the goods were lost on defendants' road, the plaintiff can not recover.

Messrs. BRYAN & COCHRAN, for the appellants.

Common carriers may restrict their duties and obligations by the course of their business. And there is no obligation in a railway company to carry goods otherwise than according to their public profession. 2 Redf. on Rail. p. 116, 117; Ibid (2d ed.) 294.

In the absence of special contract, common carriers are bound only by usage and course of business, or to extent of their route, whether known to the employers or not. *Van Stantvoord* v. *St. John*, 6 Hill, 157; *Hempstead* v. *N. Y. C. R. R. Co.* 28 Barb. 499; *U. S. Ex. Co.* v. *Rush*, 24 Ind. 407; *Nutting* v. *C. R. R. R. Co.* 1 Gray 502; Redf. on Rail. p. 101, n. 9; *Farm. & M. Bank* v. *Ch. Tr. Co.* 23 Verm. 186; *Jenneson* v. *C. & A. R. R. Co. supra*; *Angle* v. *M. & M. R. Co.* 7 Iowa, 493.

The law will not imply an agreement where the parties expressly make one. *Expressum facit cessare tacitum.* Story on Cont. sec. 15.

A bill of lading, receipt or ticket given by the carrier at the time of receipt of goods, to the owner or his agent,

and not objected to, is an express agreement between the parties as fully as if signed by both. *Baker* v. *M. S. & N. I. R. R. Co.* 42 Ill. 73; *N. J. St. Nav. Co.* v. *Merch. Bank*, 6 How. 382; *Ill. Cent. R. R. Co.* v. *Johnson*, 34 Ill. 393; *Ill. Cent. R. R. Co.* v. *Copeland*, 24 Ill. 338; *Dorr* v. *N. J. St. Nav. Co.* 1 Kernan 485; *West. Tr. Co.* v. *Newhall*, 24 Ill. 470; *Adams Ex. Co.* v. *Haynes*, 42 Ill. 94; 2 Pars. on Cont. 172; Ang. on Car. sec. 464, 223.

The taking of goods, by a common carrier, marked with an address beyond his route, will not create a contract to carry to their destination, if the receipt given at the time limits the liability to the carrier's own road. *D. & M. R. R. Co.* v. *F. & M. Bank*, 20 Wis. 122; *P. R. R. Co.* v. *Schwarzenberger*, 45 Pa. St. 208; *Steele & B.* v. *Townsend*, 37 Ala. 247; *U. S. Ex. Co.* v. *Rush*, 24 Ind. 403; *York Co.* v. *C. R. R. Co.* 3 Wallace, 107; *Foy* v. *T. & B. R. R. Co.* 24 Barb. 382; *Angle* v. *M. & M. R. R. Co.* 7 Iowa, 493; *Muschamp* v. *L. & P. R. Co.* 8 M. & W. 422, 429.

The English rule that common carriers who receive goods and book them for a certain destination, are liable as carriers for the entire route, although beyond their own roads, has not been adopted by the American courts. 2 Redf. on Rail. 101; Ibid (2d ed.) 282.

In the only cases in which this court expressed an opinion upon this subject, the point did not arise. *Ill. Cent. R. R. Co.* v. *Copeland*, 24 Ill. 338; *Ill. Cent. R. R. Co.* v. *Johnson*, 34 Ill. 389.

But, even by the English rule, the taking of goods by the carrier, directed to a place beyond his route, is only *prima facie* evidence of his undertaking, where he does not by positive agreement limit his responsibility. *Muschamp* v. *L. & P. R. Co.* 8 M. & W. 422, 429.

A common carrier may limit even his common law liability, by a receipt, bill of lading, or ticket. *Ill. Cent. R. R. Co.* v. *Morrison*, 19 Ill. 136; *Ill. Cent. R. R. Co.* v. *Smyser*, 38 Ill. 361; *Dorr* v. *N. J. St. Nav. Co.* 1 Kernan, 485; *Steele* v.

Townsend, 37 Ala. 247; *York Co.* v. *Cent. R. R.* 3 Wallace, 107; *Moore* v. *Evans*, 14 Barb. 524; *Parsons* v. *Monteach*, 13 Barb. 353; *Wells* v. *N. Y. C. R. R. Co.* 24 N. Y. 183; *N. J. St. Nav. Co.* v. *Merch. Bank*, 6 How. 382; 2 Redf. on Rail. p. 71, *et seq.* p. 77, &c.

A *fortiori*, may a railway company, when assuming the function of a common carrier, limit the route upon which it will so act, and the duties and responsibilities it will undertake beyond that route. 2 Redf. on Rail. pp. 78, 116; *F. & M. Bank* v. *Ch. Tr. Co.* 23 Verm. 186, 205; *U. S. Ex. Co.* v. *Rush*, 24 Ind. 403; *Angle* v. *M. & M. R. R. Co.* 7 Iowa, 493; *Jenneson* v. *C. & A. R. R. Co.* 4 Am. L. R. 234; *D. & M. R. R. Co.* v. *F. & M. Bank*, 20 Wis. 122.

The responsibility of the carrier, in the absence of special contract, arises from the duty attached by law to the office which he assumes. (2 Redf. on rail. p. 75, 76.) But the law does not impose upon a carrier, as such, any duty beyond the route to which he has restricted his course of business. (Ibid p. 78, 116.) The reason upon which the law is founded ceasing, the law itself ceases.

Mr. D. McCullock, for the appellee.

The liability of the company under the common law, as held in this State, was, to transport the goods to the place of destination. *Ill. Cent. R. R.* v. *Copeland*, 24 Ill. 338; *Ill. Cent. R. R.* v. *Johnson*, 34 Ill. 389; *Baker* v. *Mich. South. R. R.* 42 Ill. 73; *Adams Ex. Co.* v. *Haynes*, 42 Ill. 89; *West. Transp. Co.* v. *Newhall*, 24 Ill. 466.

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

This was an action of assumpsit, brought to the Peoria circuit court by Amos L. Merriman against the Toledo, Peoria & Warsaw Railway Company, for failing to deliver certain

goods and chattels of the plaintiff, to be carried by the defendants to the city of Washington.

The goods delivered to the defendants' agent at Peoria, were placed in a box marked to the plaintiff at Washington, in the District of Columbia, and for which a receipt, or bill of lading was made out and delivered to the plaintiff's agent at Peoria. The goods failed to reach their destination.

The defense was, that they were not liable as common carriers beyond the terminus of the defendants' road, which was at the State line, and, as it was not shown the loss happened on defendants' road, the plaintiff could not recover.

This defense is utterly groundless, as the receipt, or bill of lading, offered in evidence, shows upon its face it was a "through freight contract," and it was in proof by the defendants' agent that freight received by this company as through freight, was never unloaded or delivered at their terminus, but forwarded on to its place of destination in the cars in which it was received. It is idle, then, for the defendants to claim this was not a through contract, and that their liability did not extend beyond the terminus of their own road.

The defendants must perform their contract, or show some valid excuse for non-performance. None is shown in this case. The plaintiff's right to recover the value of his goods cannot be questioned. This the jury have allowed him. We see no reason to disturb the verdict, and the judgment thereupon must be affirmed.

Judgment affirmed.

EDWARD W. GRIFFIN *et al.*

v.

THE MARINE COMPANY OF CHICAGO *et al.*

1. MORTGAGEE—*purchasing at his own sale.* A mortgagee of real estate, selling under a power, can not become the purchaser at his own sale, unless by consent of the mortgagor.

2. SAME—*construction of a mortgage, on that subject.* A mortgage, with a power of sale in the mortgagee, contained this clause: "It shall be lawful for the said party of the second part, his representative or assigns, to become purchaser at said sale, or any member or members of the firm of H. A. Tucker & Co.," (H. A. Tucker being the mortgagee), "may become a purchaser at such sale, provided his or her bid for said property, or any portion thereof:" *Held*, that it was apparent the right of the mortgagee to purchase at the sale was intended to be upon conditions, which were not fully expressed, and the language in that respect being unintelligible, the entire clause must be disregarded. The power to become a purchaser at the sale was not conferred upon the mortgagee.

3. CONSTRUCTION—*the rule in such cases.* Where it is claimed that a mortgage confers upon the mortgagee the right to purchase at his own sale, under a power in the mortgage, the instrument, in that regard, will be strictly construed. Such a privilege the law does not give to the mortgagee, and does not favor, and if claimed under a clause in the mortgage, he must show it has been given in clear and unmistakable terms.

4. Such a clause in a mortgage is analogous to one providing that the mortgagee may purchase the equity of redemption at a fixed price, and places the mortgagor substantially at the mercy of the mortgagee. Whether it would be void, as being extorted from the necessities of the mortgagor, or whether the mortgagee, acting under it, would be required to show, against a claim by the mortgagor to redeem, that the sale had been fair, and the property had brought a reasonable price, is not decided, but upon the question whether the language used does confer the right, it must receive a strict construction, being regarded with disfavor by the courts.

5. MORTGAGES—*of the mode of foreclosure—as to real estate and personalty.* Where a mortgage of real estate provided as the mode of foreclosure, that the property should be sold at public sale by the mortgagee, at a specified place, and after advertising for a given time, it was *held*, this cut off the right of private sale by the mortgagee.

6. And if such a provision should be contained in a mortgage of personal property, it is not perceived what right the mortgagee would have to disregard it and sell the property at private sale.

7. REALTY AND PERSONALTY—*of a leasehold interest.* A lessee of a lot of ground erected a building thereon, under an agreement with the lessor that the former might remove all the improvements placed by him on the premises, or the lessor should pay for them at their appraised value; and in case of removal, rent was to be paid upon an appraisement to be made at certain intervals, without regard to the improvements. The lessee and owner of the improvements executed a mortgage upon his interest in the premises, including the improvements, and it was *held*, the property mortgaged was an actual interest in real estate, a chattel-real at the common law, falling under the definition of "real estate," given in the first section of our statute of judgments and executions, and, because immovable, possessing none of those attributes as personal property which have shaped the law in regard to the mortgage of such property.

8. TRUSTEES' SALES—*of the notice required on their adjournment.* It has been held that a trustee in a deed of trust may adjourn a sale in his discrecretion, but when he does so, he must give a new notice for the same length of time required in the first instance.

9. Nor is this rule in regard to the notice, affected by the fact that the deed contains a clause authorizing an adjournment; such a clause is not material, as the power exists without it.

10. MORTGAGEE IN POSSESSION—*of his relation to the mortgagor.* Although, in a limited sense and for some purposes, a mortgagee in possession for condition broken, and without foreclosure, is a trustee for the mortgagor, yet he is not so in a strict sense and for all purposes, to the extent of disabling him from dealing with the mortgaged property, under any circumstances, for his own benefit.

11. The general rule may be thus stated: if a mortgagee "gets an advantage by being in possession, or 'behind the back' of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust;" subject to this general rule, each case must stand on its own equities.

12. So, if the purchase of an outstanding title by the mortgagee has been accomplished by means of a friendly possession derived by him from the mortgagor, and the latter has had no opportunity to purchase for himself, the former should hold his purchase for the benefit of the mortgagor.

13. If, on the other hand, his possession is adverse, or his purchase has not been aided by it, or the mortgagor has had the opportunity to buy and has declined, there can be no reason for holding the mortgagee a trustee.

14. SAME—*who will be deemed to hold the position of a mortgagee in possession.* A mortgagee of a lease, upon condition broken, took possession,

and then, under a power in the mortgage, sold the property mortgaged, and became the purchaser at his own sale without having any right so to do. He afterwards sold and conveyed his interest, his grantee taking possession and leasing the premises to a third person, the latter entering into possession under his lease. This last lessee, while thus in possession, purchased in the outstanding title for his own benefit: *Held*, that he was in no such relation to the mortgagor, the original lessee, as to constitute him the trustee of the latter. He was not a mortgagee, and owed no allegiance, as regarded his possession, to the mortgagor, nor was there any privity between them, but he held the title he had acquired, independently of, and adverse to, the mortgagor.

15. The possession even of a mortgagee, after an attempt at foreclosure by sale under a power in the mortgage, would be adverse to the mortgagor, although the foreclosure be invalid at the election of the latter, by reason of the mortgagee purchasing at his own sale, and a person holding as tenant under the grantee of such mortgagee would occupy no fiduciary relation to the mortgagor which would prevent him from acquiring an outstanding title for his own benefit.

16. MORTGAGOR OF A LEASE—*of his rights after an invalid foreclosure, as against a subsequent occupant and owner of the fee.* Nor would the fact that the lease of the mortgagor provided that he might retain possession until his improvements were paid for or secured, give him an interest in the fee, or any right to purchase, or even to be restored to the possession, as against the party who had acquired the fee under the circumstances named, upon a bill filed by the mortgagor, to determine his rights in the premises, a decree was entered securing to him payment for his improvements by a lien on the ground, and that fully met all his just claims for relief.

17. USURY—*what constitutes.* A note executed in this State, payable in New York, renewable at intervals of sixty or ninety days, the maker paying the exchange, is not usurious.

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

The opinion states the case.

Mr. J. A. SLEEPER and Mr. J. D. CATON, Messrs. DENT & BLACK, for the appellant.

Messrs. SCAMMON, MCCAGG & FULLER, for the Marine Company.

Mr. JOHN N. JEWETT, for the appellee, Wheeler.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The long litigation, of which the history is disclosed in this record, had its origin in certain transactions, which we will briefly state in their chronological order, so far as they have any material bearing upon the case, in the view we have taken of it. Many minor points have been more or less discussed by counsel, to which we do not deem it necessary to advert.

On the 2d of November, 1851, John S. Wright leased lots 3 and 4, block 5, in Chicago, to George A. Gibbs and Michael Tiernan, for a term commencing November 22, 1851, and ending December 1, 1856. In 1854, Tiernan assigned his interest in the lease to Gibbs, and the latter then formed a partnership with Edward W. Griffin, the complainant, and appellant herein. The firm of Gibbs & Griffin continued the transportation and warehouse business upon said property, and soon conceived the plan of erecting upon said lots a large elevator. In order to do this with safety to themselves, it was important to procure from Wright a supplemental agreement, which was done.

The original lease provided for its renewal for the term of five years, according to certain terms endorsed thereon, and also contained a provision that the lessees might remove from the premises all improvements placed there by them, or have them appraised by disinterested persons, and the lessor should pay for them in six and twelve months at their appraised value. The terms of renewal endorsed on the lease were, that the premises should be appraised, without regard to the improvements, by three freeholders to be appointed by the circuit or county judge, and the rent should be seven per cent. upon the appraised value until another appraisal, which might be had every two years.

By the supplemental agreement made September 19, 1854, Edward W. Griffin is recognized as the assignee of Tiernan; the clause of the original lease, relating to the improvements,

was made to apply to the close of the second term of five years, and then follows this provision: "It is hereby further stipulated and agreed between the parties hereto," (Wright of the first part, and Gibbs & Griffin of the second part) "that said Gibbs & Griffin shall, at the expiration of ten years mentioned in the said original lease, have the right, after the expiration of the said ten years, to continue in the possession of said premises until the said Wright shall have paid the appraised value of the improvement thereon, according to the terms of said lease, the said Gibbs & Griffin paying rent for said land according to the terms of the last preceding estimate or appraisement of the value of said premises, to said Wright; or if the said Wright shall so prefer, he may extend the said lease for a longer period than ten years, by having appraisement of said premises made, according to the terms and conditions of said lease, or he may take possession of said lots leased by giving security for the appraised value of the buildings and improvements on said leased lots, to the said parties owning said improvements, which security shall be held and deemed to be sufficient for the purpose by the president of some one of the banking institutions then existing, said president to be agreed upon by said parties."

After the making of this supplemental agreement, Gibbs & Griffin proceeded with the erection of their elevator, which they completed in the spring of 1855, at a cost, it is alleged, of $91,500. In the process of building, they had borrowed a large sum of money from Hiram A. Tucker, a banker in Chicago, and a relative of both members of the firm, all of which they repaid in 1855 and 1856, during which years their business was exceedingly profitable. There was, however, an individual indebtedness from Gibbs to Tucker of about $30,000, and in February, 1857, Tucker insisted on its payment by Gibbs, or its assumption by the firm. As security for the debt, Tucker held the title to a mill and distillery property in Clintonville, Kane county, and also a mortgage upon Gibbs' interest in 11.41 acres in section 11, township 39,

range 13, called, in this case, the West Lake Street property, for the purchase of which Gibbs held a contract. The firm took these two pieces of property, and assumed Gibbs' debt to Tucker, agreeing to give a mortgage on the elevator. No mortgage, however, seems to have been executed at that time, but in the spring of 1858, the firm found itself in need of capital to carry on their business, and applied for aid to Tucker, and also to the Marine Insurance Company of Chicago. On balancing their accounts with Tucker, they were found indebted to him $29,000, and he advanced them $10,000 in money, and took from them notes for $39,000, secured by a mortgage on their lease-hold interest and elevator. The Marine Company, at the same time, advanced $15,000, with the understanding that more would be advanced thereafter, which was, in fact, done, and took from the firm an absolute deed of the lease-hold interest and elevator, subject to Tucker's mortgage, and also of the West Lake Street property, the mill and distillery property at Clintonville, and a house and lot standing in the name of Mrs. Griffin. The company gave back a defeasance, showing the true character of the transaction, and providing that it should have a lien on the property for advances made, within two years, to an amount not exceeding $30,000. The defeasance further provided for a sale of the property, in default of payment, after advertisement for sixty days.

Gibbs & Griffin, having made default upon their paper due Tucker, the latter, early in the year 1859, took possession of the elevator, and advertised it for sale in pursuance of the terms of his mortgage. It had at that time ceased to do business. The sale took place on the 14th of May, 1859, and the property was bid in by Tucker for $42,000. He soon afterwards conveyed his interest to Carver, the secretary of the Marine Company, for $45,000. The Marine Company had also advertised for a sale under their mortgage, as it will be convenient to designate the deed and defeasance, to be held on the 18th of May, 1859, but it was twice postponed,

and finally held on the 18th of July, 1859. The sale was, of course, subject to the Tucker incumbrance, and John Forsyth, who seems to have been in the frequent habit of transacting business for the Marine Company, bid in the property in his own name, for the nominal sum of $50 for the elevator, and $120 for the West Lake Street property. A few months later, Carver conveyed the elevator to Forsyth for the benefit of the company. Carver, however, while he held the title, had leased the elevator to Hiram Wheeler, the appellee herein, at an annual rent of $15,000. Wheeler took, and has ever since retained, possession.

In the meanwhile, the legal title to the lots on which the elevator stood had passed out of John S. Wright, the original lessor, and Timothy Wright had become the owner of one, and Francis A. Hoffman of the other, subject, of course, to the conditions of the lease. In the summer of 1861, Wheeler bought from Hoffman the fee of lot 4, and in October of the same year, from Wright, the fee of lot 3, Wheeler being in possession under his lease from Carver at the date of both purchases. Before the purchase, and on the 29th of May, 1861, Gibbs & Griffin notified Wright and Hoffman that they did not recognize the right of Forsyth, or of the Marine Company, to control the premises, and that it was their intention to terminate the lease on the 1st of December, 1861. These notices were delivered by Wright & Hoffman to Wheeler, who, on the 8th of October, 1861, served Gibbs & Griffin, and all other parties interested, with a notice that, at the expiration of the term, he would be ready to proceed with an appraisal of the improvements in the manner prescribed in the lease, and to perform all the covenants made and entered into by said Wright in said instrument.

Gibbs & Griffin took no steps towards having the improvements valued, but on the 14th of December, 1861, commenced this suit for the purpose of setting aside the sales under their mortgages, and praying that they be permitted to redeem and be restored to possession, and also asking such further relief

as the case might require. The Marine Company, and the various persons interested in the property were made parties. The defendants answered, and replications having been filed, a great amount of testimony was taken. Before the cause came on for a final hearing, the complainants asked leave to amend their bill for the purpose of claiming against Wheeler the fee of the lots bought by him, on the ground that his position was such in reference to the property at the time of his purchase as to give the complainants the right to treat him as their trustee. The motion for leave to amend was reserved by the court until the hearing. The case having at length come to a hearing, the court pronounced a decree setting aside the sales under the mortgages, and permitting the complainants to redeem. The cause was referred to a master, who was directed to state an account, charging the complainants with whatever was due Tucker or the Marine Company, with interest to December 1, 1861. The complainants were to be credited with the value of the warehouse on that date, and with the rental to that time from the time the defendants, or any of them, took possession. Both parties excepted to the master's report, but the court overruled the exceptions, and, on the 2d of August, 1869, the court made the final order, fixing the annual rental at sixteen thousand dollars, payable monthly, with interest, and the value of the elevator improvements, on the 1st day of December, 1861, at $72,000, and found a balance due the complainants of $17,206.06, for which, with interest thereon from December 1, 1861, it rendered a decree. The decree also provided that the other property included in the mortgages should be released from the lien thereof. From this decree Griffin appealed, his co-complainant, Gibbs, having died pending the suit.

After the commencement of the suit, namely, on the 1st day of March, 1862, Wheeler, having, as already stated, previously acquired the fee of the lots, bought from the company the elevator improvements for the sum of fifty thousand dollars. J. Young Scammon gave him his personal bond of

indemnity for the same sum, agreeing, to that amount, to hold him harmless against the claims of Gibbs & Griffin. The rents charged in the decree to the company, and the $50,000 received by it from Wheeler, together paid the debt due the company on the mortgages, lacking $4793.94, and at the request of the defendants, the court, in its decree, directed that sum to be paid by Wheeler to the company. No error is assigned on that provision of the decree, and, indeed, the equities of Wheeler and the company, as against each other, have not been presented in the argument. So far as this record and the argument have disclosed, these defendants are in accord.

The appellees have assigned cross errors, questioning the action of the court in holding the sales invalid and the mortgages redeemable, and as this question lies at the foundation of the suit, we will first consider it.

The sale under the Tucker mortgage was attacked on various grounds, but the circuit court held it invalid because Tucker, the mortgagee, was the purchaser at his own sale. That a mortgagee of real estate, selling under a power, can not become the purchaser at his own sale, unless by consent of the mortgagor, is perfectly well settled, and is not denied. The two positions of vendor and purchaser are irreconcilable.

In answer to this objection, it is claimed, by counsel for appellee, that the interest of the mortgagees in the lease and elevator was personal property, and, being such, if the mortgagee obtained possession after condition broken, his legal title became complete, and without reference to the public sale under the power, his subsequent private sale to Carver was a valid foreclosure of the equity of redemption. The conclusive answer to this position is, that the property mortgaged was an actual interest in real estate, a chattel-real at the common law, falling under the definition of "real estate," given in the first section of our Statute of Judgments, and Executions, and, because immovable, possessing none of those attributes of personal property which have shaped the law in

regard to the mortgage of such property. But what is still more conclusive is, that the parties, by the very terms of their mortgage, treat the property as real estate, and provide, as the mode of foreclosure, that it shall be sold at public sale to the highest bidder at the door of the court house, after advertising for sixty days. Nothing can be plainer than that this cuts off the right of private sale, and if such a provision should be contained in a mortgage of property strictly personal, we do not see what right the mortgagee would have to to disregard it.

But it is further claimed, in answer to this objection to the sale, that the mortgage, by its terms, authorized the mortgagee to buy at the sale. We have not found the question thus raised free from difficulty. We have, however, arrived at the conclusion that the mortgage can not fairly be construed to contain such an authority. The clause relied upon as conferring the power reads as follows:

"It shall be lawful for the said party of the second part, his representatives or assigns, * * * to become purchaser at said sale, or any member or members of the firm of H. A. Tucker & Co., may become a purchaser at such sale, provided his or her bid for said property, or any portion thereof."

All that can fairly be claimed for this clause is, that it indicates the parties recognized the fact that the mortgagee could not purchase except by permission of the mortgagor, and agreed upon certain conditions upon which he might purchase, but, probably by the oversight of the scrivener, neglected to embody their agreement in the mortgage in an intelligible shape. Was the mortgagee to bid the full value of the property, or a certain proportion of its value? What would have been the condition if the broken sentence had been completed? It is impossible to say. Counsel urge that the proviso is void because unmeaning, and should be disregarded, leaving the residue of the sentence in full force. But

the mortgagee is claiming a privilege which the law does not give him, and does not favor. If he has it, it is because the mortgage has expressly given it to him, and he must show it has been given in clear and unmistakable terms. The mortgage, in this respect, is not to be construed in his favor. It has been held that a stipulation in a mortgage, that the mortgagee may purchase the equity of redemption at a specified price, is void, because considered as extorted from the necessities of the mortgagor. 1 Hilliard on Mort. ch. 4, secs. 11 and 12, and cases cited in Notes, 3d Edition.

Without committing ourselves on the question whether such a provision would be void, or whether the mortgagee, acting under it, would be required to show, against a claim by the mortgagor to redeem, that the sale had been fair, and the property had brought a reasonable price—without, we say, expressing an opinion on these points, it is very clear that this clause must be regarded with disfavor by the courts, and must be strictly construed. It is analogous to a clause providing that the mortgagee may purchase the equity of redemption at a fixed price, and places the mortgagor substantially at the mercy of the mortgagee.

Construing the clause in the present mortgage in the light of these principles, we must hold it shows merely that an understanding of some kind was had between the parties, which is so imperfectly and unintelligibly expressed in the mortgage that we can not ascertain what it was from this incomplete sentence, and must disregard the entire clause. We are the more ready to take this view, because property which has been valued by the court as worth, on the 1st of December, 1861, $72,000, and which, a few months after the sale, rented for about $8000 in excess of the ground rent, brought but $42,000 under the elder mortgage, the purchaser, if the sale was valid, taking a paramount title.

We must next consider the effect of the sale under the mortgage to the Marine Company. The objection to that sale is the insufficiency of the notice. The mortgage

required sixty days' advertisement. The sale was first advertised to take place May 18, 1859. On the morning of that day, a notice was inserted in the paper that the sale was postponed to June 17th, and we do not find that any notice of the adjournment was given at the time when and place where the sale was to have been held. On the 18th of June, another notice of postponement until the 18th of July was published, and on that day the sale was held. This court decided, in *Thornton* v. *Boyden*, 31 Ill. 200, that a trustee in a deed of trust may adjourn a sale in his discretion, but when he does so, he must give a new notice for the same length of time required in the first instance. The court say the first notice is exhausted.

Counsel attempt to distinguish the case at bar from the one cited, by the fact that, in the mortgage to the Marine Company, there was a clause authorizing an adjournment. But the court, in *Thornton* v. *Boyden*, say, it is not material that the deed should provide for an adjournment, as the power exists without it, but when an adjournment is made, there must be a new advertisement, such as was first required. In the case at bar, the sale, which took place on the 18th of July, had been advertised for that date only thirty days, and the mortgage permitted a sale only after sixty days' notice. As Forsyth, who bought at the sale, bid in the property for the nominal sum of fifty dollars, and as he has, in all this matter, evidently acted for the company, he can set up no equitable claims as an innocent purchaser. The objection to the sale is well taken.

Having disposed of the cross errors which question the right of the appellant to any species of relief, we proceed to consider those assigned by appellant, which are based upon the theory that the measure of relief granted by the circuit court was wholly inadequate.

It is claimed by counsel for appellant, that Wheeler occupied the position of a mortgagee in possession, without foreclosure; that, in that position, he was but a trustee for the

mortgagors, and, in consequence of his fiduciary relation towards them, was disabled from dealing with the mortgaged property for his own benefit, and that Griffin and the heirs of Gibbs are entitled to a conveyance from Wheeler of the fee of the elevator lots upon reimbursing their cost, and also to an account from Wheeler, not only of the rent of the elevator, but also of all the profits which he has made from the business he has transacted in connection therewith.

In the view of the case upon which this demand is based we can not concur. We can not concede that a mortgagee in possession occupies a fiduciary relation to the extent which is here claimed, nor can we admit that Wheeler occupied the position of a mortgagee who has taken possession for condition broken, without attempting to foreclose.

We had occasion, in the case of *Moore* v. *Titman*, 44 Ill. 368, to investigate, with a good deal of care, the doctrine of the books in regard to the relation between a mortgagor and a mortgagee in possession. The conclusion we then arrived at, and to which we still adhere, after the argument in the present case, is, that although, in a limited sense, and for some purposes, the mortgagee in possession for condition broken, and without foreclosure, is a trustee, yet he is not so in a strict sense and for all purposes. What was said by Chancellor KENT, in *Hobridge* v. *Gillespie*, 2 J. C. R. 30, doubtless approaches as nearly to a general rule as can be given. He says if a mortgagee "gets an advantage by being in possession, or 'behind the back' of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust." Subject to this general rule, each case must stand upon its own equities. If the purchase of an outstanding title has been accomplished by means of a friendly possession derived by the mortgagee from the mortgagor, and the latter has had no opportunity to purchase for himself, the former should hold his purchase for the benefit of the mortgagor. If, on the other hand, his possession is adverse, or his purchase has not been

aided by it, or the mortgagor has had the opportunity to buy and has declined, there can be no reason for holding the mortgagee a trustee.

Applying this principle, the courts of England and of this country have held, if a mortgagee of a lease enters for condition broken, and while in possession obtains a renewal of the lease, he shall hold such renewal for the benefit of the mortgagor, because it is the custom of landlords, other things being equal, to give a preference to a tenant in possession. In such cases, courts assume the mortgagee to have obtained the renewal by means of his possession. Most of the cases in which this particular point has been decided have arisen in England, where leasehold interests are more common than in this country, and where the renewal of leases is almost a matter of course. But even in England, the courts hold that the rule is not so broad as to prevent a person in possession under a limited estate, from purchasing an outstanding fee to his own use. *Hardman* v. *Johnson*, 3 Merivale, 347; *Norris* v. *Le Nere*, 3 Atk. 26. See also *Randall* v. *Russell*, 3 Merivale, 190. So, too, it was distinctly decided by the supreme court of Florida, in *Harrison* v. *Roberts*, 6 Fla. 711, and by the supreme court of Alabama, in *Walthall's Exec.* v. *Rives*, 34 Ala. 92, that a mortgagee may purchase, to his own use, an outstanding title. See also *Cameron* v. *Irwin*, 5 Hill, 280. Of course, if he has entered for condition broken, and his possession is not adverse, he must surrender possession to the mortgagor before setting up his newly acquired title, but this rule, as we shall hereafter show, has no application to Wheeler in the present case. In short, no authority has been cited in the present case, nor was there in *Moore* v. *Titman*, *ubi supra*, nor have we met any authority in our own examination, in which a mortgagee has been required to surrender to his mortgagor an outstanding title bought by him, simply on the ground that he bought while in possession. If there are circumstances in the case making it inequitable in the mortgagee to retain the title purchased, as where the mortgagor has had

no opportunity of buying, and the mortgagee has effected a favorable purchase by means of his possession, an application to a court of equity would undoubtedly have very great force. As this court said in *Moore* v. *Titman*, although "the relation of trustee and *cestui que trust* may not be created by the execution of a mortgage, as between mortgagor and mortgagee, still they are not on the same footing as strangers to the estate."

That distinguished jurist, Chief Justice SHAW, in the case of *King* v. *The State Mutual Fire Ins. Co.* 7 Cush. 7, used the following language in regard to the argument of counsel, that the mortgagee was trustee of the mortgagor: "But, in truth, he is not such trustee. Nothing, an eminent judge has said, is so likely to mislead as a simile. In some very limited respects, a mortgagee is a trustee, as when he has entered and is in the receipt of rents and profits, he is liable to account therefor, and, in that respect may be denominated a trustee." He was not speaking in reference to such a question as that before us, but his language shows to what a limited extent he regarded the relation as strictly one of trust. We have had occasion, in a case decided at the present term, to differ from some of the conclusions to which he arrives in the case cited, but not from his position in this respect.

Our conclusion, then, is, that a mortgagee, though in possession for condition broken, is a trustee for the mortgagor only in a limited sense, and that he is so in purchasing an outstanding title does not necessarily follow from the existence of the relation, but must depend on the circumstances and equities of the individual case.

What, then, was the position of Wheeler in the case at bar? Counsel for appellant insist he is to be regarded as a mortgagee in possession and a trustee. If this be so, it must be because he either did, in fact, enter and hold under the mortgagor, and as a trustee, or because, whatever was the actual character of his possession, the law will not permit it to be regarded as adverse to the mortgagor. That it was, in

fact, adverse, admits of no debate. There was not the slightest privity, in fact, between him and the mortgagor. He entered and held, not under the mortgagor, but under Carver, who claimed as purchaser, and adversely to the rights of the mortgagor. Did the law, then, forbid Carver or his tenant to claim an adverse possession?

This question has been settled in this court by an important and well considered decision directly upon the point. We refer to the case of *Chickering* v. *Failes*, 26 Ill. 519. In that case, the court held that, although a mortgagee in possession does not hold adversely to the mortgagor, and can not set up against him the statute of limitations, yet, if the mortgagee has made an attempt to foreclose the mortgage, although ineffectual and invalid, and holds under such attempted foreclosure, he is to be considered as holding adversely to the mortgagor, and may set up the statute of limitations. The court say: "After a foreclosure, or an effort to foreclose the mortgage, by decree or deed which purports to have that effect, the presumption then arises that all acts done in reference to the property, are done under a claim of ownership, by the mortgagee, and referred to his color of title. If they are such as are required by the statute, and for the period of time designated by the statute, they would form a bar to a redemption." Page 520. "It must be held that this effort to foreclose was such an act as authorized the mortgagee to act under claim in himself, and not subordinate to the title of those claiming the equity of redemption. That proceeding manifested to them and to the world that he no longer recognized them as having any rights in the premises. That act was hostile to their rights, and his subsequent acts must be regarded in the same light." The decree was reversed and the cause remanded. It subsequently came back to this court, and the title to a large amount of property was settled upon the principles above set forth. S. C. 29 Ill. 301, and 38 Ib. 343.

The case in 26th Ill. settles, beyond controversy, that the possession of Wheeler was, in law as well as in fact, adverse to appellant. His position is, indeed, a far stronger one than that of a mortgagee who holds possession under an invalid foreclosure, if, in this, there can properly be said to be degrees of strength. Tucker, the mortgagee, was the purchaser at his own sale. The sale was invalid only at the election of the mortgagor. Carver bought from Tucker, and received a deed. He went into immediate possession, and leased to Munger & Armour, who held for nearly a year, and then he leased to Wheeler. In this transaction, Carver bought from Tucker upon the theory that the mortgage was foreclosed, and the rights of the mortgagor extinguished. He did not buy from Tucker as merely the owner of a mortgage, but bought from him as the absolute owner of the property. He never, in any way, or at any time subsequent to the sale, recognized the mortgage as still in force. Whatever he did in regard to the property he did under a claim of ownership. How, then, can it be truly said that his possession was not adverse, as all his acts were, and were known to be by the mortgagor, or what element of actual trust was there in his dealings with the property?

But still less, if possible, was Wheeler under any trust restrictions. An entire stranger to the property and to all the transactions of these parties, he finds Carver in quiet possession, and leases it from him in the utmost good faith. His only obligation was to pay his rent and keep the other covenants in his lease. If Gibbs & Griffin had equities in the property, he was under no obligation to protect them. There was not the slightest privity of any kind between him and them. He owed them no allegiance. There was nothing whatever to create a trust relation between him and them. In fact, he sustained no relation to them different from that which he held towards other strangers in the community. Standing in this position of entire independence towards Gibbs & Griffin, and, as tenant of Carver, even occupying a position

adverse to them, he bought the fee of the lots from Wright & Hoffman. What element of wrong towards Gibbs & Griffin was there in his doing so? He made no false representations, he practised no concealment. He did not secure the fee by virtue of his possession, but even if he had, it would have been wholly immaterial, as his possession was not under Gibbs & Griffin but adverse to them. But it does not appear that his temporary possession, as Carver's tenant, in any way aided him in the purchase of the fee. Gibbs & Griffin knew all that he knew in regard to the title, and had equal opportunity with him to buy it. They had no prior right of purchase under their lease from Wright. That gave them no privilege of purchase whatever, but simply a right to payment for their improvements, and to retain possession until such payment should be made or secured. They had, indeed, indicated their design to terminate all connection with the property, by their notice given before Wheeler bought, of their intention to terminate their lease. Even if Wheeler had been the tenant, directly, of Gibbs & Griffin, we know of no principle of law that would have prevented him from purchasing the fee, or would have authorized them to insist that such purchase should be held in trust for them. They could only have insisted upon a restoration of the possession, and when he had restored that, he could have claimed whatever rights belonged to the ownership of the fee. They were not, however, Wheeler's lessors, and he stood in no species of fiduciary relation towards them.

It follows, from what we have said, that the claim of appellant to a conveyance of the fee from Wheeler, and to an account of the profits of his business in connection with the elevator since he took possession, is, in our judgment, utterly groundless.

Much stress has been laid, by counsel for appellant, upon the clause in the lease authorizing the lessees to retain possession until they should receive payment for their improvements under such a mode of valuation as was provided for by that

instrument. That provision gave them no interest in the fee nor any right of purchase. It was simply a security for their improvements, and provided that they should surrender possession upon receiving payment, or such security for payment, as the presidents of certain banks should pronounce sufficient. Their interest in the property was to terminate absolutely and forever at the election of the owner of the fee, upon the 1st of December, 1861, in case they should receive payment, or security for their improvements. Of what, then, can the appellant complain, since the court has, by its decree, given him full payment for the value of the improvements at that date, with interest to the date of the decree? Why should the court restore appellant to the possession in order that he may secure payment for his improvements, when he is made secure by the terms of the decree giving him a lien on the lots, and directing their sale in case of non-payment. To do this would accomplish no good end, would make the appellant no more secure in his rights, and would merely place it in the power of the appellant to inflict a great loss upon an innocent party, and lead to useless litigation. A court of chancery should use its power for no such purpose. A complainant can ask its aid only upon equitable terms, and when the court has amply secured him in the payment of all that is his due, he can not be permitted to object that the court has adopted that mode of doing him justice which will work least injury to innocent parties, such as we hold Wheeler, in this case to be.

But again, in reference to this point, it may well be asked, by whose act was it that appellant lost possession? Was it the fault of Wright, the original lessor? Was it the fault of Wheeler? Or was it because Gibbs & Griffin, by mortgaging their lease and improvements, placed themselves in a position to lose possession, as they did lose it, and thus, by their own act, rendered it impossible to literally carry out the provisions of the lease? Wheeler was ready to have the improvements valued, and gave notice to that effect to all the parties

interested, but a satisfactory valuation had become impossible in consequence of the controversy in which the mortgagees of Gibbs & Griffin had involved their claims. The owner of the fee was in possession when the lease expired, and he, certainly, was under no obligation to surrender the possession because Gibbs & Griffin and their mortgagees could not act together for the purpose of an appraisement.

Both parties complain of the mode in which the master has stated the account, and of the valuation placed by the court upon the improvements. We have examined the evidence bearing upon this branch of the case, and are satisfied that substantial justice has been done. The value fixed by the court on the warehouse is certainly as high as the evidence will warrant, and the opinions of the witnesses were very contradictory, and the circuit court knew much better than we can know the degree of weight to be attached to the varying testimony of the different witnesses. The same thing may be said in reference to the rent.

It is urged, by appellants' counsel, that they should at least have been allowed rents up to March, 1862, when Wheeler bought the improvements. But we do not find that Wheeler paid rent to the Marine Company after December 1, 1861, and the court allowed the appellant rent to that date, and gave him credit as of that date for the sum of $72,000, the value of the improvements, thus stopping the running of interest upon his mortgage debts. The value of his improvements, at that date, was all his lease entitled him to claim. He can not also have their rent after that date.

The appellant also insists that it was usury in the Marine Company to require Gibbs & Griffin to give their notes payable in New York, and renew them at intervals of sixty or ninety days, paying the exchange. We can discover no taint of usury in this. The exchange would not necessarily be in favor of New York. It might be at par or below, and of this uncertainty the borrower had the benefit. He might be so situated that it would cost him less to pay in New York than in

Chicago. In any event, he was under no obligation to buy the exchange from the company. He could buy it elsewhere, or send the money by express to meet his note. This is, in principle, like the case of *Stevenson* v. *Unkefer*, 14 Ill. 103, in which the court held that a note payable in Baltimore bank notes, with twelve and a half per cent. interest, was not usurious, because Baltimore bank notes might, at the maturity of the note, be under par, as, in this case, New York exchange might be.

We have gone over the salient points in this case, and do not deem it necessary to extend further this already long opinion. In our judgment, the circuit court has very happily succeeded in administering between these various parties substantial justice. Certainly the appellant has received all that is his due. He goes out of court with his mortgages paid, and with a money decree in his favor amounting, with interest, to about twenty-five thousand dollars, and with the West Lake Street property, the Clinton distillery, and whatever other property was included in the mortgages, disincumbered from their lien.

His claim that Wheeler shall convey to him the elevator property, now greatly increased in value, upon being reimbursed the cost of the fee, and shall account to him for the profits of his business from the time he leased the elevator to the present, we can not but regard as unreasonable in the extreme. If we were to pronounce such a decree, if we should compel Wheeler to surrender the title to the warehouse, and should strip him of the fortune which it is said he has made by the application of his capital and industry to this business during the last ten years, upon the theory that, by leasing a building from a person in its peaceful occupancy, and subsequently purchasing the lots from their undisputed owner, he had become an unconscious trustee for a person of whom he may have never heard, buying for his benefit and toiling for his profit—if we should render such a decree, we should certainly go far to shake the confidence of business men in the security

of their property, and Wheeler might well retire from this litigation with a profound conviction that the mysteries of the law are inscrutable, and the ways of courts past finding out.

Decree affirmed.

JESSE C. BOYD

v.

GEORGE MERRIELL.

1. MARRIED WOMEN—*whether bound by contracts made in their names by their husbands.* Even if a married woman can enter into a contract so as to be bound as a member of an association for business purposes, yet her husband can not, without authority from her, make a binding contract for her by signing her name to the articles of association.

2. PARTIES—*in actions at law.* In a suit against the members of an association for services rendered, the name of a person which was signed to the articles of association without authority, may properly be omitted as a defendant.

3. JOINT OBLIGATION, *of an individual with a body of individuals.* Where an association of persons employ an individual to render a service for them, a third person, not a member of the association, may become jointly bound with them.

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

The opinion states the case.

Messrs. DENT & BLACK, for the appellant.

Messrs. BONNEY, FAY & GRIGGS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee against appellant, and several other persons, to recover the value of services rendered by appellee in traveling and examining silver mines in Colorado Territory, and for expenses incurred in performing the service. Appellant, only, appeared and defended the action, and judgment by default was rendered against the other defendants, upon whom service was had, and others not having been served, no proceedings were had against them. The declaration contained only the common counts for work and labor rendered, money paid, laid out and expended. Appellant filed the plea of the general issue, and a plea verified by affidavit, denying his joint liability with his co-defendants. Issues were formed upon these pleas, and the cause was submitted to the court for trial without the intervention of a jury, by consent of the parties. The court found the issues for plaintiff, and rendered judgment for the amount of his claim and costs of suit.

It is urged, that the evidence fails to support the finding of the court below. On the trial, appellee introduced James Larman, who was a defendant, as a witness, and he testified that appellee was employed by defendants to go to Colorado to examine mines there. He testifies that he was employed at a meeting of the association, of which defendant was a member; that defendant acted as chairman of the meeting, and that it was agreed the association would give him $50 per week and pay his expenses while thus engaged; that appellant was at the meeting; that he accompanied appellee to Colorado, and knew that he made the examination; that witness was present at the meeting when appellee made his report; that he was one of the persons who employed appellee.

The evidence shows that appellant was a member of the association, and present at the meeting at which appellee was employed to make the examination. Martin, the secretary, swears he was present, acting as secretary, and corroborates Larman in his testimony as to the employment, and it is shown by the minutes of the meeting, kept by the secretary.

And appellee and others testify to his employment. On this question there seems to be no doubt, and he has made out a clear case, unless, for other reasons, he is not entitled to recover.

It is insisted, that Mrs. Larman, the wife of James Larman, was a member of the association, and that she should have been a defendant. Larman swears he signed her name to the articles of association, but says it was without authority, as he had never consulted with her on the subject, and that it was not with her knowledge or consent. Even if a married woman could enter into such a contract so as to be bound by it, there can be no pretense that such an obligation could be imposed by her husband, in the absence of all authority from her for him to make the agreement. And, in his statements on this question, he stands uncontradicted It is true, appellant swears that Larman informed him that his wife desired to subscribe for stock. Even if he made the statement it did not prove the authority. He is not shown to have been her agent, so as to bind her, if that could be done by his admissions. There is no evidence in the record that Mrs. Larman ever made such an admission, or authorized her husband to make any for her. It then follows that she was properly omitted as a defendant to this action.

It is next urged, that inasmuch as Larman's name was not signed to the articles of association, and as he was not a member, he was not a party to the contract, and that he was not liable, and was an improper party to the suit. If it were conceded that he was not one of the members of the association, it would not follow that he could not become a contracting party with the association, and become jointly bound with them for the performance of an agreement. No reason is perceived why an individual may not unite with a firm, or even a corporation, in making a contract, by which the firm, or corporation, and the individual, would become jointly bound for the performance of the agreement. If the subject matter of the agreement is legal, and a firm, and an individual not a

member of the partnership, were to enter into an agreement with another person, they could, no doubt, be sued for the breach of the contract. And no distinction is perceived between such a case and one where a voluntary association, like that proved in this case, and an individual, not a member, employing a third person to perform labor or services for them.

In this case, Larman acted with, and as a member of, the association at the meeting which employed appellee. He was president of the meeting, and was recognized and treated by the members of the association as one of their number. Larman says, "We agreed to pay plaintiff $50 per week, and pay his expenses," and this he says was at the meeting over which he presided. This evidence, then, leaves no doubt that Larman did jointly contract, with the other defendants, with the appellee for the services for which suit was brought. Having so contracted, it does not matter whether he was or not a member of the association. We perceive no error in this record, and the judgment of the court below is affirmed.

Judgment affirmed.

ROBERT M. DOUGLAS *et al.*
by their next friend,

v.

JAMES T. SOUTTER.

1. PARTIES ON FORECLOSURE—*of the heirs-at-law of a person who had conveyed his title in his life time.* The owner of real estate conveyed the same in fee, and his grantee, simultaneously with such conveyance, made a quit-claim deed to the wife of the first grantor. Subsequently, the wife executed a mortgage upon the property, her husband joining therein. Upon foreclosure of such mortgage, after the death of the husband, the children and

heirs-at-law of the latter, having no interest in the property, were not necessary parties to the suit.

2. ASSIGNMENT OF ERROR—*by whom.* And though the minor heirs of the husband were made defendants in the suit to foreclose, together with his widow, in whom the fee had become vested before the mortgage was made, yet, the infant defendants, having no rights to be affected by the decree, can not maintain a writ of error alone, the rule being, that a party can not assign for error an erroneous decision which does not prejudice his rights.

3. Where there are infant and adult defendants, and the adults alone prosecute a writ of error, they cannot assign for error the proceedings which only affect the interests of the infants; and the converse must be true, when infants alone prosecute the writ.

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

The opinion states the case.

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

Mr. C. BECKWITH and Messrs. HOYNE, HORTON & HOYNE, for the defendant in error.

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

This was a bill in chancery, in the Cook circuit court, by James T. Soutter, against D. P. Rhodes, executor, and Adele Douglas, executrix, of the last will and testament of Stephen A. Douglas, deceased, and Robert M. and Stephen Douglas, his infant heirs-at-law, to foreclose a mortgage executed by Stephen A. Douglas, in his life time, and his wife, Adele, to complainant, to secure the sum of eleven thousand dollars loaned to him by complainant, on the 1st day of July, 1859, and such proceedings were had, on due and legal notice to all the defendants, that a decree of foreclosure was duly entered, and the premises sold to complainant for twelve thousand dollars, and no redemption being made, a deed of the premises

was made by the master in chancery to complainant, and the sale confirmed by the court.

The adult defendants made no defence to the suit, and as to them the bill was taken as confessed. The infant defendants appeared by their guardian.

To reverse the decree, the infant defendants, Robert M. and Stephen Douglas, by their next friend, O. Jackson, bring the record here by writ of error, and urge a reversal on several grounds.

As the adult defendants, against whom the bill was taken as confessed, do not join in this writ of error, no erroneous rulings of the court, if there be such against them, can be urged by the plaintiffs in error, the rule being that a party can not assign for error an erroneous decision which does not prejudice his rights. *Arenz* v. *Reihle*, 1 Scam. 340; *Schlencker* v. *Risley*, 3 ib. 483; *Thorn* v. *Watson, Admr.* 3 Gilm. 26; *Vansant* v. *Allmon*, 23 Ill. 31.

And where there are infant and adult defendants, and the adults alone prosecute a writ of error, they cannot assign for error those proceedings which only affect the interests of the infants. *Tibbs* v. *Allen*, 27 ib. 119; and the converse must be true, when infants alone prosecute the writ.

By this record it does not appear that these plaintiffs in error have any interest in the subject matter of the decree which they seek to reverse, or in the premises foreclosed, and why they were made parties in the original bill in chancery, we do not understand. The bill alleges that the premises were conveyed by S. A. Douglas, by deed dated Nov. 20, 1857, to Richard T. Merrick, which deed was duly recorded in the proper office in Cook county on the 23d of that month. Simultaneous with the execution of this deed to Merrick, the the grantee, Merrick, conveyed and quit-claimed by deed the premises to Adele Douglas, the wife of his grantor, S. A. Douglas, which deed was recorded on same day with S. A. Douglas' deed to Merrick, to-wit: on the 23d of November, 1857.

At this time, then, Adele Douglas was the owner in fee of these premises, and being so, she joined with her husband, on the 1st day of July, 1859, in the deed of mortgage to defendant in error. From what appears in this record, then, these infant plaintiffs have no interest in the premises, and, consequently, can urge no matter upon this court as ground for reversal, under the authorities cited. The circuit court did not, in any manner, by its decree of foreclosure, dispose of any interest, or attempt to do so, which these infants may, by possibility, have. Adele Douglas was the owner of the fee, and she granted it to Soutter, her husband, now deceased, joining in the deed. It was her interest, then, and her's only, which was foreclosed by the decree, and she complains of no error therein. The bill only sought to foreclose that interest, and in that interest these plaintiffs had no portion.

This being so, the effect of the decree being only to bar her interest, these plaintiffs can, by no possibility, be injured. If they have any title to the premises, which is outlying, and does not appear by the bill to foreclose, these proceedings will not bar them from asserting it. They were unnecessary parties to the bill, no rights of their's have been adjudicated, and they cannot be heard to allege any matter or error in the proceedings, if there be any, which does not prejudice them.

The decree of the circuit court is affirmed.

Decree affirmed.

Syllabus.

MICHAEL GORMLEY

v.

EDWARD SANFORD.

1. SURFACE WATERS—*rights of the servient and dominant heritages.* The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter.

2. And it is not perceived that it would follow, as a result of this doctrine, that the owner of the inferior heritage must allow such surface waters to drain, and that he would have no right to use and exhaust them for his own benefit, or to drain them in a different direction.

3. SAME—*application of the rule in cities.* The rule forbidding the owner of the servient heritage to obstruct the natural flow of surface waters, applies as well to city lots as to agricultural lands; though where a city has established an artificial grade and provided an artificial sewerage of which property owners can reasonably avail themselves, it would probably be held to be their duty to do so.

4. SAME—*rights of one whose land does not occupy the position of a servient heritage.* Where adjacent lands, owned by different proprietors, are upon a common level, there being no natural drainage from one to the other by a surface channel, then the land of neither proprietor will occupy the position of a servient heritage, and if an artificial channel should be dug upon one of the lots by the occupant thereof, for his own convenience, by means of which the surface water from the adjacent lot was being carried away, a subsequent owner of the former lot would have the right not only to fill such artificial channel, but to raise his lot above its natural level, if by so doing he does not throw the surface water of his own lot on that of the adjacent proprietor.

5. SAME—*of an artificial drain as an easement upon adjacent land.* Where one of two lots of ground belonging to the same owner, is being occupied by a tenant who dug a ditch thereon for his own convenience, but not at the request or even with the knowledge of the owner, and which incidentally acted as a drain for the surface water of such adjacent lot, a subsequent owner of the latter lot cannot claim such artificial drain as an easement appurtenant to his lot, so as to prevent a subsequent purchaser of the lot upon which it was dug from closing it.

APPEAL from the Circuit Court of Grundy county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Statement of the case. Briefs of Counsel.

The appellant, Gormley, and the appellee, Sanford, owned and occupied adjacent lots in the city of Morris, in Grundy county, in this State. It is claimed by the appellee that the appellant, by artificial means, obstructed the natural flow of the surface waters from the lot of the former upon that of the latter. The principal question presented is, has the owner of the superior or dominant heritage an easement in the servient or lower heritage, for the free and unobstructed flowage, in accustomed natural channels or courses, of the water falling or descending naturally upon his own land? The appellee affirms that he has, and the appellant asserts the negative.

Messrs. S. W. & T. B. HARRIS, for the appellant, cited *Shield* v. *Arndt*, 3 Green Ch. (N. J.) 234; *Luther* v. *Winnisimmet Co.*, 9 Cush. 171; *Ashley* v. *Wolcott*, 11 Cush. 192-5; *Flagg* v. *Worcester*, 13 Gray, 601-7; *Parks* v. *Newburyport*, 10 Gray, 28; *Dickenson* v. *Worcester*, 7 Allen, 19-22; *Gannon* v. *Hargadon*, 10 Allen, 106-9; *Rawstrom* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbottom*, 11 Exch. 602; *Bangor* v. *Lansil*, 51 Maine, 521-5; *White* v. *Chapin*, 12 Allen, 518; *Goodale* v. *Tuttle*, 29 N. Y. 459; *Frazier* v. *Brown*, 12 Ohio State R. 298; *Buffom* v. *Harris*, 5 R. I. Reports, 253; *Broadbent* v. *Ramsbottom*, 34 Eng. Law & Eq. R. 553; *Bentz* v. *Armstrong*, 8 Watts & S. 40; *Kaufman* v. *Griesmer*, 26 Penn. St. R. 414.

Mr. B. C. COOK, also for the appellant, argued upon the same authorities, and, in addition, cited Angell on Water Courses (Perkins' ed.), 122.

Messrs. DENT & BLACK, for the appellee.

Water runs, and should run, as it is accustomed to run. This doctrine had its origin in nature, and found its expression in the civil law, whence it was incorporated into the body of our own common law. That the owner of the superior, or dominant heritage, has an easement in the servient or lower land

for the free and unobstructed flowage in accustomed channels or courses of the water falling or descending naturally upon his own land, is not more consonant to nature and its invariable laws than to reason and justice. And this is distinctly maintained in the civil law. Domat, 616, Cushing's ed.; Irskine's Institutes, p. 408; Pardessus (quoted in 26 Penn. p. 413); Code Napoleon, sec. 640.

And the same doctrine has been uniformly held in Louisiana, where the civil code prevails. *Delahoussaye v. Judice*, 13 La. An. 587; *Hooper* v. *Wilkinson*, 15 La. An. 497; *Adams* v. *Harrison*, 4 La. An. 165.

That the same doctrine obtains at common law as to rivers, streams, &c., is not denied. We insist that by the better reason, as well as by the preponderance of authority, this rule extends to surface drainage in all cases where the flow of water, governed, as it always is in a state of nature, by the conformation of the ground, follows a regular and definite course to a natural outlet. Upon this point the authorities are conflicting, but there is no conflict or suspension in the invariable law of nature; and in every case of conflicting authority, the better reason must prevail. In support of this position we refer to Washburn on Easements and S. ch. 3, sec. 6; *Bellows* v. *Sackett*, 15 Barb. 101; *Kaufman* v. *Griesemer*, 26 Penn. 407; *Martin* v. *Riddle*, 26 Penn. 415; *Ashley* v. *Ashley*, 4 Gray, 197; *Overton* v. *Sawyer*, 1 Jones' Law, (N. C.) 308; *Hastings* v. *Livermore*, 7 Gray, 194; *Earle* v. *DeHart*, 1 Beas. Ch. 280; *Laumier* v. *Francis*, 23 Mo. 181; *Bassett* v. *Salisbury Mfg. Co.* 3 Am. L. R. (N. S.) 223; Angell on Water Courses, 214.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action on the case, brought by Sanford against Gormley, for wrongfully obstructing a channel by which, as claimed by plaintiff, his land was drained. Sanford owned certain lots in block 3, in the city of Morris, Grundy county,

numbered 11, 12 and 13, and Gormley owned lots 5, 6 and 7, in the same block, situated south of Sanford's lots, and separated from them by an alley. In May, 1867, Gormley deposited upon the rear part of his lots, near the alley, a quantity of earth, which he had taken from an adjoining coal shaft. At that time Sanford had upon his lots a large number of grape vines which had been planted two years before, about two hundred of which, together with a few young fruit trees, died in the spring of 1867, and he insists, their death was caused by the water thrown back on the rear of his lots by the deposit of earth on Gormley's lots, across which he claims a right of drainage, as being what the civil law terms the lower or servient heritage. The jury found a verdict for the plaintiff, allowing him $1500 damages, and the defendant appealed.

It is admitted that the water which flowed from Sanford's to Gormley's land, the obstruction of which is the basis of the action, is wholly surface water, consisting of rain which fell upon the land itself, or of snow falling and melting there, and much of the argument has been addressed to the question, whether the same law in regard to drainage, which applies to well-defined water courses, is applicable to cases of this character.

This question has already been decided by this court in *Gillham* v. *Madison County R. R. Co.* 49 Ill. 484, not reported, and probably not within the knowledge of counsel, when this case was argued. In the opinion filed in that case, we said, although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface waters, was not only the clear and well settled rule of the civil law, but had been generally adopted in the common law courts, both of this country and of England. Various cases bearing upon each side of the question are cited in that opinion, and it is not necessary to cite them again. This rule was thought by this court, in that cause, to rest upon a sound basis of reason and authority, and was adopted. We find nothing in

the argument, or authorities presented in the present case, to shake our confidence in the conclusion at which we then arrived. In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course, fed by remote springs, applies, with equal force, to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field, are wont to flow. What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams, furnish no satisfactory reason for the distinction. It is suggested in the argument, if the owner of the superior heritage has a right to have his surface waters drain upon the inferior, it would follow that he must allow them so to drain, and would have no right to use and exhaust them for his own benefit, or to drain them in a different direction. We do not perceive why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land. We find no error in the instructions of the court upon this branch of the case.

It is urged, however, that this rule, even if justly applicable to agricultural lands, should not be applied to city lots. Where

a city has established an artificial grade, and provided an artificial sewerage, of which property owners can reasonably avail themselves, we should probably hold it their duty to do so, and so the court substantially instructed in the present case. But this was not the state of facts in reference to this property, so far as disclosed by this record. The lots lie in a very thinly populated addition to the city of Morris, and those belonging to plaintiff were used for the purpose of fruit growing, while defendant mined coal upon his.

While, however, the court gave the law correctly to the jury in regard to superior and servient heritages, it committed an error in the modification of the fourth and fifth of defendant's instructions, which, in the conflicting state of the evidence, may have had a potent influence upon the jury in arriving at their verdict. The plaintiff insisted the water was drained from the rear of his lots to the rear of the defendant's lots by a natural channel. This was denied by the defendant, who insisted that his own and the rear of plaintiff's lots were on the same level, or so nearly so, that there was no drainage by any natural channel upon the surface, and that whatever drainage, in fact, existed, was by means of artificial ditching. It was clearly proved that one Rogan, who occupied the Gormley lots in 1859, dug two ditches across these lots in that year—one from the north line to the south, and one from the northeast to the southwest corner of the lots. At that time, the Sanford lots on the north were open prairie, and the rear of these lots, and the Gormley lots, were low, wet land. Rogan testifies he ditched to save what he planted. It is further shown that Sanford, after he bought his lots, drained them to a greater or less degree by means of dead furrows, and that the water thus collected passed off through a ditch across the alley. We are expressing no opinion as to the existence of a natural channel, but merely stating the proof in regard to the artificial ditching, for the purpose of showing the propriety of these instructions as asked, and the materiality of the court's amendments.

The instructions, as asked by the defendant, were as follows:

"4. If the jury believe that the south end of Sanford's lots, as the ground naturally stood along the alley in question, was lower than the original surface of the alley, so that the surface waters shed there from heavy rains did not all drain off, but was carried off by artificial ditches through defendant's lots, dug by a person in possession therof for his own convenience, the defendant had a right to fill up the ditches, the law being that one owner of land is not obliged either to open or keep open artificial ditches below the natural surface of his own land for the purpose of draining the low lands of his neighbor.

"5. If the jury believe, from the evidence, that nearly the entire surface of the plaintiff's lots, in their natural condition, was wet and swampy, caused by the water percolating or soaking from ponds above them, or from any cause; that a portion of the lots descended towards the defendant's lots; that the lower ends of the plaintiff's lots, and the alley and the adjoining ends of the defendant's lots, were nearly or quite on a level, and were also wet and swampy, caused by the percolation or soaking of the water from the upper portion of the plaintiff's lots; and if the jury further believe, from the evidence, that across the defendant's lots artificial ditches were dug below the natural surface for the accommodation of the possessor thereof; then the defendant had a right to fill up those artificial ditches, the law being that the owner of land is not obliged to open or keep open artificial drains for the purpose of draining the low and swampy lands of another."

The first of these instructions the court qualified by adding after these words, "the defendant had a right to fill up the ditches," this clause: "but not above the natural surface where they were dug." The second was qualified by inserting a similar clause. These qualifications amounted, in effect, to an instruction that the defendant could not fill ditches upon his own land dug by a former occupant for his own convenience, and

raise his lots above their natural level, even though there was no drainage by a natural channel from the plaintiff's lots to his own. Now, if the rear of the plaintiff's ground and the lots of defendant were flat and wet, and on a common level, there being no natural drainage by a surface channel, which was the hypothesis of the instructions, then the defendant's lots did not occupy the position of a servient heritage, and he had the right, not only to fill the artificial ditch, but to raise the natural surface, if in so doing he did not throw the surface water of his own lot on that of the plaintiff. The defendant did undoubtedly fill a part of his ground above the natural surface, but it was close upon the alley, and there is no pretense that he thereby threw the water falling on his own land upon that of the plaintiff to an extent capable of producing any injury. This is not claimed by plaintiff's counsel, and indeed the plaintiff himself testifies that the filling near the edge of the alley seemed higher than that on other portions of the lot. This would have the effect of throwing the surface water of the defendant away from plaintiff's lots.

This qualification of the defendant's instructions may well have misled the jury, as it told them the defendant had no right to do what he clearly had done, and what he had a clear right to do.

It is urged by plaintiff's counsel that even if plaintiff's lots were artificially drained, yet as the ditch upon defendant's lots was dug by Rogan at a time when both these lots and those of plaintiff belonged to Goold, and Goold sold first to Sanford and afterwards to Gormley, the ditch remaining open and in use, and being necessary for the cultivation of Sanford's lots, it became an easement appurtenant thereto, and could not be closed against the will of their owner. It is unnecessary to decide the question sought to be raised, as the proof shows the ditch on the Gormley lots was dug by Rogan for his own benefit as tenant, and not for the purpose of draining the Sanford lots, which were then uninclosed, or with any reference

thereto, and there is no evidence that it was done at the request or even with the knowledge of the then owner. So far as the Sanford lots were benefited thereby, such benefit was simply accidental. Under such circumstances, there is no ground for claiming a continuance of this ditch as appurtenant to the plaintiff's lots.

For the error above indicated the judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN LOCK

v.

CHARLES FULFORD.

1. ASSIGNEE—*after maturity.* The assignee of a promissory note, after maturity, takes it subject to all the equities then existing between the original parties.

2. MORTGAGES—*subsequent purchaser from the mortgagor of a part of the premises—only secondarily liable.* Where a mortgagor conveys a portion of the mortgaged premises, retaining a portion himself, as between the mortgagor and his grantee, that portion retained by the mortgagor should be first applied to the payment of the mortgage.

3. SAME—*subsequent purchaser of the remaining portion—of his rights in respect to the prior purchaser.* And a subsequent purchaser of the portion thus retained by the mortgagor, with notice of the prior sale of the other portion, simply steps into the shoes of the mortgagor, and will hold his portion subject to be charged primarily with the payment of the mortgage.

4. SAME—*assignee of mortgage, with notice of prior sale.* So where the assignee of a note secured by mortgage took the assignment with notice that a part of the mortgaged premises had been sold and conveyed by the mortgagor, such assignee can hold the portion so conveyed only secondarily liable, and must first exhaust the portion of the premises retained by the mortgagor. It is, therefore, competent for the grantee of the mortgagor, in a suit by the assignee of the mortgage to foreclose, to prove the fact that he

had so purchased a part of the premises after the mortgage became a lien, and that the assignee had notice of that fact.

APPEAL from the Circuit Court of Marshall county; the the Hon. S. L. RICHMOND, Judge, presiding.

The facts in this case are fully presented in the opinion of the court.

Messrs. BANGS & SHAW, for the appellant.

Messrs. BURNS & BARNES, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in chancery, filed in the Marshall circuit court to foreclose a mortgage executed by Matthew Hoyt and wife to William Bradley, for the sum of three hundred dollars. It appears that the mortgage was assigned to appellee. The bill makes the mortgagors defendants, and alleges that Lubell, Jennings, Millspaugh, Roberts and Lock claim to have some interest in the mortgaged premises, and they are also made parties defendant. The bill was subsequently dismissed as to Lubell, Jennings and Millspaugh, and was amended by making John Roberts a defendant.

The bill was taken as confessed as to all of the defendants, except Lock, who answered claiming that Hoyt had paid the mortgage and procured its assignment to appellee, who held it fraudulently for the benefit of Hoyt, to enable him to collect money out of a portion of the mortgaged premises purchased by Lock, and insists that the portion thus purchased by him is not liable to sale under the mortgage, or if so, not until the remainder has been sold, and failed to produce a sum sufficient to pay the mortgage debt, if anything remains unpaid thereon. To this answer a replication was filed, and a hearing had on the bill, *pro confesso* orders, answer, replication and proofs,

and a decree was rendered ordering the mortgaged premises to be sold to satisfy the debt.

It appears from the evidence that three payments of interest were endorsed on the note, and one payment of $151.52 on the 16th day of February, 1856, and on the 18th of July, 1862, the sum of $50. Mrs. Huldah Hoyt also testified, that after the death of her husband, and while she was the owner of the note, Hoyt, the mortgagor, paid to her the fifty dollars endorsed as a credit on the note, and that he did some work for her, and furnished her with some meat and potatoes; that these items were deducted at the time a settlement was made, in June 1867, and before she transferred the note and mortgage. She states that there was then due on the note but one hundred dollars, and says she thinks appellee knew what was due on the note; that he paid but one hundred dollars for the note, and that is the sum mentioned as the consideration in the assignment.

Appellee testified that when he purchased the note there appeared to be due on it $190 or $195, and said he bought it at a discount; but fails to state what sum he paid; but thinks he paid more than one hundred dollars.

From this evidence it is manifest that this decree is for too large a sum. The note was over due at the time appellee purchased it, and he took it subject to all defenses then existing. Mrs. Hoyt testifies that the maker did labor for her, and furnished her with some meat and potatoes, which was deducted from the note on a settlement they made while she held the note. These payments were not endorsed, nor were they allowed as a credit in ascertaining the sum for which the decree was rendered. Had Mrs. Hoyt filed the bill for a foreclosure, no one would question the right of the maker to insist upon their deduction as payments, and appellee taking the note after its maturity, cannot prevent them being allowed. Nor can he recover more than was due at the time he became the purchaser, with interest from that date. If, as Mrs. Hoyt swears, there was then due on the note but one hundred

dollars, that would, with interest, be the extent of his recovery. Again, Lock offered on the trial to prove that after the mortgage became a lien on the property, he had obtained title to a portion of the premises as set up in his answer; but the court refused to hear the evidence. In this the court erred. In the case of *Iglehart* v. *Crane*, 42 Ill. 261, it was held that where a mortgagor conveys a portion of the mortgaged premises, as between the mortgagor and his grantee, the por ion retained by the mortgagor must be first applied to the payment of the debt. And a subsequent purchaser of the portion thus retained by the mortgagor, with notice of the prior sale of the other portion, simply occupies the position of the mortgagor, and will hold his portion subject to be charged primarily with the payment of the mortgage debt. The first purchaser, in such a case, has the right to insist that the property retained when he purchased shall be primarily held to pay the debt, which must be exhausted before a resort can be had to the portion purchased by him.

This being the rule, Lock had the right to prove that he had purchased a portion of the mortgaged premises, and that appellee had notice of his purchase when he took the assignment, and upon such proof being made, the portion of the mortgaged premises as retained by the mortgagor, should have been first subjected to sale to satisfy the debt. For the errors indicated, the decree of the court below must be reversed and the cause remanded.

Decree reversed.

GEORGE BARNETT

v.

LUDWIG GRAFF.

1. PRACTICE—*going to trial without issue upon some of the pleadings.* If a defendant voluntarily goes to trial upon issues made up on a part of the pleadings in a cause, leaving, however, some of the replications of the plaintiff without rejoinders and without issues upon them, a judgment for the plaintiff will not be reversed at the instance of the defendant because of such omission on his part to plead. If the defendant choose to go to trial with the pleadings in that condition it is his right to do so, although the plaintiff might put him under a rule to rejoin to all the replications.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

Mr. S. W. BROWN, for the appellant.

Messrs. METZNER & ALLEN, for the appellee.

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

This appeal appears to have been taken for delay only.

The action was assumpsit on promissory notes against two persons, one of whom, only, was served with process, and appeared and pleaded to the action.

One of the pleas was infancy, to which three replications by leave were filed: the first, denying infancy; the second, that the notes were given for necessaries; and third, a promise to pay after arriving at lawful age. There was also a plea of no consideration, and issue thereon.

To the second and third replications of plaintiff to the plea of infancy, there was no rejoinder, and no issue made up. The jury was sworn to try the issues joined, of which there were two, and they found them for the plaintiff, and judgment against the defendant served.

If the defendant chose to go to trial upon the issues made up, it was his right so to do, although the plaintiff might have put him under a rule to rejoin to all the replications. But the trial was entered upon voluntarily upon the issues made up. There was sufficient time before the cause was tried for the defendant to rejoin, had he deemed it important so to do. The cause was called and tried in regular course upon triable issues. We cannot say the court abused its discretion to set aside the judgment on the affidavit presented for such purpose. The court might not have given the affidavit credence for reasons growing out of facts within its own knowledge.

We see no reason why the judgment should be reversed. No errors appearing on the record, we must affirm it.

Judgment affirmed.

JOHN A. ANDRUS

v.

WILLIAM J. CARPENTER.

1. SURETY—*when liable.* A party gave to another this instrument: "To whom it may concern: The bearer wants a sewing machine. Let him have it, and I will see it paid for, or the machine when called for." The person receiving the instrument presented it to a sewing machine agent, who sold him a machine on time, the price to be paid in installments. The party executing the instrument was notified of the sale the day after it was made. He knew the machine was not paid for, and knew the circumstances called for action against the purchaser, and yet did not notify the vendor to sue, or endeavor to secure himself. He was held liable to the vendor for the price of the machine.

2. SAME—*delay by the creditor.* The mere delay of the vendor to bring suit until the expiration of eleven days after the last installment became due, in the absence of any request by the party giving the instrument to sue, could not operate to release the latter from liability.

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

Carpenter brought this suit against Andrus, and a trial resulted in a judgment for the plaintiff, from which the defendant appealed.

Messrs. EDSALL & CRABTREE, for the appellant.

Mr. WILLIAM BARGE, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The appellant, Andrus, gave to one Baker the following instrument:

"To whom it may concern: The bearer wants a sewing machine. Let him have it and I will see it paid for, or the machine when called for.

J. A. ANDRUS."

Ashton, Aug. 29, 1867.

Baker, on the 30th of August, presented this to the appellee, Carpenter, who thereupon sold Baker a sewing machine, payable, $25.00 on the 15th of September, $19.62 on the 30th of November, and the same amount on the 30th of January. The evidence clearly shows Andrus was informed of the purchase the day after it was made. The information came from Baker, but this was immaterial, if Andrus was fully notified. On the 19th of December, 1867, Andrus wrote Carpenter the following letter:

"ASHTON, DEC. 19, 1867.

AGT. HOWE'S SEWING MACHINES,

Dixon, Ill:

Dear Sir—I will not be responsible for the payment of any moneys from Wm. Baker, of this town, from this date, for

sewing machine; but if you come up you can get the machine, I think. But you need not say anything I say or have written, or show this letter, as he is my neighbor, and I want no hardness. Yours truly,

J. A. ANDRUS."

Andrus and Baker were neighbors in the same town, and Carpenter lived in another town a few miles distant. On the 11th of February, 1868, Carpenter went to Ashton, where Baker and Andrus lived, to collect his debt, but Baker had left and Andrus refused to pay. Carpenter then brought this suit, and recovered judgment, first before a justice, and afterwards in the circuit court.

It is unnecessary to discuss the instructions in this case, as, in our opinion, the judgment was clearly right upon the evidence. Andrus had timely notice of the sale, and his letter of December 19th, written nineteen days after the second payment fell due, shows that he knew the debt was unpaid, and recognized his liability as then existing.

He was cognizant of all the facts necessary to be known in order to protect himself, yet he neither requested Carpenter to bring suit, nor did he do anything to save himself harmless. Under these circumstances there is no ground on which he can escape liability. He had full knowledge of the state of affairs, and can not hold Carpenter responsible for his own neglect to procure security. The mere delay of Carpenter to bring suit until the expiration of eleven days after the maturing of the last note, in the absence of any request by Andrus to sue, can not be held to release Andrus from liability. If he had requested Carpenter to sue, and the latter had failed to do so, and Andrus had been damnified by such failure, a very different question would have been presented.

On the facts disclosed by this record the judgment must be affirmed.

Judgment affirmed.

THE AMERICAN CENTRAL RAILWAY COMPANY

v.

ELISHA MILES.

1. USURY—*whether pleadable by a corporation.* Under the interest law of 1853, a corporation cannot interpose the defense of usury in any action.

2. RAILROAD DIRECTORS — *of their compensation.* The law does not imply a promise on the part of railroad companies to pay their directors for services as such, and to enable a director to recover for such services, a by-law, or resolution, must have been adopted by the board to compensate him therefor.

3. PARTIES—*in suits to recover indebtedness due a firm.* In all cases of indebtedness to a partnership firm, the action must be brought by the members of the firm,—one of the members cannot sue alone, and recover at law for what his co-partners may agree to be his portion of a debt due the firm.

4. NEW PROMISE—*by a re-organized railroad corporation.* Where the property and franchises of a railroad corporation have been sold and conveyed under a deed of trust given to secure a debt of the company, and the purchasers re-organize, to prove a new promise by the re-organized company to pay a debt owing by the company as originally organized, there must be shown some action on the part of the directors of the former from which the promise can be clearly inferred. The mere certificate of their secretary that the amount was due on specified items, would be insufficient to prove a new promise, or to bind the company, unless it appeared he had been empowered to adjust the claim.

APPEAL from the Circuit Court of Mercer county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Messrs. GOUDY & CHANDLER, for the appellants.

Mr. T. G. FROST and Mr. I. N. BASSETT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the Mercer circuit court, against appellants, on a promissory note, and on an account. The declaration contained special counts on the note, and the usual common counts. The plea of the general issue was filed, and a trial was had by the court, a jury having been waived by the parties, by consent. After hearing the evidence, the court found the issues for the plaintiff, and assessed his damages at $3,037.69, and rendered a judgment in his favor for that sum. To reverse which, defendants prosecute this appeal and assign various errors on the record.

On the trial in the court below, the parties agreed upon this statement of facts:

"1st. That on or about the 29th day of March, 1860, the plaintiff advanced, at the request of the American Central Railway, the sum of three hundred and twelve dollars and fifty cents, and that the note, a copy of which is appended to the declaration herein, was given by Robert C. Schenck, then the president of said railway, in its behalf, and with due authority from his company, and that said note may be used in evidence on the trial, subject to such defense as the defendants may be able to interpose.

"2d. It is agreed that plaintiff acted for three years as one of eleven directors of the American Central Railway, his services in that behalf ending about the year A. D. 1859, but the question as to whether, in any event, the plaintiff would be entitled to recover anything for his services as such director, is a question for determination on trial.

"3d. It is agreed that the claim of the plaintiff of twelve hundred and fifty dollars, for work and labor done for the American Central Railway in grading, grows out of a contract entered into between the said railway, on the one part, and Olof Johnson & Co. of the other, for grading said road; that under said contract about $20,000 worth of grading was done, and that the plaintiff was one of said company of Olof Johnson

& Co., and would be entitled to the said amount of $1250 as his share of such work due upon an account stated between the parties; but the question is submitted for decision on trial whether, in any event, the plaintiff would be entitled to sever himself from his co-contractors and claim his share or interest in the joint claim in an action in his own name. But it is agreed that said claim existed prior to the year 1859.

"4th. It is further agreed that the American Central Railway was originally organized by virtue of an act of the Legislature of the State of Illinois, approved February 9, 1853, incorporating the Western Air Line Railroad Company, and the subsequent acts amendatory thereof.

"5th. The liability of the defendants for either or all of the claims of the plaintiff is to be determined upon the foregoing facts, together with such documentary and other testimony as may be introduced by either party."

It appears that on the 25th of June, 1859, the railway company executed a deed of trust, or mortgage, to secure the sum of $2,790,000, bearing interest payable semi-annually, with power to sell the franchise and property thus pledged in case default should be made in the payment of principal or interest. Fifty-two bonds of $1000 each were issued, and default in payment of interest was made, and the franchise and property were sold and conveyed to James S. Thompson and others, on the 10th of May, 1865. After this sale was made, on the 1st of July following, the purchasers met and reorganized the company, and fixed the capital stock, elected directors and other officers, and provided for issuing stock or bonds for certain debts that existed against the corporation before the sale, but it does not appear that they were liens on the property.

It is claimed by appellants that by the sale of the franchise and property, the creditors at and previous to that time lost all claim against the franchise, property, or the company as it was reorganized; while the other side claims that his

previous rights remained unimpaired, because, as he claims, the old corporation was unaffected by the sale, or if it was, then he claims that the new organization is liable by express and implied promises. It is admitted that the company, before the sale, were liable for the principal of the note, but as it drew 15 per cent interest, nothing but the principal could have been recovered. They deny, however, that the company were ever liable to pay appellee $700, as a compensation for services as a director in the company. And as to the $1250, they insist that, as it was his part of a sum due the firm of which he was a member, the claim could not be so divided as to enable appellee to sue in his own name and recover the amount.

We shall proceed to determine whether the claim of appellee could have been enforced against the company as at first organized, in the name of appellee, by an action at law, and if not, whether the new organization can do any act to render them liable.

The act of 1857, regulating interest (Gross' comp. title Int. sec. 2), fixes the rate at which parties may contract, at ten per cent per annum; and the third section of the same act declares that if any person or corporation shall contract to receive a greater rate of interest than ten per cent per annum upon any contract, verbal or written, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall only be entitled to receive the principal sum due.

But the act of 1853 (Gross' comp. title Int.), by the first section, declares that "No corporation shall hereafter interpose the defense of usury in any action." This section, therefore, and not the act of 1857, governs this note. It was given by a corporation, and it is expressly prohibited from interposing the defense. It was, therefore, with the interest, a valid claim against the company first organized.

The doctrine is announced in Redfield on Railways (1st ed.) 406, that in England and this country railway directors can not recover compensation unless allowed by a by-law in the

former, or by resolution in the latter, and several authorities are referred to, which sustain the rule.

As to appellee's share of the sum due the firm of which he was a member, we are aware of no rule of pleading or practice which will authorize a recovery by an individual member of a firm in his own name on what his partners agree is his share of a debt due the firm. In all cases of indebtedness to a firm, the action must be brought by the members of the firm; nor does an agreement to divide the claim among themselves change the right. The debt is due the members of the firm jointly, and unless it be a negotiable instrument, the debt cannot be assigned at law, either in whole or in part, to one member of the firm. It then follows that appellee's interest in that claim against the company was only equitable, and the legal title was vested in the members of the firm, and they could alone sue and recover at law.

As to the item of two hundred dollars for money advanced, we fail to find any evidence except the certificate of the secretary. This was therefore improperly allowed by the court, unless the claim is proved by the secretary's certificate.

The evidence shows that it was agreed by those who purchased under the deed of trust, that in the event they should become the purchasers of the road and franchises, when sold, they would issue stock to themselves for the amount the company owed them, and to all creditors of the road having just claims upon the company, if they would present their claims in a reasonable time. The purchasers thus manifested a willingness to discharge the debts of the corporation in that mode, and to place the holders of the just claims on the same footing with themselves. But it cannot be inferred from this that they intended to pay them money. The purchasers seem to have carried out this arrangement among themselves, and had appellee been disposed to avail himself of this arrangement, he could, in all probability, have obtained stock on all just indebtedness he held against the company.

All of his items of indebtedness, if just, formed a sufficient consideration to support a new promise by the company as at present organized; and appellee insists that a new promise was made, but that is denied by appellants. That is a fair question for the jury; and inasmuch as the case will be passed upon by another jury, we deem it unnecessary to discuss the evidence which we find was conflicting on this question. But to prove a new promise, it would be necessary to show some action on the part of the directors from which the promise, or thier liability, can be clearly inferred. The mere certificate of their secretary that the amount was due on specified items would be insufficient to prove a new promise or to bind the company, unless it were shown that he had been empowered to adjust such claims generally, or this one particularly.

If the partners of appellee settled with him and found his share of the debt due them from the company, and authorized him to collect his share from the company, and the directors agreed to pay it in stock, and then refused to do so, it then became payable in money, or if they agreed to pay him in money, he may recover.

As the law does not imply a promise on the part of railway companies to pay their directors for services as such, it should appear that a by-law or a resolution of the board had been adopted to compensate them for services, before a director can recover. This seems to be the rule deducible from the current of American authorities, and is analogous to the services rendered by any other character of trustees who, under the common law, are not entitled to compensation, and must look either to the statute or a contract for the right to receive pay for their services, and we are disposed to follow the rule.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

ARTHUR W. WINDETT

v.

JAMES HAMILTON.

1. VACATING A JUDGMENT—*after the term.* The rule is, that the circuit court has no power to set aside a judgment at a term of the court subsequent to that at which the judgment was rendered.

2. SAME—*exception to this rule.* But, where a final judgment is entered upon a default, a motion is made at the same term to vacate the judgment, and set aside the default, and such motion is continued to a subsequent term, the court thereby retains its control over the judgment, and the motion may be allowed at such subsequent term.

3. This case differs in this respect from the cases of *Cox* v. *Brackett*, 41 Ill. 222, and *Messervey* v. *Beckwith*, ib. 452. In those cases final judgment had been entered, and no motion to vacate and set aside was made at the term.

4. ENTERING RETURN UPON PROCESS—*discretionary.* Where an original summons had been issued, upon which no return was made, and an *alias* summons issued which was returned served, upon which a default was entered, a motion made for leave to the sheriff to enter his return, "not found," upon the original summons, and not supported by affidavit, was so far addressed to the discretion of the court that its action thereon cannot be assigned for error.

5. VARIANCE—*between the writ and declaration—effect thereof.* Upon quashing the summons for a variance between the writ and the declaration, in respect to the amount of damages claimed, it is proper, in the absence of a motion for leave to amend, to dismiss the suit.

6. SAME—*how such variance may be reached.* Such a variance may be reached by a plea in abatement, or by motion, the defect appearing upon the face of the papers.

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

This was an action of assumpsit, brought in the circuit court of Cook county, by Arthur W. Windett, an attorney at law, against James Hamilton, to recover for legal services. The cause came on for trial at the September term of said

court, and a default was taken and final judgment rendered, for the sum of $1000. Subsequently, and at the same term of that court, the defendant entered his motion to vacate the judgment, and set aside the default. The court entered the motion, but postponed the hearing until the following October term. At the latter term, the court allowed such motion, and ordered the judgment and default entered at the preceding term to be vacated and set aside.

It appears from the record in this case that the declaration and precipe for summons were filed, returnable to the August term of that court; that the cause was continued for want of service; that an *alias* summons issued, returnable to the September term, at which term the plaintiff obtained leave to file his amended declaration.

The *alias* summons was served, and return thereof properly made; but no return was made upon the original summons. Pending the motion to set aside the default, the plaintiff entered his motion for leave to the sheriff to make his return of "not found" upon the original summons, which motion was refused. It also appears from the record, that the damages claimed in the *alias* summons, were five hundred dollars, while in the amended declaration they were one thousand dollars. At the October term, the defendant entered his motion to quash the *alias* summons, and dismiss the suit, on the ground, that there was no return made upon the original summons in the cause, and upon the ground of variance between the summons and the declaration, in the amount of damages. The court granted the motion, dismissed the suit, and rendered judgment against the plaintiff for costs.

The plaintiff brings the record to this court on appeal, and assigns for error:

1st. That the court erred in setting aside the default at a term subsequent to the term at which the default was taken, and judgment rendered.

2nd. That the court erred in refusing to allow the officer to make his return of "not found" upon the original summons, in quashing the *alias* writ, and in dismissing the suit.

For these errors this court is asked to reverse the judgment.

Mr. ARTHUR W. WINDETT, *pro se.*

Mr. JOHN J. MCKINNON, and Mr. R. H. FORRESTER, for the defendant in error.

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

The first point made by appellant is, that the court below had no power to set aside the judgment by default at the October term, the judgment having been entered at a previous term. That the court had not this power is settled by repeated rulings of this court, *Morgan* v. *Hay*, Breese, 126; *Cook* v. *Wood*, 24 Ill. 294; *McKindley* v. *Buck*, 43 Ill. 488. But this is not such a case. Here the default was taken at the September term, and the motion made at that term to set it aside, which motion was continued for discussion to the next term, and then it was allowed. The motion having been entered at the September term, the cause was kept in court and remained on the docket. In the cases cited, the causes were finally disposed of, and were not on the docket at the subsequent term. They had passed beyond the control of the court. There had been final judgment entered. *Cox* v. *Brackett*, 41 Ill. 222; *Messervey* v. *Beckwith*, ib 452. Here it was not so. The court, at the October term, had the same power over the cause that it had at the September term, the motion attaching to it at that term, and the cause remaining on the docket subject to this motion.

Another point made by appellant is, that the court erred in refusing to allow the sheriff to make a return on the first writ. There was no affidavit in support of the motion. It was a motion addressed to the discretion of the court, nothing appearing on which to base it, and the refusal of the court to allow it can not be assigned as error.

The remaining point is, that it was error to dismiss the suit, on quashing the *alias* summons. The suit was dismissed for a variance between this summons and the declaration. What other course could have been taken? This was an objection which could be reached by plea in abatement, and equally by motion, the defect appearing on the face of the papers. *Cruikshank* v. *Brown*, 5 Gilm. 75; *Holloway* v. *Freeman*, 22 Ill. 197. Plaintiff might have saved his case had he asked leave to amend. This he failed to do. *Thompson* v. *Turner*, ib. 389. We see no error in the record and must affirm the judgment.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY

v.

WILLIAM F. WELCH.

1. RAILROAD COMPANIES—*liability of—for injury to their servants occasioned by dangerous structures.* In an action against a railroad company for injuries sustained by the plaintiff, while in the service of the company as a brakeman, the evidence showed that the injury complained of happened while plaintiff was engaged in the discharge of his duties, by collision with a projecting awning from one of the station houses on defendant's line of road, whereby he was knocked off the car, and so injured as to require amputation of his left arm; and that the dangerous position of this awning was well known to the division superintendent and division engineer, whose attention had been called to it a long time prior to the accident: *Held*, that this was negligence of such a character that the company must be held liable for the damages sustained.

2. As said by this court in the case of the *Chicago & N. W. R. R. Co.* v. *Swett*, 45 Ill. 201, railroad companies are bound to furnish their servants safe materials and structures, and must, in the first instance, construct their road with all the necessary appurtenances.

Syllabus.

3. SAME—*must keep in proper repair.* And they must be kept in proper repair; and a person entering the service of a railroad company, has a right to presume that in these respects it has discharged its obligations.

4. SAME—*perils of the service—to what extent assumed.* A person engaging in this service assumes the ordinary perils of railroad life; and also special dangers arising from the peculiar condition of the road, so far as he is aware of their existence, and his exposure to them would be his voluntary act.

5. But in this case, the danger was of such a character as well might escape the observation of a person who had been in the employ of the defendant for a long period of time; and there is no reason for supposing that the plaintiff had acquired knowledge of the unsafe condition of this awning before his injury, as he had been but two months upon the road, and, except upon two trips, had always passed this station in the night.

6. CAUSE OF ACTION—*release of—what amounts to.* And in such case, it was error for the court to instruct the jury that the following instrument, executed by plaintiff, did not release the cause of action in this case:

"Received of the Illinois Central Railroad Company $40, in full payment and satisfaction for *one month's time, in April, while laid up with injuries received while breaking*, and in full satisfaction of all claims, demands, damages and causes of action against said company, hereby forever releasing said company therefrom, as witness my hand and seal, upon this 5th day of *June*, A. D. 1866. [Seal.] W. F. WELCH."

7. SAME—*release procured by means of false representations—no bar.* But if the plaintiff was induced to sign such release, by representations that it covered merely a month's time, or wages, or if he signed it under such a belief, induced by the words or acts of defendant's agents, it would not operate as a bar, and this question should be left to the jury.

8. NEW TRIAL—*excessive damages.* And in such case, a judgment for ten thousand dollars damages must be pronounced excessive; not the slightest foundation for vindictive damages existing.

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

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

Mr. B. C. COOK, for the appellant.

Messrs. HIGGINS, SWETT & QUIGG, and Mr. I. N. ARNOLD, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The facts of this case are stated with substantial correctness in one of the arguments by counsel for appellant, as follows:

The Illinois Central Railroad track at Mendota is about 18 inches from the edge of the awning, which projects from the station house, so that when a freight car stands upon the track the inside edge of the car is about even with the outer edge of the awning.

The awning is about 18 inches higher than the top of the car.

On the 28th day of February, 1866, Welch was a brakeman on a freight train running on that road. The cars were coming in to Mendota at a rate of speed about as fast as a man would walk. Welch was walking by the side of the train for the purpose of cutting off a portion of it. There was a ladder on each side of the car.

The plaintiff had pulled out the pin and disconnected a portion of the train from the engine, and was walking along beside the train when the engineer signaled for brakes. The plaintiff ran up the ladder on the car on the side next the station house, and before he reached the roof of the car he was struck by the projecting awning, and knocked from the car; his left arm was broken, and injured so that it had to be amputated. The left side of his head was bruised with a scalp wound over the same. Was treated by physicians until about the 1st of May, 1866.

It should be further stated that the attention of the division superintendent and division engineer had been some time previously called to the dangerous position of this awning.

When the engineer called for brakes, it was the duty of the appellee to mount the car for the purpose of applying them. He was therefore injured while in the performance of his duty in obedience to an order. The jury found a verdict for plaintiff for ten thousand dollars, on which the court rendered judgment.

On this state of fact it is urged by counsel for appellant that appellee was not entitled to recover. They insist the rule of law to be, that a person engaging for a particular service, and knowing, or having full opportunity to know, all the conditions and circumstances of the service, assumes all risk arising therefrom, in the absence of fraud or concealment on the part of the master. As a general legal proposition this is undoubtedly true, but we are of opinion it does not cover the facts of this case. There are many freight depots and station houses upon the line of the Central Railway, and it would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it.

We held, in the *Chicago & N. W. R. R. Co.* v. *Swett*, 45 Ill. 201, that the corporation is bound to furnish to its servants safe materials and structures, and must, in the first instance, properly construct its road with all its necessary appurtenances. This, of course, includes the obligation to keep in proper repair. When the appellee entered the service of this company, he had a right to presume that it had, in these respects, discharged its obligations. The ordinary perils of railroad life he of course assumed, and also any special dangers arising from the peculiar condition of the road so far as he knew of their existence. For exposure to such dangers he would be supposed to demand and receive an increased compensation, and his exposure to them would be his voluntary act. But it would have been morally impossible for him to have ascertained the existence of all such special perils as this which caused the injury, and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station, where he was injured, in the night, except upon two trips. Moreover, it is to be remarked

that the danger was of such a character that it might well escape the observation of a person who had been even for a long time upon the road.

The evidence shows, however, that the peril had long before been observed by other employees, and the attention of both the division superintendent and division engineer called to it. This circumstance takes away all excuse from the company, and brings the case within the legal proposition of appellant's counsel, since it was a peril known to the employer and not revealed to the employee.

But while we hold the company liable, we are of opinion the court erred in instructing the jury as matter of law that the release executed by appellee did not release the cause of action in this case. That release was as follows:

"Received of the Illinois Central Railroad Company $40, in full payment and satisfaction for *one month's time in April, while laid up with injuries received while braking*, and in full satisfaction of all claims, demands, damages and causes of action against said company, hereby forever releasing said company therefrom, as witness my hand and seal upon this 5th day of *June*, A. D. 1866.

[SEAL.] W. F. WELCH."

The words underscored were written, the remainder of the receipt was printed.

It cannot be denied that this release is, in its terms, sufficiently broad to cover the present action. If, however, the appellee was induced to sign it by representations that it covered merely his claim for a month's time, or a month's wages, or if he signed it under such a belief, induced by the words or acts of the agents of the appellant, then, of course, the release would not be a bar to the prosecution of this suit. This question should have been left to a jury.

It is not, however, merely for the error in this instruction that we reverse this judgment. The damages are excessive.

It has become a matter of public notoriety, and is evidenced by many of the records brought to this court, that juries may generally assess an amount of damages against railway corporations which, in similar cases between individuals, would be considered unjust in the extreme. It is lamentable that the popular prejudice against these corporations should be so powerful as to taint the administration of justice, but we can not close our eyes to the fact. When this becomes apparent, the courts must interfere. However natural this prejudice, or however well deserved, it can not be permitted to find expression in unjust verdicts. A railway company is entitled to, and must receive, the same measure of justice that is meted out in a suit between John Doe and Richard Roe. Juries must be taught, if possible, that when they enter the jury box they are entering upon a duty so high and solemn that they must shrink from the influence of prejudice or passion as they would shrink from crime. Doubtless the twelve men who composed this jury were, individually, honest men, but we can not believe they had a proper sense of their duty and responsibility as jurors. There was in this case no malice or oppression on the part of the company, and therefore no room for vindictive damages. The injury to the plaintiff was merely an accident, resulting, it is true, from the carelessness of the company, but still, an accident in the sense that it was unintentional. The injury, although severe, is not one that wholly disables the plaintiff. He testifies that he has since been learning the trade of a printer. His wages as a brakeman were forty dollars per month, amounting to four hundred and eighty dollars per annum. The annual income he would derive from $10,000, the amount of this verdict, would be, at the ordinary rate of interest in this State, one thousand dollars. The wages he was receiving would not amount to this verdict in twenty years. In one sense, it is true, a pecuniary value can not be placed upon an arm. But inasmuch as the law can give only a pecuniary compensation, and as the plaintiff seeks that by his suit, we are obliged to take a practical and almost

unfeeling view of this question, and when the injury is one that will still leave a plaintiff able to earn as much, in many occupations, as he was earning before the accident, we must hold a verdict to be unreasonable which gives him at once a sum larger than the great majority of the community earn by a long life of toil, and the interest of which would amount to more than twice his wages. When we consider this, and remember that such verdicts for injuries inflicted without design or malice, are never rendered in suits between individuals, and that the statute limits the damages for the loss of life to five thousand dollars, we think it our duty to pronounce the damages in this case excessive.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLIAM SEVERIN *et al.*

v.

WILLIAM H. EDDY.

1. PARTIES DEFENDANT—*in suit against joint tort feasors.* A plaintiff may maintain several actions against a number of persons who commit a trespass or other tort jointly, and may recover several judgments, though he can have but one satisfaction.

2. FORMER ADJUDICATION—*whether a bar to a subsequent suit.* A party who received an injury, by reason of a hatchway in the sidewalk in a city being left in an unsafe condition, sued the city for damages, and the city recovered judgment; but this was held to be no bar to a subsequent action by the person injured, for the same cause, against the individual through whose negligence the accident occurred.

3. SAME—*of notice by the city to the negligent party.* Nor would the fact that the person whose negligence occasioned the injury received notice of the former suit, and that the city would hold him liable for any sum that might be recovered, operate to render the judgment in such suit a bar to the subsequent suit.

4. DEFECTIVE SIDEWALKS—*liability of cities and individuals.* If an individual construct a hatchway in a sidewalk, he must respond for any damages resulting from his negligence to render it safe and free from danger. It is also the duty of the city to keep the streets and sidewalks in safe condition, and it will be liable for injury occasioned by its neglect of duty in that respect. But should a recovery be had against the city in such case, the person whose neglect of duty caused the injury will be liable over to the city therefor.

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

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

Mr. D. P. WILDER, for the plaintiffs in error.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by plaintiffs in error in the Cook circuit court, to recover for injuries sustained by Caroline Severin, the wife of William Severin, by falling through a hatchway door in the sidewalk abutting upon the premises of defendant in error. It is averred in the declaration that the hatchway had been left in an unsafe condition through the default and negligence of defendant in error, whereby Catharine Severin had received the injuries complained of, causing great pain and suffering, and crippling her for life.

To the declaration, defendant filed two special pleas. They aver that plaintiffs in error, in 1866, sued the city of Chicago to recover for the same injuries; that the city gave notice of the pendency of the suit to defendant, and that he aided in the defense of that suit, and that on a trial before a jury they found a verdict in favor of the city, upon which a judgment was rendered that the city go hence without day,

and recover costs against plaintiffs in error; that the judgment remains in full force, unreversed and in nowise annulled. Plaintiffs filed a demurrer to these pleas, which was overruled by the court, and plaintiffs in error failing to answer the pleas, judgment was rendered against them in bar of the action.

Do these pleas present a defense to this action? Was the judgment in favor of the city, and to which defendant in error was not a party, a bar to a recovery in this case? We think not. If it could be conceded that defendant in error and the city were joint *tort feasors*, still it would not follow that he could plead that judgment in bar of this action. The rule is well established that a plaintiff may maintain several actions against a number of persons who commit a trespass or other tort jointly, and may recover several judgments, but can have but one satisfaction. If a number of persons jointly commit a tort they are liable either jointly or severally, because the tort is considered the act of each person engaged in its perpetration, and the plaintiff may elect to sue jointly or severally. *Livingston* v. *Bishop*, 1 Johns. R. 290; *Thomas* v. *Rumsey*, 6 ib. 31; Chit. Pl. 86-87. It then follows that even if the city and defendant in error were joint *tort feasors*, plaintiffs in error had the election to sue them separately, and, if so, the failure to obtain judgment against either would form no bar to a recovery against the other.

When the city gave notice to defendant in error, it was for the purpose of concluding him from requiring the city to prove the cause of action in case a recovery was had against the city, and a suit should afterwards be brought against defendant in error. Had a judgment been obtained in that action against the city, defendant in error, in a suit by the city against him to recover the amount of the judgment, could not have questioned the grounds of the recovery. Having received notice that the suit had been instituted and that the city would hold him liable for any sum that might be recovered, the notice would have operated as an estoppel on him, but not on plaintiffs in error. The notice did not render him a defendant to the

action, but simply operated to confer power on him to defend the suit, and to preclude his questioning the judgment rendered on the trial.

If defendant in error was guilty of neglect of duty in failing to keep the hatch door in proper repair and in a safe condition, he was liable to plaintiffs in error for any injuries resulting from his negligence. But in such a case, it being the duty of the city to keep the streets and sidewalks in good repair and in safe condition, it was also liable to plaintiffs in error for a neglect of duty. But if defendant, by a neglect of his duty to keep the hatch door safe, caused the injury, he would be liable over to the city for any recovery that might have been had against the city, and hence the propriety of giving to him the notice averred in the plea, that he might defeat a recovery against the city for which he would have been ultimately liable. But it is believed no case has gone the length of holding that by such a notice to the party ultimately liable, he becomes thereby a party to the record.

Inasmuch as the city and defendant are liable for different acts of negligence, it can not be that a verdict in favor of the city should, at all events, become a bar to a recovery against defendant in error. For aught that appears, it may be the city on that trial proved that it had omitted no duty in reference to the passway where the injury occurred, and the evidence may have shown defendant in error to have been grossly, and even wilfully, negligent. We can well imagine a case where such might be the state of facts; and if such is the case, then plaintiffs in error should not be precluded from showing it on a trial of the case. We have no right to presume that because both parties owed the duty of keeping this passway safe, both parties acted alike, and that each is equally innocent or culpable. Their duties are different. Defendant in error having constructed the hatch door, it was his duty to render it safe and free from danger, or respond in damages which ensue from injury growing out of his negligence.

It is the duty of the city to use all reasonable precautions to keep the streets and sidewalks in proper repair and in a safe

condition. But the city is not required to keep a force constantly patroling the streets to ascertain whether individuals are placing obstructions therein, or are opening hatch doors, or by closing them negligently, leave them in a dangerous condition. While the city is held to a high degree of vigilance, it can not be claimed to such a length. To do so would be unreasonable if not impracticable. It may have been, and we presume it was, shown on the trial in which the city was defendant, that every duty had been performed, and every precaution taken which devolved upon the city. But it does not follow that such was the proof as to the acts of defendant in error.

The pleas failing to present a defense to the action, the court below erred in overruling the demurrer, and the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

PATRICK WALSH

v.

MATTHEW J. BRENNAN *et al.*

1. MORTGAGES—*defeasance.* A party executed a conveyance, absolute in form, and received from the grantee a writing, in which the latter agreed, in consideration of the deed, to endeavor to sell the property conveyed within one year, and after paying a debt due from the grantor to a person who held a deed of trust upon the same property, and also a debt due to the grantee himself, to repay to the grantor all the surplus arising from the sale, and any rent received by the grantee during the year: *Held*, that this writing did not amount to a defeasance, it not being under seal, nor purporting to defeat the estate conveyed by the deed in any event. It might, perhaps, be called a declaration of trust.

2. POWERS—*whether limited.* The power given to the grantee, under the conveyance to him, and the writing mentioned, to sell the property, was not a limited power; the property was not to revert to the grantor, and his

only claim was for an account from the grantee of the proceeds of the sale, and for the payment of any surplus there might be.

3. So the title of a *bona fide* purchaser from such grantee, having no notice of the trust relations between the latter and his grantor, would not be affected thereby, and such grantor would not be entitled to a reconveyance of the property upon payment of the amount secured.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

This was a suit in chancery, instituted in the court below, by Patrick Walsh, against Matthew J. Brennan and Thomas Walsh, by which the complainant sought to redeem a certain lot of ground conveyed by him to Thomas Walsh, and by the latter sold and conveyed to Brennan. The circumstances upon which this alleged right of redemption is based are set forth in the opinion of the court.

Messrs. DENT & BLACK, for the plaintiff in error.

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

The questions presented by this record are chiefly questions of fact, on which the court below, after a full hearing of the cause, in which much conflicting testimony was heard, has passed, and we are called upon to set aside that finding, and reverse the decree dismissing the bill of complaint.

The plaintiff in error makes these points: First, that the evidence shows that the property in question was held by the defendant, Thomas Walsh, in trust to secure certain moneys advanced by him to the plaintiff, and under a limited power. Second, that this relation was well known to the defendant, Brennan, at the time he purchased the property, and consequently, took the property charged with the rights of the plaintiff; and third, that the sale by Thomas Walsh to Brennan was unauthorized, and made without the consent and contrary to the demands of the plaintiff, and of all which

Brennan, the purchaser, had full notice at the time of purchasing.

As a corollary from these propositions, the plaintiff insists he is entitled to a reconveyance of the property upon payment of the amount secured, less rents and profits.

Defendants in error have furnished no brief or argument, and we decide the case on the plaintiff's showing alone.

We have examined all the testimony in the record upon the several points made by the plaintiff, and are satisfied it greatly preponderates in favor of the finding of the court below.

The deed executed by plaintiff to Thomas Walsh bears date April 8, 1859, and is absolute on its face, reciting that it was made subject to a trust deed to Daniel Brainard, to secure eleven hundred and eighty dollars due Brainard as purchase money of the lot, and executed on the same 8th day of April.

At this time, we would infer from the testimony, plaintiff was largely indebted to the defendant, Thomas Walsh, and on the execution and delivery of the deed of April 8th, Thomas gave to plaintiff a writing of the following tenor: "I hereby agree in consideration of receiving a special warranty deed from Patrick Walsh for N. 25 feet, lot 2, block 5, in Brainard and Evans' addition, that I will endeavor to sell said lot within one year from the date hereof, and that after paying all moneys due to Daniel Brainard, and also to myself, with any interest accruing thereon, then I will repay to said Patrick Walsh all the surplus arising from said sale, and for any rent received by me during said year."

This writing is called by plaintiff's counsel a defeasance, which it clearly is not, as it is not under seal, and on its face does not purport to defeat the estate conveyed by the deed in any event. It is of an anomalous description, and may, perhaps, be called a declaration of trust, which was not recorded with the deed, but kept in plaintiff's pocket, and of which the public had no notice.

Plaintiff's counsel say Thomas Walsh had this property so conveyed by this absolute deed under a limited power. We

do not so understand it. The deed conveyed the title without condition or limitation, to Thomas Walsh, and by his writing as above, he was to endeavor to sell it in one year to pay Brainard and himself, but failing in that, there is no provision that the property shall revert to plaintiff. All that he could claim would be an account from Thomas of the proceeds of the sale, and if there was any surplus, then ask for a decree for that surplus. The title of a *bona fide* purchaser, without notice of this secret understanding of these parties, could not be affected by it, he having purchased from the record.

This brings us to the consideration of the second point: did Brennan, the purchaser, know of this trust?

On this point, the evidence is quite conflicting. The Walshes—three of them—and Thomas Walsh's step son, Boaz, all testify to knowledge on the part of Brennan, and that he was warned not to purchase the property of Thomas Walsh, and that it was plantiff's property.

This is distinctly denied by Brennan, and by his brother, Patrick, and by Robert C. Wright and John A. Tyrrell, real estate dealers, under the firm name of Wright & Tyrrell, friends of the Walshes, and who performed a most important part in effecting the sale to Brennan. Theirs is the testimony of business men who know about what they are testifying, and seem to be familiar with the whole transaction. From the testimony of these witnesses, it is very certain the sale to Brennan was made with the knowledge and approval of the plaintiff, who, finding that Brennan would not give more than twelve hundred dollars for the property, made no further objection. He insisted at first that Brennan should give two hundred dollars more, which being declined by Brennan, he then claims one hundred dollars more, which Brennan persistently refused to give. Then the deed was executed. This deed bears date March 31, 1862. These facts dispose of the second and third points made by plaintiff in error, and place Brennan, the purchaser, on impregnable ground.

The fact that the debt was not due by one month, is of no importance in view of the fact that the sale of the property was made with the knowledge of the plaintiff, and for its full value at the time of the sale, and without objection by him. We do not find it true, as contended by plaintiff, that the sale was made to Brennan for an inadequate consideration, before any money was due on the property, and contrary to plaintiff's rights and expressed wishes. The testimony of Thomas Walsh on all these points is wholly unreliable, and that of plaintiff and the others called in his favor, is of a rambling, disjointed and uncertain character, not calculated to make a favorable impression on the mind of a court.

The sale was made in 1862, when real estate in Chicago was at the lowest point of depression, and the real estate dealers, Wright & Tyrrell, testify that the sum paid for it by Brennan was its full value.

Since that date, real estate in Chicago has had an upward tendency so great as to astonish the dealers in it, and had reached its climax about the time this bill was filed—in April, 1868,—up to which time, a space of six years and more, we hear no word of complaint from the plaintiff, and no attempt made by him to redeem. Had the property fallen in value, it is not at all probable this effort would have been made. No reason is shown to justify this *laches*, if he had equities, for, if the property was sold below its value, and contrary to the trust, a pledge of the property would have enabled the plaintiff to control means sufficient to litigate his rights in a court of justice. Nothing sufficient is shown why he has not so done. On the whole record we can see no equity on plaintiff's side. The facts are all against him, and the superior court did right in dismissing the bill, and the decree must be affirmed.

Decree affirmed.

Syllabus.

NATHANIEL NORTON

v.

JOHN A. COLBY

1. DEMURRER. Where a plea of the statute of limitations is interposed, the question, whether there is any statute barring the action should be raised by demurrer to the plea.

2. LIMITATIONS—*assumpsit upon a note made out of this State.* An action of assumpsit was brought September 1, 1866, upon a promissory note given out of this State, bearing date February 19, 1835, and falling due in three years from date: *Held*, that the action was barred, under the limitation act of 1827, that act still being in force at the time the action was brought.

3. SAME—*effect of acts of* 1845 *and* 1849 *upon the act of* 1827. The act of 1827, was not repealed, but was re-enacted, by the Revised Statutes of 1845, and the proviso to the 4th section of the act of November, 1849, directing that in all actions instituted upon causes of action arising during the period in which the act of 1845 was in force, shall be the rule of limitation and adjudication, is construed as meaning the act of 1827; and that proviso is not affected by the act of 1851, except so far as concerns actions which accrued while the act of February, 1849, was in force, and such as accrued before the act of February, 1849, went into operation, and for the barring of which there was no previous statute.

4. FORMER DECISIONS. The language of the opinion in the case of *Campbell* v. *Harris*, 30 Ill. 395, is too broad, if it is to be construed as meaning that no promissory note given out of this State, and maturing prior to the act of February, 1849, and since the act of 1827, is barred by any act of limitation in force in this State.

5. NEW PROMISE—*what sufficient to take a case out of the statute of limitations.* A party against whom it was claimed some promissory notes were held in another State, was spoken to about them by a person who had been written to on the subject, who was asked by the alleged debtor if he had the notes, and he said he had not. The debtor then said there were no notes against him; that he paid his notes; that if the agent had any notes against him, or anybody, he would pay them. The agent then said: "I will send for the notes." The debtor answered, "You can; if you produce any notes against me I will pay them." In another conversation, the debtor, upon being shown the notes, acknowledged he had executed them; that they had not been paid, and were still due, and when asked what he would do about them, started away and said he could not be detained then: *Held*,

that these conversations, taken together or separately, were insufficient to show a new promise, so as to take the case out of the statute of limitations.

6. The new promise, to be available, must be of such a character as clearly to show a recognition of the debt, and an intention to pay it, thus waiving the protection of the statute; but where the entire language of the debtor rebuts the presumption of an intention to pay, the bar of the statute is not lost.

7. A promise by a person to pay all the notes that could be produced against him, accompanied by an averment that he owed none, and none could be produced, does not amount to a promise to pay any particular note, or a recognition of its validity; and the promise or acknowledgment, to be binding, must have special reference to the debt in controversy.

8. Moreover, in this case, the agency of the person with whom the debtor had the conversation, did not clearly appear, and if he was then a stranger to the notes, it was immaterial what the debtor said to him; it could not amount to a binding promise.

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

The opinion states the case.

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

Mr. MELVILLE W. FULLER and Mr. S. K. DOW, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit, brought September 1, 1866, upon two promissory notes, bearing date February 19, 1835, and falling due in two and three years from date. The defendant pleaded, first, the general issue; second, that he did not promise within sixteen years before the commencement of the suit; and third, that he did not promise within five years. The plaintiff replied to the special pleas, a new promise. Issue was joined, and the jury found a verdict for the plaintiff, upon which the court pronounced judgment, and the defendant appealed.

The appellee insists that there is no statute of limitations barring this action, and cites *Campbell* v. *Harris*, 30 Ill. 395. This question should have been raised by demurrer to the pleas. The position, however, in itself, is not tenable. In the case cited, the plea set up a limitation of the action by virtue of the act of February 10, 1849. The plea was undoubtedly bad, as held by the court, but the language of the opinion is too broad if it is to be construed as meaning that no promissory note given out of this State, and maturing prior to the act of February, 1849, and since the act of 1827, of which the law of 1845 was merely a re-enactment, is barred by any act of limitation in force in this State. The proviso to the 4th section of the act of November, 1849, directs that the act of 1845 and the act of February, 1849, "in all actions instituted upon causes of action arising during the period in which said laws were respectively in force, shall be the rule of limitation and adjudication," and this proviso is not affected by the act of 1851, except so far as concerns actions which accrued while the act of February, 1849, was in force, and actions accruing before the act of February, 1849, went into operation, and for the barring of which there was no previous statute. The act of 1845 referred to in the proviso to the act of November, 1849, must be construed as meaning the act of 1827, of which, as already stated, the act of 1845 in the Revised Statutes of that year was a simple re-enactment, and by that act this action of assumpsit was barred, on one of these notes, in 1842, and on the other in 1843. The bar to this action then became complete, and was not affected by any subsequent legislation. An action of debt would have been barred on these notes in 1853 and 1854, respectively, under the proviso in the act of November, 1849. Or, if the act of 1827 could be considered as repealed by the act of 1845, which it was not, then the bar to an action of debt on these notes, counting from 1845, would have been complete in 1861. As showing that the act of 1827 was not repealed by the Revised Statutes of 1845, we refer to the chapter entitled "Revised

Statutes," section 41, in which the operation of existing limitation laws is expressly saved.

The evidence of a new promise in this case, as given by the plaintiff himself, was as follows:

"I am plaintiff in this suit. Know defendant by sight. I have seen the notes in suit before. They were sent to me from William Webster, son of David Webster, of Maine, endorsed to me for collection. Two years ago last June, I think, I called on Mr. Norton and told him I received a letter from Maine, from Mr. Webster, about some claims against him for land, given to Webster & Burnham. He then asked me if I had the notes, and I told him I had not. He then said to me there were no notes against him; that he paid his notes; that if I had any notes against him, or anybody, he would pay them. I said to him: 'I will send for the notes.' He says: 'You can; if you produce any notes against me, I will pay them.' That was at his house, on the door of the stoop, a year ago last June. I sent for them and then handed them to Mr. Dow, and told him the conversation I had had with Mr. Norton about them."

This was in June. In the following August the defendant, in consequence of a note from the attorney of plaintiff, called at his office, and what occurred at that interview is thus related by one of plaintiff's witnesses:

"I saw Mr. Norton at your (Mr. Dow's) office in August, 1866. These notes were spoken of. You showed them to him; he took one note and you had the other, and you read the other one to him, and asked him if that was his signature. He said yes, it was; and you asked him if the notes had been paid, and he said they hadn't. You asked him if the notes were still due at the time. He handed it back to you and said: 'Yes, yes, yes, yes,' You asked him what he would do about them. He started to go, and he says: 'You musn't

detain me now, for the women folks are down at the door waiting for me.' My women folks, I believe he said."

This was all the evidence of a new promise.

Whether these conversations are taken together or separately, they are manifestly insufficient to show a new promise. As stated by the supreme court of Pennsylvania, in *Suler* v. *Shuler*, 10 Harris, 310, the statute of limitations is a bar, unless it has been waived by failure to plead it, or by matter *in pais*, like a new promise, and when the latter is relied upon, it must be clearly shown that the waiver has had respect to the very claim in suit. In *Bell* v. *Morrison*, 1 Pet. 351, the court held the following language:

"If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action."

In *Keener* v. *Crull*, 19 Ill. 191, this court spoke of the identification of the debt as the first condition of a new promise. On this point, see also *Burr* v. *Burr*, 26 Penn. (2 Casey) 284, and *Moore* v. *Bank of Columbia*, 6 Pet. 86.

On this whole subject a just reaction has taken place against the rulings of Lord MANSFIELD, which went so far to neutralize the beneficial purposes of the law. The modern doctrine as laid down by this court in *Parsons* v. *N. Ills. Coal and Iron Co.* 38 Ill. 433, is, that there must be either an express promise, or a conditional promise, with performance of the condition, or such an unconditional admission of the justice of the debt as fairly to imply an intention and promise to pay it. The promise or acknowledgment must, it is plain, have special reference to the debt in controversy. It would be a contradiction to say that a promise by a person to pay all notes that could be produced against him, accompanied by an

averment that he owed none, and none could be produced, amounted to a promise to pay any particular note, or a recognition of its validity. So far from being a promise to pay any particular note, or a recognition of its validity, it is the very reverse. It is, as to any particular debt, a refusal to promise and a denial of liability. It is the same as saying, in reference to a particular debt: "I would pay it if it were just, but it is not just, and I will not pay it." It would be difficult to hold this to be either a promise or an acknowledgment.

This was the substance of the first conversation in the present case. The defendant said he would pay any notes that plaintiff would produce against him, but at the same time said there were none against him. In this language there is certainly neither an express nor conditional promise to pay the debt that plaintiff had mentioned, nor an acknowledgment that it was due. On the contrary, the defendant denied its existence. In the case of *Goodwin* v. *Buzzell*, 35 Vt. 9, the alleged debtor denied the justice of the debt, but said to the plaintiff's attorney: "If Goodwin will swear to that account I will pay it." And a few days later: "I do not think the account is just, but if it is just I will pay it." The court held, this language, so far from taking the case out of the statute, rebutted all intention of promising. In *Moore* v. *Stevens*, 33 Vt. 308, the defendant admitted the account was just when it accrued, but claimed he had paid it, and at the same time promised payment if he did not prove he had paid it. He made no proof of this kind, but the court held this was not such a conditional promise as would take the case out of the statute, as it was accompanied with a denial of liability. The case at bar is similar in principle. The language of the defendant can not be construed as a conditional promise to pay, because, by denying the existence of the debt, he repudiated any idea or intention of payment. When, after denying the existence of any notes against him, he said: "If you produce any, I will pay them," he intended rather to strengthen

the force of his denial, and express the strength of his conviction that he had no notes outstanding, than to promise payment of a debt whose existence he denied. The promise, to be available, must be of such a character as clearly to show a recognition of the debt, and an intention to pay it, thus waiving the protection of the statute. A promise, for example, to pay as soon as the debtor has made a specified sum of money, or when a specified event has happened, are promises which recognize the existence of the debt, and show an intention to pay on the happening of a condition, and when such condition has occurred, the debt is recoverable. We understand the true rule to be, that where the entire language of the debtor rebuts the presumption of an intention to pay, the bar of the statute is not lost. 1 Smith's L. Cases, 869, Notes to *Whitcomb* v. *Whiting*.

We infer, moreover, from the evidence, that at the time of the first conversation the plaintiff had merely received a letter of inquiry in regard to the defendant, and his liability on the notes, and had not then been employed to collect them, as he says they had not then been sent to him. His agency at that time is not made clearly to appear, and if he was then a stranger to the notes, it was immaterial what the defendant may have said to him, under the ruling in *Keener* v. *Crull*, 19 Ill. 191.

The second conversation was of little import. The defendant, in answer to a question whether the notes were due, answered yes, and when asked what he was going to do about it, said he must not be detained then. This interview, like the other, rebuts all idea of a promise or intention to pay, and the more clearly, if taken in connection with the first conversation when the existence of the notes was denied. As was said by this court in *Ayers* v. *Richards*, 12 Ill. 148, a promise can not be implied from an admission that a debt is due, if any thing is said or done at the time rebutting the presumption of a promise to pay.

We remark, in conclusion, that these notes were given more than thirty years before the commencement of this suit. The defendant, for twenty years, as appears from the evidence, has been a resident of Chicago, and has often returned to the State of Maine, where these notes were given, yet no suit has been brought, until the institution of the present. The evidence upon which the validity of the notes depends, has doubtless gone with the dead, or faded out of the memory of the living. With all these presumptions against them, the evidence must be very clear and satisfactory to overcome the bar of the statute. So far from being so, we regard it as absolutely rebutting the idea of an intentional promise. The verdict should have been set aside.

In the view we have taken of the case, it is unnecessary to discuss the instructions. So far as they conflict with this view, they can be modified in the event of another trial.

Judgment reversed.

HENRY B. CHILDS

v.

FREDERICK J. FISCHER.

1. CONTRACTS—*construction of a contract payable in negotiable securities.* An instrument was given as follows: "Value received, in seven-thirty United States bonds, to the amount of $2400, with interest coupons due the 15th of February next, and the bonds due or convertible into five-twenty bonds on the 15th of August next, we jointly and severally promise to pay Frederick J. Fischer or order $2400 in United States bonds, or the equal value of the above described bonds at maturity, with the interest accrued on the same to this date. To be paid in five-twenty or ten-forty bonds or money, at the election of said Fischer, one year from date with interest at the rate of ten per cent per annum." Under this contract, Fischer should make his election within the year, if he desired to receive five-twenty or ten-forty bonds,—he could not elect after the note matured. Failing to

make such election, the maker could elect whether he would pay in United States bonds, and the amount to be paid, in that event, would be the value of $2400, of seven-thirty bonds, with the premium, and all interest which had accrued on them at the date of the contract, with ten per cent interest.

2. EVIDENCE—*under the common counts.* Such an instrument is admissible in evidence under the common counts, as it is either a promissory note or a contract fully executed by the party to whom the promise is made, and nothing left to be done by the maker but to pay the money.

3. CONSIDERATION—*whether necessary to be proven.* It is not necessary to prove the consideration of such an instrument, as it states upon its face what the consideration was. Nor does it matter that the consideration was bonds and not money.

4. PROOF OF EXECUTION *of instruments—whether necessary.* When an instrument is offered in evidence under the common counts in assumpsit, our statute has not dispensed with the necessity of proving its execution; but where a declaration contained a special count and the common counts, and the instrument was not admissible under the former, by reason of a variance, and was offered under the common counts, notice having been given the defendant that it would be offered under all the counts and no other claim would be asserted under the declaration, it was *held*, such notice took the case out of the rule, and obviated the necessity of proving the execution of the instrument.

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

The opinion states the case.

Messrs. VALLETTE & BEAVER, for the appellant.

Messrs. NISSEN & BARNUM, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This is an action of assumpsit. The declaration contains four special counts upon the following instrument:

"$2400. Value received, in seven-thirty United States Bonds, to the amount of twenty-four hundred dollars, with interest coupons due the 15th of February next, and the

bonds due or convertible into five-twenty bonds on the 15th of August next, we jointly and severally promise to pay Frederick J. Fischer or order twenty-four hundred dollars in United States bonds or the equal value of the above described bonds at maturity with the interest accrued on the same to this date. To be paid in five-twenty or ten-forty bonds or money at the election of said Frederick J. Fischer, one year from date with interest at the rate of ten per cent per annum.

"HENRY C. CHILDS,
"J. C. WHEATON,
"ERASTUS GARY.

"WHEATON, October 24, 1866."
[STAMP.]

And four common counts:

For money lent, &c.; for money paid, laid out and expended, &c.; for money had and received, &c.; for money due for interest, &c.

Upon the trial, the plaintiff offered the instrument in evidence under the special counts, when it was rejected by the court.

Plaintiff then offered it under the common counts, when it was admitted, without proof of execution, and upon proof of the value of seven-thirty bonds of the United States, on the fifteenth of August, 1867, the court found for the plaintiff the value of $2400 of seven-thirty United States bonds on that day.

The objection is not, that the instrument sued upon is not accurately set out in the declaration, but that its legal effect is not what appellee averred it to be. He, by his declaration, claims that he was first to receive the value of seven-thirty bonds at maturity, with the accrued interest to that time, and ten per cent on that sum from the time the instrument was made, in five-twenty bonds, and appellant having failed to discharge the debt in such bonds, he was entitled to recover the value of such bonds at the maturity of the note. Appellant,

in terms, promised to pay $2400 in United States bonds, or the equal value of the above described bonds at maturity, with the interest accrued on the same to the date of the note. Had the instrument stopped here, then it would have been clear, that appellant would have had the right under the agreement, to have paid, at his option, either the value of $2400, in any description of United States bonds or the market value of $2400 of United States bonds bearing 7.3 per cent interest, with interest that was due upon the seven-thirty bonds which appellee let appellant have when the note was executed.

But the note contains a further provision which is, that it is to be paid in five-twenty bonds or ten-forty bonds, or in money, at the option of appellee, and with ten per cent interest per annum. It was the privilege and the duty of appellee to have made his election within the year, if he desired to receive five-twenty or ten-forty bonds. He had no right to make his election after the note matured. Having failed to do so, then appellant, could at the end of the time have elected whether he would pay in United States bonds as he had promised in the first clause of his note. But having failed to so elect, what then under his promise was he bound to do? Appellee having failed to elect whether he would receive five-twenty or ten-forty bonds, under the latter clause inserted to give him that right, appellant was bound to pay the value of twenty four hundred dollars of seven-thirty bonds, with the premium, and all interest which had accrued on the same, at the date of the contract, with ten per cent interest. *Townsend* v. *Wells*, 3 Day, 331. This seems to be the only reasonable construction this instrument will bear. It hence results that there was a variance between the note and the special counts of the declaration, and it was therefore properly rejected. With the construction given by appellee in those counts the note is essentially variant. Failing to elect to receive five-twenty bonds, appellee was not, as he claimed in his declaration, entitled to recover the premium on that class of bonds.

Was the note, then, properly admissible under the common counts? The note recites, or acknowledges, that it was for value received in seven-thirty bonds, and falls within the case of *Lane* v. *Adams*, 19 Ill. 169, if it can be regarded as a promissory note, or an executed agreement. In that case it was said that where a contract has been fully executed on the part of the plaintiff, and nothing remains under it but to pay the money, as a duty growing out of the contract, and devolving upon the defendant, the plaintiff need not declare specially, but may recover in *indebitatus* assumpsit. This rule has been frequently recognized by this court, and is regarded as the settled law. It follows that this instrument was properly admitted, as it is manifest that it was either a promissory note, or a contract fully executed by appellee, and appellant had nothing to do under the agreement but to pay the money.

It is, however, urged that to be admissible, a consideration should have been proved, if it was not a promissory note. There can be no force in this objection, because the instrument itself states that value had been received by the maker, and states that it was in United States bonds. But it is urged that bonds are not money, and that the instrument itself disproves that it was given for money lent, money had and received, for money paid, laid out and expended, or for money due on a settlement of accounts. In the case of *Lane* v. *Adams*, it was proved by the plaintiff himself, that the note was given for the purchase of land, and yet, it was held to have been properly admissible under the common money counts. That case must therefore govern this.

It is urged, that this instrument could not be read in evidence under the common counts until its execution was proved. Such was the rule announced in *Peake* v. *The Wabash R. R. Co.* 18 Ill. 88. It is, however, insisted, by appellee, that as notice was given to appellant, that the note would alone be read in evidence, this case does not fall within that and is not governed by it. No such notice was given in that case, and between the two cases there is that distinction.

Appellant then was fully apprised by the endorsement on the declaration, that the note would be offered under all the counts, as well the common as the special. And the object of requiring the plaintiff to file a copy of the instrument sued upon is, to give him notice of the character of the claim upon which he is sued, that he may prepare for his defense. In this case appellant had the notice by a copy of the note attached to the declaration and he was notified that no other claim could be asserted under that declaration, and had the opportunity offered him to deny the execution of the note or to make any other defense he might choose. Had this notice not been given, then the presumption would be, that appellant would not know but appellee would have offered other evidence, and could not have known what he had to defend, and then the case of *Peake* v. *The Wabash R. R. Co. supra*, would have applied. We are therefore of the opinion that there was no error in admitting the note under the common counts. The judgment of the court below must be affirmed.

Judgment affirmed.

CHARLES O. BOYNTON

v.

WILLIAM PHELPS *et al.*

1. RELEASE OF SURETY—*by acts between the principal debtor and the creditor.* If the principal debtor does any act, or makes any agreement, for a valuable consideration, without the consent of the surety, express or implied, and which tends to his injury, or which delays or suspends the right to coerce payment, to the prejudice of the surety, or which shall put the surety in a worse condition, or increase his risk, or impair the ultimate liability over of the principal to him, the surety will be discharged.

2. SAME—*dismissal of a bill for an injunction by the complainant.* A judgment debtor obtained an injunction, restraining the collection of the

judgment, and executed the usual injunction bond, with sureties. Pending the suit, the complainant, without the consent of his sureties, agreed with the owner of the judgment enjoined, a person to whom it had been assigned, that a decree might be entered such as should be deemed necessary to protect the rights of the owner of the judgment, and enable him to collect it, together with interest and costs; but it was stipulated that all claim for damages in consequence of the issuing of the injunction should be waived: *Held*, there being no fraud or collusion shown as between the complainant and the assignee of the judgment, this agreement did not operate to discharge the sureties on the injunction bond.

3. SAME—*where the creditor omits to avail of a levy on personal property.* An execution issued upon a judgment was levied upon personal property sufficient to satisfy the judgment, and a forthcoming bond was given to the officer. Afterwards, the judgment debtor obtained an injunction restraining the collection of the judgment, giving the usual injunction bond. Pending the suit for injunction, the judgment debtor, by stipulation with the owner of the judgment, dismissed the bill on condition no damages should be allowed: *Held*, that the judgment creditor could elect, either to sue upon the injunction bond, or to obtain satisfaction under the levy of his execution, and in choosing the former remedy omitting to avail of the levy upon the personal property, he would not release the sureties in the injunction bond.

4. WITNESS—*competency, under act of* 1867. Where a suit is brought in the name of one person for the use of another, the latter is a "party" to the suit, within the meaning of the second section of the act of 1867, concerning the competency of witnesses, and if such beneficial party be dead at the time of the trial, the opposite party will not be a competent witness to testify on his own behalf, in respect to acts and declarations made by such deceased party in his life time.

5. ADMISSIONS OF RECORD—*obviate the necessity of proof.* Whatever is admitted on the record of a cause need not be proved; so where a plea admits the interest of a beneficial plaintiff in the subject matter of the suit, such interest need not be proved, in the event it becomes necessary that the fact should appear.

6. VERDICT—*put in form by the court.* In an action of debt on a penal bond, it was stipulated the jury might sign and seal their verdict, and leave it with the clerk, and if it should not be in proper form, the court might put it in form without the presence of the jury. The verdict, on being opened, was found to read thus: "We, the jury, find the issues joined for the plaintiffs, and assess the damages at $2408.14." The court directed it to be put in this form: "We, the jury, find the issues in favor of the plaintiffs, and find the debt $2700, and the damages $2408.14:" *Held*, there was no error in the action of the court.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

The opinion states the case.

Mr. R. L. DIVINE, for the appellant.

Mr. A. B. COON and Mr. CHARLES KELLUM, for the appellees.

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

This was an action of debt, brought, in 1858, to the DeKalb circuit court by William Phelps, Albert G. Robb and John H. Ball, for the use of George L. Wood, against Charles O. Boynton, impleaded with Hiram E. Whitney, and by change of venue taken, in 1868, to the circuit court of Kane county. By the death of George L. Wood, the names of his administrator, Lester P. Wood, and his administratrix, Margaret Wood, were inserted in the record.

The action was brought on an injunction bond, in the usual form, executed by Hiram E. Whitney and Charles O. Boynton and George Walrod, the latter as sureties, to the above named plaintiffs.

The issues were tried by a jury, and after instructions by the court, returned a verdict for the plaintiff for the debt in the declaration mentioned, being twenty-seven hundred dollars, and assessed the damages at twenty-four hundred and eight dollars and fourteen cents, for which judgment was rendered in proper form.

To reverse this judgment, the defendant appeals to this court, assigning several errors, which may be properly considered under the point he has made and elaborately argued, and that is, that the stipulation of the complainant, Whitney, in the bill for an injunction, to dismiss the bill, without the knowledge or consent of his surety in the injunction bond, operated as a release of the surety.

It is hardly worth while to consume time in discussing any other proposition, as the whole case hangs upon that.

Appellant has labored this point, and presented in support of his views, first, a printed brief of sixteen pages, filed October 18, 1869; a written argument, accompanied by a manuscript opinion of the supreme court of Michigan in an attachment case, filed November 3, and a written argument in conclusion, filed November 26, 1869, all of which we have read, and we have given them all the consideration the question discussed demands.

The case has been twice before this court for consideration. On the first occasion, the judgment was reversed for error in sustaining a demurrer to certain pleas alleging fraud in procuring the dismissal of the injunction suit; the other, on account of a variance between the record described in the declaration and the one given in evidence.

To understand the case, it is only necessary to state a few leading facts. On the 29th of October, 1855, one Albert G. Robb recovered in the Cook circuit court two judgments against Hiram E. Whitney. On the same day, executions issued to the sheriff of DeKalb county, who was William Phelps, who proceeded to levy the same, and did levy them, upon personal property of Whitney sufficient to satisfy the executions. On the 9th of February, 1856, Whitney filed his bill of complaint in the Cook circuit court, making Robb, the execution plaintiff, one John H. Ball and sheriff Phelps the defendants, praying to restrain them from enforcing the collection of the judgments. An injunction was granted, upon the execution of a bond by Whitney, with appellant, Boynton, and one George Walrod as sureties, in the penal sum of twenty-seven hundred dollars, conditioned as the law required.

At the special June term, 1857, of the Cook circuit court, the bill was dismissed and the injunction dissolved, whereupon this action was brought upon the bond, in the DeKalb circuit court, in 1858. In the meantime, the judgment, had been

assigned to George L. Wood, and the suit was brought for his use, and so alleged in the declaration.

The dismissal of the injunction bill was in accordance with this stipulation:

"It is hereby stipulated and agreed by and between Hiram E. Whitney, complainant in the above entitled suit, and George L. Wood, the assignee of the two judgments mentioned in the bill of complaint filed in this cause, that the said defendants shall be at liberty to have a decree entered against the complainant in any form which may be deemed necessary to protect the rights of the said assignee of said judgments, and that the attorney or counsel of said George L. Wood shall have the right to the entry of any order in said suit which may be necessary to carry out the decree and collect the judgments before referred to, with interest and costs to be taxed. It is agreed on the part of said Wood that all claim for damages, in consequence of the issuing of the injunction on the part of the said defendant, or himself, shall be waived. It is further agreed and stipulated by and between the parties that this stipulation may be filed with the clerk of the court, and the decree and orders entered at any time the said George L. Wood, his attorney or counsel, may elect to do so."

Appellant contends this stipulation, entered into without his consent, was a material alteration of the contract, and released him. Various cases are referred to on this point, and an elaborate effort made to bring this case within their range.

We have examined all the cases to which reference has been made by appellant, and draw from them this conclusion, that if the principal debtor does any act, or makes any agreement, for a valuable consideration, without the consent of the surety, express or implied, and which tends to his injury, or which delays or suspends the right to coerce payment, to the prejudice of the surety, or which shall put the surety in a worse condition, or increase his risk, or impair the ultimate liability

over of the principal to him, the surety would be discharged. All the cases cited by appellant include some one or more of these, or of cognate, elements.

Appellant, by his undertaking as surety, put himself in the power of his principal, so far as the prosecution of the bill was concerned. He knew perfectly well that the complainant had power, at any time, in his discretion, to dismiss his bill. He knew the court could dismiss it for reasons shown, and he took these risks.

This court said in this case, "no matter from what motive the complainant in the injunction suit may have dismissed it, so as it was not brought about by improper inducements by the defendants in that suit, the sureties could have no cause to complain. The sureties took the risk that the complainant had good cause for the injunction, and that he would conduct it in good faith, but did not undertake that the other parties would not corrupt and bribe him to dismiss a good cause of complaint." 22 Ill. 527.

These are the views this court now entertains upon this point. In the absence of proof of fraudulent combination and conspiracy of Whitney, the principal, and the defendants in the bill, or any of them, the stipulation to dismiss the bill on the condition no damages should be allowed, worked no injury to appellant. It did not, in any respect which we can see, extend his liability, it did not increase his risk, it did not put him in a worse condition, or impair any ultimate liability over to him of the principal, and tended, in no degree, to the injury of the surety.

The manuscript case from Michigan, on which appellant so much relies, has features quite distinguishable from this. There, the writ of attachment was issued against three persons, and levied on a large amount of personal property in the hands of one Orton, and to prevent its removal, Orton caused to be executed and delivered to the sheriff a bond, with the condition, if the obligors should well and truly pay any judgment which might be recovered in the attachment suit within

sixty days after the judgment should be recovered, the obligation should be void. The defendants were the makers of the bond, and the plaintiff the assignee.

On the trial of the attachment suit, the plaintiff, by permission of the court, under one of its rules, discontinued the action as to two of the defendants, and proceeded against one only, recovering a judgment against him of four thousand six hundred and ninety-two dollars, besides costs.

The breach was alleged to consist in the non-payment of this judgment, recovered against one, only, of the parties. The condition of the bond was, we infer, that the obligors would pay such judgment as should be rendered against the three parties to the suit. By discontinuing the suit as to two, and taking judgment against one, only, it became a contract wholly different from the one into which defendant entered. The court say, the bond, when executed, must be considered as tacitly referring to the suit as then constituted in respect to parties, and not as it should, possibly, be thereafter constituted at the instance of the plaintiff, to avoid defeat. The sureties enter into the contract, knowing the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ, and the ability of the latter, in case of defeat, to respond to the plaintiff, or the sureties themselves, if called on.

The ground of this decision is, the increased risk to which the obligors would be subjected, for the court say, in conclusion: "It would also have the effect to compel the sureties to look for indemnity to such defendant, or defendants, as should be left in the case at judgment, instead of the whole number of defendants named in the writ at the giving of the bond, and it might well happen that, in the responsibility of the latter, the sureties would know themselves to be safe, while in that of the former, they would know themselves to be without remedy." This decision was upon a statute of Michigan, of the peculiar provisions of which we have no information, but so far as it asserts a principle, we fully accord

with it, as entirely compatible with the proposition we started on.

Should the law be, as insisted on by appellant, then no appeal from a justice of the peace to a circuit court, or from that court, or any other, to this court, could be dismissed by the appellant without releasing the surety in the appeal bond. The law has never been understood as having such an effect.

We are free to admit, if an appeal, or other proceeding, in which sureties have been required and given, shall be dismissed by the party giving the security, collusively, and for the fraudulent purpose of involving the surety, the party claiming the benefit of the security, if involved in the fraud, should be compelled to forfeit such benefit, but there is no proof of that in this case.

Another point, quite subordinate to the one we have discussed, made by appellant is, that he was discharged from his liability on this bond by the failure and refusal of appellees to make available for the payment of the debt, the security obtained by the levy of the executions on Whitney's property, it being sufficient to satisfy the judgment.

When the facts are considered, the principle of law here invoked will be seen to have no application.

The bond in question was executed after the levy, and after the forthcoming bond was delivered to the officer. The writ of injunction obtained by means of this bond in suit, arrested all further proceedings under the levy. On the dissolution of the injunction, what was the position of the plaintiffs in the execution? They had, or the sheriff for them, a forthcoming bond; they had the injunction bond—if the goods levied on were still *in esse* they had a right to a writ of *venditioni exponas*, or to have a sale by the sheriff without such writ. They, then, on the dissolution, had a choice of remedies, and has it ever been understood a court of law could compel them to elect the remedy? It might be, on a proper case made in equity, a party would be compelled to elect, but no effort in that direction was made by the appellant. He might, perhaps, after

satisfying the condition of the bond, have applied to a court of chancery to be subrogated to the rights of the plaintiffs in the writ of execution, and thereby received the benefits of the levy. The appellees had a clear right of election as to the course most advisable to pursue to obtain satisfaction of their judgment, and we can not say, they violated any recognized principle of law in choosing to proceed on the injunction bond.

In support of appellant's views on this point, he has referred to the case of *Rogers* v. *Trustees of Schools*, 46 Ill. 428.

That case is wholly unlike this. In that, the holder of a note, with personal security given at the time of its execution, received other security on real estate, and destroyed it without the consent of the security; it was held, such destruction operated as a release of the personal sureties.

The other cases to which reference is made, will be found, on examination, to have no greater bearing on this point than the case from 46 Ill. *supra.*

Another point made by appellant is, that Whitney was not allowed to testify in the cause, being called by the defendant for such purpose.

This right is claimed by appellant as one conferred by the act of 1867. It hangs upon the meaning to be given to the term "party," as used in the act.

Keeping in view the purposes of this act, we do not think the term "party" should have that restricted and technical meaning on which appellant insists. It seems to us the design of the legislature was to embrace within it a party who might appear, by the record, to have an interest in the subject matter of the suit. A nominal plaintiff is not, as is well understood, always the real party in interest. Wood, the *cestui que use* in this case, or *usee*, as he is called by appellant, was not in the position of a surviving partner, and, therefore, the citations on that head have no application. He was the only party having any interest in this suit, and was so admitted on the record by appellant in his seventh and eighth pleas. He was dead

when the proposition to make a witness of Whitney, and of the appellant, Boynton, was made to the court.

The second section of the act of 1867 clearly contemplates that the parties to a suit, when one of them is offered as a witness against the other, shall occupy equal ground; that both shall be present in the flesh, or have the power to be present. If it were not so, the greatest injustice would be the result. A swift and willing living witness would have the whole case in his own power, and a door to perjury would be opened, so wide and so inviting as to require great moral firmness to decline an entrance into it. It would be a temptation very many would not be able to resist.

It may be admitted, there was no legal necessity for the statement in the declaration that Wood was the beneficial party, but it was so stated, and being by the record such a party, and as admitted by the pleas, and he dead, the opposite party could not be a witness against him, or Whitney, by whose testimony the dead man's acts and declarations were sought to be brought up against him, to condemn him. His administrator would be in no condition to avail of any explanations that the deceased, if living, might have made.

That a party for whose use a suit is brought is the real party to the action, has been often held by this court. *Dazey* v. *Mills, for the use of Pinkham*, 5 Gilm. 67. These considerations dispose of all the objections made to the refusal of the court to permit Whitney to be a witness for any purpose against the deceased Wood, or to his prejudice.

As to the objection of absence of proof to establish Wood's interest in this bond, that stands admitted on the record by the eighth plea of appellant, and it is a rule, whatever is admitted on the record need not be proved, and the additional plea of defendant, first filed on the last remand of this cause, admits the same, and avers that Wood had the charge and control of the chancery suit, and that it was with him Whitney entered into the stipulation to dismiss the injunction bill, and in it he is named as the assignee of the judgments.

Another point made by appellant is, that the court excluded evidence of Whitney's declaration in regard to the dismissal of the chancery suit, the proof being before the court establishing a *prima facie* case of conspiracy between him and the deceased Wood, as the representative of the defendants in the chancery suit, who were the obligors in the bond sued on.

We look in vain into the record to discover marks of any conspiracy, or fraudulent agreement, between Whitney and Wood, resulting in the stipulation entered into between them. We perceive in the stipulation itself no indication of one, but do see in it a legal consideration therefor, namely: a release of all damages for suing out the writ. If Whitney acted in this in bad faith toward his sureties, it was their misfortune to have trusted their interests with one so unworthy. But nothing was shown to implicate him or Wood in any conspiracy, or fraudulent combination, to the prejudice of the sureties. The result of the injunction suit was uncertain, and it was by no means sure the equities alleged in the injunction bill could have passed the ordeal of severe judicial criticism, and deliberate examination, after a hearing from the other side. By affidavits, or by answers, the defendants might have demolished the structure the complainants had erected, and thereby mulcted him and his sureties in heavy damages.

But if a conspiracy had been established by proof *aliunde*, then there could be no doubt the acts and declarations of any one of the conspirators, in furtherance of the unlawful object, could be given in evidence in a proper case. In such a case as this, the law will not permit one of the actors to raise the cry of a conspiracy, got up, perhaps, by himself, and charge another who is dead, and can not speak to it, to have been a party to it. What we have here said, disposes of all the questions necessary to be considered, as arising on the pleadings and instructions.

Something has been said about the change by the court in the verdict of the jury.

There was the usual stipulation, as shown by the record, that the jury might sign and seal their verdict, and leave it with the clerk, and if it should not be in proper form, the court might put it in form without the presence of the jury. The verdict was sealed, and on opening it, it was found to read in this way: "We, the jury, find the issues joined for the plaintiffs, and assess the damages at $2408.14."

The form which it was made to assume by the court was: "We, the jury, find the issues in favor of the plaintiffs, and find the debt $2700, and the damages $2408.14."

The action was debt for the penalty of a bond. This proved itself. The finding of the jury could add no additional force to it. They were only to find the damages, which would be the amount of the judgments which had been enjoined, and the interest upon them, which made up the damages. We see no error in the action of the court in this particular.

An objection is also made, that the court permitted the testimony of Hansha and Champlin to go to the jury, for the purpose of showing that Walrod and J. H. Boynton had received from Whitney indemnity, in the shape of some goods retained by them, against this bond, but J. H. Boynton, and the defendant, C. O. Boynton, both testified that they had not received, in any shape, any indemnity whatever, and what Hansha and Champlin said could not, therefore, have had any influence upon the verdict. If we thought it might, possibly, have had some influence, we would not reverse the judgment for admitting the testimony, satisfied, as we are from the whole record, that substantial justice has been done.

The judgment of the circuit court is affirmed.

Judgment affirmed.

FREDERICK WILHELMI
v.
FREDERICK HAFFNER.

1. GARNISHMENT. Where a garnishee in an attachment suit answered that he had given the defendant in the attachment his promissory note, had last seen it in his possession prior to the service of the garnishee process, but had since been told by him that he had sold it before the service, and the note had since been presented for payment by another party claiming to own it, it was held *prima facie* that he would not be liable as garnishee.

2. BURDEN OF PROOF. The garnishee in such case could not be required to prove the validity of the assignment of the note, or to swear to it, as it was not a fact within his knowledge. If the transfer of the note was not in good faith it would devolve upon the plaintiff in attachment to show that fact by proper proof. Plaintiff could make an issue on that question and the garnishee could notify the holder of the note to appear and defend his title.

WRIT OF ERROR to the Circuit Court of LaSalle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This is a case where George Gleim brought an attachment suit in the court below against Frederick Wilhelmi, and Frederick Haffner was served with process as garnishee. The facts sufficiently appear in the opinion.

Mr. D. P. JONES, for the plaintiff in error.

Messrs. BULL & FOLLETT, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

In this case, the answer of the garnishee was not excepted to for insufficiency, or in any way controverted, and he was properly discharged. It states all the facts of which he would

probably be cognizant, which were, simply, that he had given the defendant in the attachment a note; had last seen it in his possession before the garnishee process was served; had been told by him he had sold it before the service, and it had been since presented to him for payment by one Hoage, who claimed to own it. He could not be required to prove the validity of the assignment or to swear to it, as it was not a fact within his knowledge, or with which he had any concern. He was required to state whether he owed the defendant in the attachment. He stated the facts within his knowledge from which the presumption would be, he did not owe him. If the transfer of the note was not in good faith, it was for the plaintiff to show that fact by proper proof. The plaintiff could have made up an issue upon this question if he had desired, and the garnishee could have notified the holder to appear and defend his title.

Judgment affirmed.

SAMUEL L. HINKLEY *et al.*

v.

COGGSWELL K. GREENE.

1. LIMITATION ACT OF 1839—*what constitutes color of title.* A deed of conveyance, which purports to convey title, executed by a purchaser at a sale under a judgment of foreclosure of a mortgage upon the premises, will constitute color of title in the grantee, notwithstanding the judgment of foreclosure be void.

2. SAME—*in what character of proceedings the statute may be invoked.* The bar of the statute may be invoked as fully in a suit in equity as in an action at law. So in a suit in chancery by a junior mortgagee against the grantee of the purchaser under foreclosure of the prior mortgage, to redeem from the sale under the prior mortgage, and to foreclose the junior mortgage, the defendant may rely upon the statute to prevent the granting of the relief sought.

Syllabus. Opinion of the Court.

3. SAME—*payment of taxes by one tenant in common under color of title in himself.* Under the act of 1847, in respect to joint rights and obligations, one tenant in common of land may pay the taxes upon his own interest, without reference to his co-tenant's rights in the premises.

4. And where tenants in common jointly mortgage their land, and upon foreclosure and sale, one of the tenants in common becomes the grantee of the purchaser under the foreclosure, by deed purporting to convey the whole tract, the payment of taxes by such grantee, under claim and color of title thus acquired, the land being vacant and unoccupied, will amount to an ouster of his co-tenant, and will enure to his own benefit under his color of title, under the second section of the act of 1839.

5. SAME—*who may become a purchaser.* The fact that the grantee of the purchaser under the foreclosure was a mortgagor, did not place him in such a position as forbade him acquiring the title in that manner; his purchase would not operate as a redemption, but he could rely upon his deed as color of title, which might ripen into a complete bar under the act of 1839, and afford protection to the holder even as against his former co-tenant, or the grantees or mortgagees of the latter.

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

This was a suit in chancery, instituted in the court below by Coggswell K. Greene, against the unknown heirs of Henry Moore, deceased, and various others. The facts are fully presented in the opinion of the court.

Mr. J. A. CRAIN, for the appellants.

Messrs. KNOWLTON & JAMIESON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that on the 24th of June, 1835, Wm. B. Ogden conveyed to Samuel L. Hinkley and Henry Moore, lots 31 and 32, in Kinzie's addition to Chicago. The sale was for $5000, one-fourth was paid in hand, and the balance to be paid in one and two years, in equal installments, with ten per cent interest.

The cash payment was made by Hinkley, and Moore gave to him his note for one-half, but it was never paid. To secure the deferred payments, Hinkley and Moore executed a mortgage to Ogden on the premises, which was duly recorded.

On the 27th of November following, Ogden sold and assigned the bond and mortgage given by Hinkley and Moore, to secure the deferred payments, to Charles Butler, of the city of New York. This assignment was not on the bond and mortgage, but on a separate paper. A similar assignment of the same instruments was made on the 25th of August, 1838, by Butler to one Samuel Hinkley. After the purchase by Hinkley and Moore, the latter, on the 3d of July, 1837, gave his bond to complainant for $4500, payable on or before the 1st of January, 1847, at Moore's option, with interest at seven per cent till paid, payable the 1st of January and July of each year. At the same time he executed a mortgage on his interest in the lots purchased of Ogden, to secure the payment of the principal and interest of the bond, which was duly recorded.

No portion of the principal or interest on the bond given by Hinkley and Moore to Ogden, and assigned, having been paid, on the 15th of January, 1839, a *scire facias* was sued out on the mortgage, in the name of Ogden, for the use of Hinkley, the assignee. The writ was issued from the Cook circuit court, returnable to the next March term, but it was returned "not found." On the 4th day of the following April an *alias scire facias* was issued, returnable at the next term of the court, and it was likewise returned "not found." A special term of the court was held on the 13th of May, 1839, when a judgment was rendered foreclosing the mortgage and ordering a sale of the lots. On the 18th of June following, a special writ of *fieri facias* was issued on the judgment and was placed in the hands of the sheriff, and he, having advertised the property, on the 30th day of that month sold it, each lot separately, and Samuel Hinkley became the purchaser, and the sheriff issued to him a certificate of purchase.

Afterwards, on the 12th day of November, 1840, the sheriff conveyed the premises to Samuel Hinkley; but the latter had previously, on the 12th of November, 1839, sold and conveyed the premises by quit-claim deed, to Samuel L. Hinkley, for $4000, which was, on the 8th of July, 1843, duly recorded. This deed contains a substantial covenant against himself, his heirs, or persons claiming under him. After Samuel L. Hinkley purchased, he paid all taxes on these lots until the spring of 1848, during which time the premises were vacant and unoccupied.

At this latter period, he took actual possession of the lots by his tenants, and he, or they, and his grantees, have continued the possession until this suit was commenced, and S. L. Hinkley, or those claiming under him, paid all taxes legally assessed on the premises from the time possession was taken.

On the 27th of November, 1858, appellee filed this bill, against the unknown heirs of Moore, Ogden, Butler, the two Hinkleys, and the unknown heirs of James B. Campbell, for the purpose of foreclosing the mortgage executed to him by Moore, on his interest in the lots. Subsequently, he filed an amended bill, and new parties were made and answers were filed. Samuel L. Hinkley set up his deed from Samuel Hinkley, as claim and color of title, and the payment of all taxes on the lots for more than seven years, while they were vacant and unoccupied, and insists upon the bar of the second section of the statute of 1839, and the payment of all taxes under the same color of title, for more than seven successive years after he took possession of the premises, and sets up and relies upon the bar of the first section of the same act. Willard, in his answer, sets up the same facts, and relies upon the statute, as a purchaser from Samuel L. Hinkley. Smith answered and required proof of the allegations of the bill.

A hearing was had on the bill, amended bill, answers, replications, exhibits and proofs, and the court granted the relief sought by the bill. The case is brought to this court on appeal, and errors are assigned, that the bill should have been

dismissed, the decree is too large, and in decreeing in favor of complainant.

There are several questions presented by this record, but the most material is, whether appellants were in a position to avail themselves of the bar of the statute and have entitled themselves to its protection. It has been held by numerous decisions of this court, that a deed which, on its face, purports to convey title, constitutes claim and color of title, and that it is not essential the party so claiming should trace title to, and connect himself with, its original source. To do so, by regular and properly executed and authenticated deeds, would constitute, in most cases, paramount, and not color of title. The deed, then, from Samuel to Samuel L. Hinkley was, under the statute, claim and color of title; and having paid all taxes after he took possession, by himself and those holding under him, a bar was created under the first section of the statute.

But it is insisted that Hinkley was not in a position to avail of the bar. It is first urged, that the foreclosure by *scire facias* against Hinkley and Moore was absolutely void, and hence the bar of the statute can not be interposed. It is also insisted, that as the last writ of *scire facias* was not returnable to the next term, the court failed to acquire jurisdiction, as no power existed in the court to issue a writ returnable to the same term, and there not having been two *nihils* to writs returnable to different terms, the judgment of foreclosure was a nullity. Admitting this to be true, still it does not necessarily follow that the statute would not become a bar in favor of a subsequent purchaser from the vendee at the sheriff's sale.

In the case of *Woodward* v. *Blanchard*, 16 Ill. 433, it was held, that an auditor's deed to a purchaser of land at a sale for taxes, although the law under which the sale was made was unconstitutional, and the sale consequently void, in the hands of the purchaser, unless chargeable with bad faith, was color of title. In the case of *Laflin* v. *Herrington*,

16 Ill. 301, it was held that title, absolutely void in its inception, when held by the grantee of the purchaser at the void sale, unless chargeable with fraud, is claim and color of title. These decisions are in point, and must govern this question. In this, as in the latter of those cases, Samuel L. Hinkley bought of the purchaser under the judgment which is claimed to be void, and we fail to find any facts in this record to charge Samuel L. Hinkley with fraud or bad faith. He purchased and paid what seems to have been a fair consideration for the property.

It is true, those cases were at law, while this is in equity. But in the case of *Chickering* v. *Failes*, 26 Ill. 507, it was held that the bar of the statute could be invoked as fully in proceedings in equity as at law; that in each forum the statute would receive the same interpretation and application, and we must, then, hold that, whether the judgment of foreclosure is void or not, Samuel L. Hinkley can not be affected by it, as he purchased of the grantee of the sheriff under that judgment.

It is next urged that the purchase by Samuel L. Hinkley from Samuel, after the foreclosure and sale, and before the redemption expired, only operated as a redemption from the sale and mortgage to Ogden; that Samuel L. Hinkley, being a mortgagor, could not purchase, but could only redeem. We are aware of no legal principle which prohibits a defendant from buying the land from the purchaser under a judgment, and taking an assignment of the certificate of purchase or a deed of conveyance. We perceive nothing fraudulent, immoral, or otherwise against the policy of the law in such a transaction, in itself. *McCagg* v. *Heacock*, 44 Ill. 476. But in this case, whatever Hinkley's duty to Ogden, or those holding under him, might have been, no moral or legal obligation to Moore required him to pay Moore's part of the debt, or to compel him to redeem Moore's half of the land, much less to protect appellee's interest in, or claim to, Moore's property.

Appellee had no claim on Hinkley. His only rights were against Moore and his property.

If any obligation arose, it was after he made the redemption, as the law usually infers that when a tenant in common purchases an outstanding title, or removes an incumbrance on the common property, it is for the benefit of the estate, and the other tenant in common may avail himself of the benefits acquired, by contributing his proportion of the cost. But this is under the limitation that he does so in a reasonable time.

But even if appellee could have treated Hinkley's purchase as a redemption, it could only be upon the condition that he refunded to Hinkley his proportion of the money he paid to prevent the purchaser from acquiring the title. Moore owed all of his share of the purchase money for the land, but of the fact that he had not advanced anything on the first payment appellee is admitted to have been uninformed, and hence he, by his mortgage, cut off Hinkley's lien on Moore's portion of the land, to have the purchase money advanced by him refunded. But appellee was notified by the record that both Hinkley and Moore had purchased of Ogden, and mortgaged the premises to pay the balance of the purchase money. He is chargeable with notice that Moore owed his portion of that amount on the lots. How, then, could he claim that the debt was Hinkley's, and he was bound to pay Moore's share, and render his part of the lots liable to appellee's mortgage? Appellee, to render his mortgage availing, should have filed his bill to foreclose, and offered to refund the sum paid by Hinkley to redeem Moore's interest in the lots, and such a bill should have been filed in a reasonable time. His claim, whatever it may have been in its inception, does not commend itself to the favorable consideration of the court after lying dormant for nineteen years. In the meantime, by the growth of the country and the city, if not by improvement, the property has greatly enhanced in value. Hinkley has held it and treated it as his own, and it would be hard and inequitable, after such a lapse of time, to compel him to lose the money

he paid for Moore's interest, and lose the land for which it was paid. What has already been said disposes of the proposition that appellants did not set up in defense, that they were *bona fide* purchasers. The facts are disclosed in their answer, from which the rights of the parties must be determined. Especially the bar of the statute rendered such a defense unnecessary, as that disposes of the question of the foreclosure or redemption by appellee.

It is urged that Samuel L. Hinkley, when he paid taxes on the whole tract, only performed a duty which the law imposed on him as a tenant in common with Moore. By the act of February 16, 1847, sec. 1 (Gross' comp. title, Joint Rights and Obligations) it is enacted that tenants in common of any real estate in this State shall be authorized to pay their respective individual shares of taxes accruing thereon, according to their interests therein. It will be perceived that, under this enactment, even if Samuel L. Hinkley had not taken possession under claim and color of title, he was in nowise, either morally, legally or equitably bound to pay on Moore's third of these lots. And this being so, nothing can be claimed from the fact that they were previously tenants in common. Had he not purchased of Samuel Hinkley, and no foreclosure had been had, and he had gone into possession as a tenant in common, it would have been otherwise, as he would then have been in the receipt of the rents of the property of the tenant in common, and would have been required to pay the taxes from that fund; but here, the lot was vacant until he had paid more than seven years.

In the case of *Geowey* v. *Urig*, 18 Ill. 238, it was held that the conveyance of a whole tract of land by one of several tenants in common holding the tract, followed by adverse possession by the purchaser, amounts to an ouster or disseizin of the co-tenants, and, if complied with, the statute will bar an action or entry by the other co-tenants. And, in principle, we can see no difference, where tenants in common jointly mortgage their property, and proceedings to foreclose are

commenced, judgment rendered, the property sold under it, and one tenant in common buys from the purchaser under the judgment, and a person who purchases from one of several tenants in common, and receives a deed purporting to convey the whole tract. In either case, the possession is adverse, the claim, as manifested by the deed, is of the entire property, and so is the payment of taxes. It will be observed that *Goewey* v. *Urig*, *supra*, places tenants thus situated on the same footing as other persons. If, however, a tenant in common did not hold claim and color of title to the whole tract, it would, no doubt, be otherwise, under the statute. In this case, Samuel L. Hinkley and his grantees have shown claim and color of title, the necessary possession and payment of taxes, to render the bar created by the first section of the act availing. The court below, therefore, erred in decreeing a foreclosure of appellee's mortgage, and the decree must be reversed and the cause remanded.

Decree reversed.

At the September term, 1870, of this court, a petition for rehearing was filed on behalf of the appellee, whereupon the following additional opinion was delivered:

PER CURIAM: We have been asked by a petition for a rehearing, to review the decision rendered at the last term in this case. We have done so, with care, and see no reason to revise the decree then rendered. It is urged, that the relation of tenants in common between Samuel L. Hinkley and Moore, or his assigns, was not terminated by the ineffectual effort at a foreclosure, and hence Greene, as Moore's mortgagee, has the right to foreclose the mortgage given by Moore. If it be conceded that the foreclosure was void, still it does not follow that the deed from the purchaser at the sheriff's sale was not claim and color of title. It was held in *Chickering* v. *Failes*, 26 Ill. 507, that an effort at a strict foreclosure of a mortgage, which was void, still amounted to claim and color of title,

unless there was fraud; that such an act manifested to the holder of the equity of redemption, and to the world, that the mortgagee recognized them as no longer having any interest in the premises. That act was hostile to their rights, and his subsequent acts were regarded in the same light.

Afterwards, in the case of *McCagg* v. *Heacock*, 43 Ill. 153, the same rule was announced. In that case, it was held that a conveyance from the mortgagor to the mortgagee of the premises showed such an intention, and, in the absence of oppression or bad faith, constituted color of title. If, in this case, the foreclosure had been regular, and the time for redemption had expired, and Samuel had sold to Samuel L. Hinkley, no one would doubt that the latter would have acquired the fee, and Moore's equity of redemption from the Ogden mortgage would have been effectually barred, and the same would have been true as to Greene, his mortgagee. If, then, a regular foreclosure, judicial sale, sheriff's deed, and a conveyance from the purchaser would have produced that result, it must follow that the effort to foreclose by judgment, sheriff's sale, and the conveyance to Samuel L. Hinkley, although irregular, had the effect of producing color of title, unless it was tainted with fraud or bad faith. The purchase from Samuel Hinkley, and payment of taxes under that deed, manifested to Moore, or those claiming under him, that Samuel L. Hinkley was claiming adversely and in hostility to them and the whole world. These acts, of themselves, were hostile, and amounted to an ouster. Under ordinary limitation laws, barring the action of ejectment, or other real action, possession is regarded as the hostile act, but under the second section of the act of 1839, claim and color of title and payment of taxes, under a deed taken by one tenant in common from a stranger, in good faith, and conveying the whole land, the co-tenant having knowledge of such adverse claim and payment, are made hostile, and where actual possession has been taken under such deed, and the requisite payment of taxes, it may be set up as a protection to such

possession, even as against the original co-tenant. And in this case we, under the circumstances, must infer that the co-tenant had such knowledge. At the common law, the possession of one tenant in common was held to be the possession of all the tenants. But in the case of *Goewey* v. *Urig*, 18 Ill. 238, it was held that the possession of one tenant in common under a deed purporting to convey the entire premises, and the requisite payment of taxes, amounted to an ouster, and created the bar of the statute against his co-tenants.

Then, if possession and payment of taxes under a deed purporting to convey title amounts to an ouster of co-tenants, under the first section, the payment of taxes under a similar deed must be held, under the second section of this act, to have the same effect. If bad faith were shown, however, it would not produce that result. It then follows that the purchase of what was supposed to be a paramount title under an irregular effort to foreclose Ogden's mortgage, and the payment of taxes thereunder, or such payment and possession, were acts of such hostility as amounted to an ouster of Moore or his assigns, and when continued for the statutory period, followed by possession, created the bar which is available to prevent a redemption. It effectually determined the tenancy in common. The relation of mortgagor and mortgagee is the same, in many respects, as that of tenants in common. In either, hostile acts must be done adverse in their nature, or they will be referred to the relation that had previously existed. But in each, one party may so act as to show that he regards the relation ended, and thenceforward his acts will be regarded as independent of and adverse to the relation.

It is urged that there was not payment of taxes for seven years after possession was taken of the property, under and in subordination to the title claimed by Samuel L. Hinkley, or his grantees. We understand the record as proving that fact; but, even if our inferences in this respect are erroneous, still there can be no question that the taxes were paid on the property for the requisite period under the deed, while the

land was vacant and unoccupied, which was followed by possession before this suit was brought; and in *McCagg* v. *Heacock*, *supra*, this was held to create a bar, and that case only followed numerous former decisions.

As we said before, Moore, or those claiming under him, have never paid or offered to pay Samuel L. Hinkley for the money he advanced to Ogden, or the money he paid to Samuel Hinkley when he purchased of him, which is claimed only amounted to a redemption of the mortgage given to Ogden. Samuel L. paid this money to Samuel Hinkley in November, 1839, and if it were conceded that it was advanced for the benefit of both tenants in common, it should have been repaid to Samuel L. in a reasonable time. And no one can say nineteen years would be such a time. This we regard as gross *laches*. Moore and his assignees seem to have stood by and done nothing, not even to have paid taxes during all of that time. It would be unjust now to permit him or them to come in after such a lapse of time and reap all the benefits of Samuel L. Hinkley's superior diligence, and not even offer to restore to him the money paid for Moore when they purchased of Ogden. Counsel mistake the scope of the decision when they suppose that *laches* is imputed to Greene, or those claiming under him, in proceeding to enforce his mortgage on Moore's interest. The *laches* consists in the failure of Moore or his assigns to refund to Samuel L. Hinkley the money he advanced to Ogden to pay for Moore's interest in the land, and the sum he paid Samuel Hinkley when he received the deed for the property. When we find Moore and his assigns have delayed such a length of time, we must conclude they abandoned all claim to the property, and regarded Samuel L. Hinkley as the owner. Moore's grantees or mortgagees can not, under the circumstances disclosed in this record, occupy any better position than he could, had he never made the mortgage to Greene, or parted with his title. On either of the grounds presented, we are

satisfied the case was properly decided at the last term of this court, and that the decree then rendered should not be disturbed. The rehearing must be refused.

Rehearing refused.

ASHER G. SKINNER
v.
CHRISTIAN ZIMMER.

In this case there was no error found in the record.

APPEAL from the Superior Court of Chicago.

Messrs. RUNYAN & AVERY, for the appellant.

Messrs. HELM & HAWES, for the appellee.

PER CURIAM: This was an appeal from the judgment of a justice of the peace, to the superior court of Chicago, where the appeal was dismissed, for want of an affidavit of merits, under the act of 1857 relating to practice in the courts of Cook county. The defendant in the judgment brings the record here, and assigns for error, that the court erred in dismissing the appeal. He has, however, filed no argument or suggestions pointing out wherein the court departed from the statute, and we perceive no ground for holding its action erroneous.

Judgment affirmed.

Syllabus. Statement of the case.

NELS NELSON *et ux.*

v.

CHARLES J. BORCHENIUS.

1. PLEADING—*slander—sufficiency of declaration upon motion in arrest of judgment.* In an action for slander, the declaration averred that the plaintiff was a trader, and that defendant falsely said of and concerning him in his trade and business as a merchant, that he was a villain, a rascal and a cheater, meaning the plaintiff was then and there a villain, a rascal and a cheater in his said business as a merchant: *Held*, that, upon a motion in arrest of judgment, the declaration was sufficient in substance.

2. SLANDER—*words not actionable per se, become actionable when spoken in reference to one in his business.* Although the words alleged to have been spoken, are not actionable *per se*, yet they are of such a character that when spoken in reference to a person in his business, are actionable, without the averment of any other extrinsic circumstance to explain them.

3. MOTIONS—*in arrest of judgment—what objections can be heard upon.* Upon a motion in arrest of judgment, objections going to the substance, only, can be heard.

4. EVIDENCE—*slander—in actions for—proof as to the sense in which the hearers understood the words—admissible.* In actions for slander, the testimony of the hearers as to the sense in which they understood the words spoken, is admissible.

5. SAME—*such testimony not conclusive upon the jury.* But such testimony is not conclusive upon the jury. It is admissible as tending to show what meaning hearers of common understanding would and did ascribe to them.

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

This was an action on the case for slander, brought in the circuit court of LaSalle county, by the appellee, Charles Borchenius, against Nels Nelson and Kate Nelson, his wife, the appellants. The averments in the declaration are sufficiently set out in the opinion. The cause was tried before the court and jury, and a verdict found for the plaintiff. A motion in arrest of judgment was made by the defendants, which the

court overruled, and rendered judgment for the plaintiff for one cent, and costs. Whereupon, the defendants appealed to this court.

Mr. B. C. COOK, for the appellants.

Mr. OLIVER C. GRAY and Mr. B. M. ARMSTRONG, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

There can be no doubt about the sufficiency of the declaration in this case, upon a motion in arrest of judgment. The allegations are, that Mrs. Nelson falsely said of and concerning the plaintiff, and of and concerning him in his trade and business as a merchant, that he was a villain, a rascal, and a cheater, meaning that the plaintiff was then and there a villain, a rascal, and a cheater, in his said business as a merchant.

The declaration had already set forth the fact that the plaintiff was a merchant, and these averments sufficiently apply the slanderous words to his business. The words in this case, though not in themselves actionable, were, nevertheless, of such a character that, if spoken as averred, concerning the plaintiff in his trade as a merchant, they were actionable, without the averment of any other extrinsic circumstance to explain them than the fact that the plaintiff was such trader or merchant. The declaration meets these requirements. It avers the plaintiff was a trader, and that the words were spoken of him in his trade. This is sufficient in substance, and it is only objections going to the substance that can be heard upon this motion.

It is further urged that the court erred in permitting the witnesses to testify that they understood the defendant to be speaking of the plaintiff in his business as a merchant. It is claimed the witnesses can only testify as to what words were

spoken, and the jury must determine the sense in which they were spoken, and to what they were designed to apply, without aid from the testimony of the witnesses as to the sense in which they understood them. Although there is much conflict in the cases, we are of opinion the weight of authority and the sounder reason are adverse to this position.

The rule laid down by POLLOCK Ch. B. in *Hawkinson* v. *Bilby*, 16 M. & W. is, "the words must be construed in the sense which hearers of common and reasonable understanding would ascribe to them." It may well be asked what better guide there is, in that inquiry, than to ascertain how they were really understood by the bystanders. It has been held, if the words are ambiguous, and the hearers understood them in an actionable sense, it is sufficient; for it is this which caused the damage; and if a foreign language is employed it must appear to have been understood by the hearers. *Fleetwood* v. *Curley*, Hob. 268. So evidence that plaintiff had been made the subject of laughter at a public meeting is admissible, for the purpose of showing how the words were understood. *Cook* v. *Mead*, 6 Bing. 409. The essence of the injury is the effect created by the slander upon the minds of the hearers, and it seems to us extraordinary that a person having used language concerning another which all his hearers understood in a slanderous sense, should be permitted to escape the legal consequences by saying he did not use the words in that sense. It was his duty to avoid the use of language which would be liable to such a construction in the minds of reasonable men who might hear him. We do not mean that their construction would be conclusive upon the jury, but it is admissible in evidence, as tending to show what meaning hearers of common understanding would and did ascribe to them. If words spoken in a foreign language, not understood by the hearers, can not be slanderous, it would seem necessarily to follow that the sense in which they are understood by the hearers is the essential inquiry. Hobart says, page 268, the slander and damage consist in the apprehension of the

hearers; and in Gilbert's Cases on Law and Equity, page 117, the rule is laid down that the words shall be taken in the sense in which the hearers understood them. This rule is so far modified that the understanding of the hearers is not conclusive upon the jury; but that they should be permitted to state what it was, we entertain no doubt. In cases of this kind, the impression made upon the minds of the hearers goes to the gist of the action, and hence, a slander in a language unknown to the bystanders is not actionable. As said by PARKE, B. in *Hawkinson* v. *Bilby*, 16 M. & W. 442, in reply to counsel who had quoted from Starkie on Slander, page 44: "The drift of Mr. Starkie's remarks is to show that the effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable; that is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them. A man must be taken to mean what he utters."

In *Woolwich* v. *Meadows*, 5 East, 463, Lord ELLENBOROUGH, in passing upon the sufficiency of the declaration, said the plaintiff on the trial would be obliged to show, not only that the defendant intended to impute a crime to the plaintiff, but that the words were so understood by the hearers. The case of *Harrison* v. *Berington*, 34 Eng. Com. Law, cited by counsel for appellant, has no bearing on this question. It was a case at *nisi prius*, in which a witness stated that he "did not remember the words at all, only the impression made on his mind," and Lord ABINGER interrupted by saying: "What were the words? This is an action of slander; you can not have the impression." No case has been cited by counsel from the English courts, and we have found none, in which it has been held that witnesses, after proving the words spoken, if they are at all ambiguous, can not be permitted to tell the jury in what sense they understood them.

In Townshend on Slander, page 471, the rule is laid down as claimed by counsel for appellant, but the author cites only American cases, and of these the larger number are directly

adverse to the doctrine announced in the text. In *Snell* v. *Snow*, 13 Metc. 281, the decision is very pointed against the admissibility of the evidence; but in the subsequent cases of *Miller* v. *Butler*, 6 Cush. 71, and *Leonard* v. *Allen*, 11 Cush. 241, this case, although not expressly overruled, is certainly not followed. The rulings in New York have excluded the evidence, as in *Van Vechten* v. *Hopkins*, 5 Johns. 211, and *Gibson* v. *Williams*, 4 Wend. 320; but the opinion in *Phillips* v. *Barber*, 7 Wend is not consistent with these cases.

On the other hand, in *Smart* v. *Blanchard*, 42 N. H. 146, the authorities are all reviewed, and the evidence is held admissible. It is also thus held in *Smith* v. *Miles*, 15 Vt. 245; in *Burton* v. *Holmes*, 16 Iowa, 252, and *Smawley* v. *Stark*, 9 Ind. 386. Greenleaf, in the 2d volume of his Evidence, sec. 417, says, from the nature of the case, witnesses must be permitted, in these cases, to state, to some extent, their opinion, conclusion and belief, leaving the grounds of it to be inquired into on a cross-examination. We are satisfied this is the true rule, and in accordance with it has been the general practice in this State, on the authority of what was said in *McKee* v. *Ingalls*, 4 Scam. 33.

Counsel for appellant object to the exclusion of a question which asked a witness his opinion as to the cause of Mrs. Nelson's anger when she uttered the words, and whether she was not talking in regard to an affair about some cologne, in regard to which there had been some testimony. The opinion of the witness as to the cause of her anger was incompetent, and the residue of the question he answered, stating that he "understood the words she used to apply to the charge made against her of emptying the cologne bottle."

We find no error in this record, either in the rulings on the evidence, or the instructions, and the judgment must be affirmed.

Judgment affirmed.

Syllabus. Brief for the plaintiff in error.

DUDLEY R. ROUNDTREE, Administrator,
v.
MARVIN BAKER, Administrator.

1. CONFLICT OF LAWS—*when the lex loci contractus governs.* Where an instrument executed in the State of Kentucky, prior to the abolition of slavery in that State, for the purchase price of a negro slave sold there, was sued upon in this State: *Held*, that, the contract being valid and enforcible in the State where it was made, will be enforced in our courts, under the law of comity, notwithstanding such a contract could not have originated here by reason of slavery being prohibited in this State.

2. SAME—*effect of the abolition of slavery after the contract was made.* The abolition of slavery in Kentucky, after the making of the contract, did not affect its validity or impair the consideration upon which it was based.

WRIT OF ERROR to the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The question presented in this case is, whether a contract executed in a State where slavery existed, for the purchase price of a negro slave, will be enforced in the courts of this State.

Mr. A. M. CRAIG, for the plaintiff in error.

It is a general rule of law, well settled, that the law of the place where the contract is made, and not where the action is brought is to govern in enforcing and expounding the contract, and in determining its validity. *Bradshaw* v. *Newman*, Breese, 94; *Stacy* v. *Baker*, 1 Scammon, 417; *Phinney* v. *Baldwin*, 16 Ill. 108; *Cox et al*, v. *The United States*, 6 Peters, 172.

This contract was made in Kentucky, and was a valid contract by the laws of Kentucky. If an action had been brought on this contract in Kentucky, the courts of that State must have sustained its validity, and enforced its execution; and this court can judicially take notice of this contract only by the

light of the laws where the contract was made. *Smith et al.* v. *Whitaker et al.* 23 Ill. 367.

The law of the remedy is no part of the contract. *Wood et al.* v. *Child et al.* 20 Ill. 209. See, also, 2 Salkeld, 666; *Hone* v. *Ammons*, 14 Ill. 29; *Commonwealth* v. *Aves*, 18 Pick. 215.

Messrs. HANNAMAN & KRETZINGER, for the defendant in error.

The recognition of comity is based on the principle of reciprocity, and reciprocity in this country must be founded on the consent of the States to the legality and justness of the subject matter of contracts, and the equal mutual benefits or rights to be yielded or enjoyed. No such relation can exist between a slave-holding and non-slave-holding State.

The contract sought to be enforced contains the terms of the sale and purchase of a negro girl. It bears the taint of slavery, and slavery is offensive to the good morals of a people.

Sir William Blackstone declares, in his Coms. v. 1, p. 423, that slavery rests on an unsound foundation, and insists that it is repugnant to reason, and exists in utter violation of the natural laws. *Fahrs* v. *Cochran*, 3 Dowl. and Ryl. 679; S. C. 2, Barn. and Cressw. 448; Wayland's Elmt. of Moral Science, 209; Rutherford's Inst. Nat. Law, bk. 1, c. 20; Stroud's Sketch of the Laws relating to the laws of slavery in the United States, 25.

It is well settled by the current of authorities, that comity will be denied upon general principles, by the courts of free States, on contracts arising upon slavery. And still less is the doctrine of comity admissible in the case at bar, when the contract, itself, by its express terms, is opposed to the policy which the people of Illinois thought proper to adopt, in the foundation of their State government; and in direct violation of the express provisions of sec. 1 and 2 of article 6. of the original constitution of Illinois.

No State is bound, or ought to enforce or hold valid, in its courts of justice, any contract which violates any provision of its own statute law; and if any contract is entered into without the State, and the consideration moving to either party, is positively forbidden by the written law of the State where the litigation arises, a court of justice will not enforce it, and surely it ought not, when such enforcement would be a violation of the law which it is bound to administer.

Mr. Justice STORY says, "that the state of slavery will not be recognized in any country whose institutions and policy prohibit slavery." Story's Conflict of Laws, sec. 104. And further, to the same point, in the same work, sec. 253, it is stated that "contracts to carry into effect the African slave trade, or the rights of slavery in countries which refuse to acknowledge its lawfulness, &c. would be held utterly void, whatever might be their validity in the country where they are made, as being inconsistent with the duties, the policy, or the institutions of other countries where they are sought to be enforced."

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of debt, brought by plaintiff in error, in the Knox circuit court, against defendant in error, on a writing obligatory, entered into in the State of Kentucky, by Turner R. Roundtree to Dudley Roundtree, given for the price of a negro girl sold by the latter to the former. It appears, the instrument sued on bears date the tenth of October, 1833; is for four hundred dollars, payable in equal annual installments of twenty dollars each, the first payable on the last day of December, 1834. It was stipulated that plaintiff in error is the administrator of Dudley Roundtree, deceased; that the girl, Eliza, named in the writing obligatory, was a slave in the State of Kentucky, owned by Dudley Roundtree, and that, as such, by the laws of Kentucky, she was liable to sale at the time the instrument was executed. That she was sold and

delivered in the State of Kentucky by Dudley Roundtree to Turner Roundtree, who resided in this State, on the tenth of October, 1833, and the writing obligatory was given in Kentucky on the purchase of the girl. Defendant below filed a plea of *nil debet* upon which there was an issue to the country; next, a plea of the statute of limitations; third, that the instrument was given for the purchase of a negro girl, and hence the consideration had failed; fourth, that the writing obligatory was given for the balance of the price of a negro girl, who was free and was sold as stated in the instrument sued upon, and the consideration had therefore failed. To the second plea, plaintiff replied that the cause of action had accrued within sixteen years. Plaintiff below interposed a demurrer to the third and fourth pleas, which was overruled by the court. He then replied to the third plea that, by the laws of Kentucky, the girl was a slave, and liable to be sold as such, and the consideration had not failed; and to the fourth, that the girl was not free, and was under the laws of Kentucky liable to sale, she being a slave. Issues were joined upon these replications.

At the February term, 1869, the cause was tried before the court, without the intervention of a jury, by consent of the parties, when the court found for defendant; a motion for a new trial was overruled, and a judgment was entered in favor of the defendant for costs. The record is brought to this court on error, and we are asked to reverse the judgment of the court below because it is against the law.

It is a general rule, that we look to the law of the place where the contract is entered into, and not where it is to be enforced, to ascertain its validity; and not only so, but in expounding its terms and conditions. *Bradshaw* v. *Newman*, Breese, 133; *Stacy* v. *Baker*, 1 Scam. 417; *Phinney* v. *Baldwin*, 16 Ill. 108. In the case of *Adams* v. *Robertson*, 37 Ill. 45, the rule was announced, that the laws of every country allow parties to enter into obligations with reference to the

laws of the country where such obligations are to be performed, and although such obligations may not be in accordance with the laws of the country where they are entered into, as regards agreements to be performed where they are made, they may be strictly in conformity with the laws of the country where they are to be performed. But there is a limitation on this law of comity which requires that the contract, when entered into, must conform to the laws of the country where made, or else to the laws of the country where it is to be performed. The rights enforced by courts, where the contract is made in one country, to be performed in another, are those given by the laws of the country where the contract was made, and such rights are enforced in the country where the contract is to be performed, not as a matter of strict right, but as a matter of comity extended toward the country in which the contract was made. It was again said, in the case of *Lewis* v. *Headly*, 36 Ill. 433, that it is a presumption of law, where there is no agreement to the contrary, that a contract is to be performed in the country where it is made.

There is to this general rule a further limitation which is, that the courts of one country will not, under this comity, ever execute the criminal or penal laws of another country. *Sherman* v. *Gassett*, 4 Gilm. 521. The general rule has been recognized in the cases of *Forsythe* v. *Baxter* 2 Scam. 12; *Holbrook* v. *Vibbard*, ib. 465; *Chenot* v. *Lefevre*, 3 Gilm. 642; *Strawbridge* v. *Robinson*, 5 Gilm. 470; *Schuttler* v. *Piatt*, 12 Ill. 419; *Crouch* v. *Hall*, 15 Ill. 264, and the case of *Sherman* v. *Gassett*, 4 Gilm. 521, referred to above. These cases, determined in our own court, all concurring, fix and establish the rule so firmly that nothing short of legislative enactment should overturn or disturb it. A different rule would work manifest injury to commerce, trade, and the various pursuits of life. If our courts could refuse to enforce contracts made and entered into in other countries and states, because the laws governing them where made are different from or repugnant to our laws, a vast amount of injustice would ensue,

as the laws of no two countries coincide in every particular in but a few cases. The exigencies of commerce and the general trade of the world have compelled the adoption and enforcement of this rule.

If we refer to the adjudged cases in other courts, whether of Great Britain or the various States of the Union, we find that the rule has been adopted that the laws of one State, entering into and forming a part of the contract, will be enforced in the courts of another State; and it is recognized to be on the principle of comity—not the comity of the courts, but the comity of the nation—which is administered and ascertained in the same way, and guided by the same reasoning by which principles of the municipal law are ascertained and guided. Story's Conflict of Laws, sec. 38; *United States Bank of Augusta* v. *Earle*, 13 Peters, 519. The rule stated by Huberus and approved by Story, is this: "That the rules of every empire, from comity, admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or their citizens." Story Conf. Laws, sec. 29.

In France, the State, as it was organized before the revolution, was divided into a large number of provinces governed by different laws and customs, and was at an early period obliged to sanction such authority through its courts, in order to provide for the constantly occurring claims of its own subjects, living and owning property in different provinces, in a conflict between the different provincial laws. Ib. sec. 24. If the attainment of justice required the application of the rule in France, the peculiar frame of our government certainly imperatively demands its application and enforcement between the different States of the Union. And we have seen that it was fully recognized by the supreme court of the United States. In the absence of any positive statutory rule affirming or denying, or restraining such operation of foreign laws, courts of justice presume the tacit adoption of them by their own

government, unless they are repugnant to its policy or prejudicial to its interests. Ibid. sec. 38.

Our legislature having declared no rule on the subject, our courts, like others, have adopted the rule, with the limitation that they will never enforce the criminal or penal laws of another country. Nor would they enforce and compel the specific performance of a contract under the laws of another State, when the laws are clearly repugnant to our policy and interests. Our courts would not enforce a contract for the sale of a slave, whether made in this State, where slavery has always been prohibited, or in a State where such contracts are binding, because it is against public policy. But after the parties have fully executed their contract, and a note is given for the price, under this comity which exists between the States of the republic, the note may be collected, and it is not for us, from caprice, or because we may abhor the system of slavery and the sale of human beings, to refuse to lend the aid of the courts for the collection of the money. It is not against the policy of our State to allow its collection, nor is it contrary to the interests of our citizens. Under the laws of Kentucky the sale was authorized, and there was a sufficient consideration.

In the case of *Smith* v. *Brown*, 2 Salk. 666, suit was brought for the price of a negro slave, and it was held that, although slavery could not exist in England, yet when a slave, by the laws of Virginia, had been sold in London, the seller might recover. So, in the case of the *Commonwealth* v. *Aves*, 18 Pick. 215, the court held that, "though slavery is contrary to natural right, the principles of justice, humanity and sound policy, as we adopt them and found our laws upon them, yet not being contrary to the laws of nations, if any State or community sees fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound to take notice of the existence of those laws, and we are not at liberty to declare and hold an act done within those limits unlawful and void upon our

views of morality and policy, which the sovereign and legislative power of the place has pronounced to be lawful."

"So, in pursuance of the well known maxim, that in the construction of contracts the *lex loci contractus* shall govern, if a person having, in other respects, a right to sue in our courts, shall bring an action against another, liable, in other respects, to be sued in our courts, upon a contract made upon the subject of slavery, in a State where slavery is allowed by law, the law here would give it effect. As, if a note of hand made in New Orleans were sued on here, and the defense should be that it was on a bad consideration, or without consideration, because given for the price of a slave sold, it may be well admitted that such a defense could not prevail, because the contract was a legal one by the law of the place where it was made."

In the case of *Hone* v. *Ammons*, 14 Ill. 29, the court was divided, but Mr. Justice CATON held, that if there had been evidence that the negro was a slave, plaintiff might have recovered the price for which he had been sold. Mr. Justice TRUMBULL, however, held that, as the sale of the negro was made in this State, a recovery could not be had, but Chief Justice TREAT held that plaintiff was entitled to recover on the note, although the sale was made in this State, and dissented from the conclusion at which the other members of the court had arrived. These cases fully establish the fact that a case of this character is not an exception to the rule, and hence they are referred to as not only recognizing the fact, but as requiring us to so hold; although, it might have been otherwise had the contract been entered into within this State and been wholly governed by our laws.

We do not conceive it to be reasonable to hold that because slavery has been abolished, and become unlawful in the State of Kentucky, therefore this contract has become illegal. It does not follow, because slavery was expressly abolished, that the obligation of the contract was impaired by implication. Such consequences cannot be inferred, as no language

employed for the abolition of slavery can be construed to render notes given for the purchase of a slave inoperate and void. If the abolition of slavery could have such an effect, then all persons who had paid money or property might sue for and recover it back, as having been paid without consideration. Such consequences could never have entered into the contemplation of those who abolished slavery. And courts will not hold laws to have a retro-active operation from mere construction. This is a familiar principle in our jurisprudence, and much less so when to do so would impair the obligation of a contract, which no State can do, and it may well be doubted whether Congress possesses such transcendent power. The facts in this case fail to establish a defense, and the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

NORTHERN TRANSPORTATION COMPANY OF OHIO

v.

DAILY SELLICK.

1. CONVERSION—*what constitutes.* If one person has the property of another in his possession, and the owner makes demand of it, and the party in possession, without right, refuses to deliver it, that will constitute a conversion of the property by the latter to his own use.

2. SAME—*and herein of the respective rights and duties of a shipper and common carrier.* So, where the owner of a carriage shipped the same by a common carrier, the amount to be charged for the transportation being first agreed upon, and, upon the carriage reaching its destination, was demanded by the owner, he offering to pay the charges as agreed, but the agent of the carrier refused to deliver it except upon the payment of a larger amount: *Held*, this was a conversion of the property by the carrier, and the owner could maintain trover therefor. The latter discharged his

duty by making a demand for the carriage immediately on its arrival, and offering to pay the freight agreed upon.

3. The carriage, while in the possession of the carrier, and after the refusal to deliver it to the owner, was destroyed by fire, and it was held that the owner did not waive the effect of such refusal by agreeing at the time to communicate with the agent with whom the contract was made, at the place of shipment, in respect to the amount of freight agreed to be paid. If there was an overcharge for freight, it was as much the duty of the agent of the carrier to make an effort to have it corrected, as it was that of the owner.

4. Nor was the owner under any obligation to pay the overcharge of freight, upon the verbal promise of the warehouseman to refund all over a proper charge. He was not required to put his money in such jeopardy.

5. INTEREST—*when recoverable, and from what time.* And in such case, where the owner brought trover against the carrier, it was held the plaintiff was entitled to interest on the value of the property from the time of the demand and refusal.

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

The opinion states the case.

Messrs. WAITE & CLARKE, for the appellants.

Mr. B. W. ELLIS, for the appellee.

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

This was an action on the case, for failing to deliver a carriage entrusted to appellants by appellee, to be by them carried from Ogdensburg to Chicago, with a count in trover.

It appears the appellants' agent at Ogdensburg, in the fall of 1866, agreed with appellee, who was about to move to Chicago, to ship his carriage to that place for ten dollars, but if he would leave it until spring, they would carry it for less. It was left until the following spring, and reached Chicago about the 17th of June, 1867. On its arrival, appellee called for it, and offered to pay ten dollars freight, but it was refused him

unless he would pay twenty dollars, and one dollar dockage. This appellee declined doing, and the carriage remained in the control of appellants until the succeeding November, when it was destroyed by fire.

Appellants have failed to make any defense to this action. It was their duty to deliver the carriage when demanded by appellee on its arrival, on his offering to pay the freight agreed upon. The refusal to do so was wrongful, and was, in itself, evidence of a conversion of the property. The demand in June, on the arrival of the carriage, gave appellants an opportunity of delivering the carriage to appellee, and thus relieving themselves from all responsibility. By refusing so to do, unless on compliance with an extortionate demand, greatly beyond the agreed compensation for carrying, threw the entire responsibility, in case of loss, upon the appellants. Appellee had discharged his duty by making a demand for the carriage immediately on its arrival, and offering to pay the freight agreed upon. The refusal to deliver is evidence of a conversion, and appellants have offered nothing to destroy its effect. The carriage, after the demand, remained at their risk.

Appellants' counsel lay much stress upon the fact that appellee agreed to write to Eddy, their agent, and get his statement about the charge. He did write two letters on the subject, and failed to get an answer. He certainly did not undertake that Eddy would reply to his letters. He did all he could to get a statement from the agent. But, under the circumstances, was it not the duty of Howe & Co., the agents of appellants, to make some effort to ascertain the true state of the case? If there was an overcharge, and which, from the testimony of appellee, Howe admitted, it was as much their duty to make an effort to have it corrected, as it was that of appellee.

Appellants' counsel insist there was no absolute refusal to deliver the property before the fire; that it was only a qualified refusal, to which appellee consented, and waived by agreeing himself to "ascertain if there was any overcharge," and for that

purpose, by implication, constituted Howe & Co. his bailees to hold the property until appellee had time to obtain this information. If this position be conceded, it could extend no further than the time necessary to take a letter to Ogdensburg and receive a reply, which, by due course of mail, would not exceed three days. But appellee repeatedly, during the summer, applied for the carriage, and it was refused him, and he threatened with the additional charge of storage, if he did not pay the extortionate charge, relying upon the verbal promise of the warehouseman to refund all over a proper charge. This, appellee was not bound to do. He was not required to put his money in such jeopardy. That the charge was not a proper charge is evident from Eddy's letter, written after the carriage was injured by the fire. That it was one hundred fold greater than the amount agreed upon, is apparent from appellee's testimony. It is true, one, perhaps both, of his sons say no precise amount was agreed upon, but that the charge should be reasonable. The appellee testifies in the most positive terms the charge was to be ten dollars, and he is corroborated by Eddy's letter.

Appellants insist there was no conversion when appellee presented Eddy's letter and demanded payment of the value of the property, which appellants' agents, Howe & Co. refused to pay, but offered to deliver it to him as it then was, which he refused to receive, demanding only its value.

The conversion dates back to about the 17th of June, when the carriage reached Chicago, and the demand was made for it, and on offering to pay the charges agreed upon. It certainly would have been competent for appellee, under the circumstances, to have sued out his writ of replevin for the carriage, as he became then entitled to the possession of it. We understand such proof would sustain an action of trover. It could be, certainly, no satisfaction to appellee to receive such parts of the carriage as remained after the fire. They were the irons, probably, of the vehicle, and injured by the fire. To tender them on a demand for a costly carriage which they

had in their possession, and refused to deliver to the owner when demanded, would be unreasonable.

That there was a conversion of the property under the facts proved, it is only necessary to refer to some of the cases cited by appellants. In *Hill* v. *Cook*, 1 Comst. 522, it was held, a demand and refusal were evidence of a conversion, but might be repelled by showing that a compliance with the demand was impossible. In *Yale* v. *Sanders*, 16 Verm. 243, the court said a defendant in trover would not be found guilty of a conversion of the property, upon evidence merely of a demand and refusal, unless the property was, in some way, subject to his control. This carriage was in that condition. Howe & Co. were the agents of appellants to deliver goods carried by them. So, in *Taylor et al.* v. *Honall*, 4 Blackf. 317, the well-known rule was announced, to support the action of trover there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant, and the gist of the action being the conversion, unless the defendant has had the actual or virtual possession of the goods, he cannot be charged with a conversion to his own use. The application of the case from this court, *Byrne* v. *Stout*, 15 Ill. 180, is not perceived. It is cited under the head of an offer to return the carriage in its damaged condition. There, the hog being troublesome to defendant, he castrated it, and turned it loose, and it was afterwards found dead. The court say, castrating a scrub male hog running among one's stock is not such proof of a change of property as to be evidence of a conversion or appropriation to plaintiff's (defendant below) use. Appellants' counsel may perceive the pertinency of this case. We do not.

The law of this case is fully stated in the first instruction given in the case of *Hale et al.* v. *Barret et al.* 26 Ill. 195. That instruction is substantially this: If the lathe in controversy was the property of the plaintiff, and the defendant had the possession of it, and the plaintiff demanded the lathe, and defendant, without right, refused to deliver it, that was

evidence of a conversion by the defendant of the lathe to his own use. The same facts appear in this case, and constitute a conversion of the carriage on the 17th of June, 1867.

And this case disposes also of the question of interest, raised by appellants here, for it was there held, the eighth instruction, directing the jury to allow interest on the value of the lathe from the time of the demand, was proper, and see also *C. & N. W. R. R. Co.* v. *Ames*, 40 ib. 249.

The objection that the verdict is too large by twelve dollars and thirty-four cents, is predicated in a wrong assumption of time from which interest should be calculated. If calculated from the day of the demand, as it should be, to the day of trial, it will be found the finding is not too large.

In the language of this court, in the case of *Bissel et al.* v. *Price*, 16 Ill. 409, these associations, for the transportation of goods, are a great public convenience, if properly and honorably conducted; while, on the other hand, their position enables them to practice a constant system of peculation, oppression, fraud and injustice, when there is a disposition to pursue such a course, to which individuals are often inclined to submit, rather than vindicate their rights at a cost and trouble greater than the amount suffered by the wrong perpetrated; and while it is the duty and the policy of the courts and of the law to protect these forwarders and carriers when they have acted fairly, justly, and in good faith, so, on the other hand, they cannot be too strict in visiting them with the most exemplary judgments, whenever a disposition is evinced to prey upon those whom they suppose at too great a distance to protect their rights, or prefer to submit to the injustice rather than the expense of a prosecution.

In the light of these remarks, appellee is entitled to commendation for instituting and prosecuting this action, and resisting an extortionate demand.

The judgment of the court below is in all things affirmed.

Judgment affirmed.

HENRY H. SHUFELDT

v.

JOHN S. SUTPHEN.

ASSIGNOR—*insolvency of maker.* In an action against the assignor of a note for $1000, where it was sought to recover on the ground of the insolvency of the maker, and that a suit against him would have been unavailing, it appeared the maker had some fine oil paintings, a fine library which filled two large book cases, worth $150 to $200 each, and furniture worth $2500 to $3000: *Held*, the assignor was not liable, although the maker may have been heavily in debt.

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

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

Messrs. STORY & KING, for the appellant.

Messrs. GOUDY & CHANDLER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

We are obliged to reverse this judgment because the verdict is clearly against the evidence. It was incumbent on the plaintiff to prove a suit against the maker of the note would have been unavailing, but the witness called by him for that purpose showed it would not have been. The note matured May 1, 1867. The witness testified the maker of the note kept house in Chicago in 1866 and 1867, and had handsome furniture, some fine oil paintings, and a fine library which, the witness says, filled two large book cases, worth $150 to $200 each. He thinks the furniture was worth $2500 to $3000. He says the horse and carriage which the maker of the note also owned, may have been sold before May, 1867, though he

can not state positively, but it does not appear what has become of the furniture and library further than that after the owner ceased to keep house he stored his furniture. For aught that appears in the record he owned this furniture and library at the time of the trial.

On this evidence the jury were not justified in finding that a suit against him would have been unavailing, although he may have been heavily in debt. The judgment must be reversed and the cause remanded.

Judgment reversed.

CITY OF CHICAGO
v.
CHARLES LANGLASS *et ux.*

VINDICTIVE DAMAGES—*negligence of municipal corporations.* In actions against a city to recover damages for injuries occasioned by neglect of the officers or employees to keep the streets or sidewalks in proper repair, compensatory damages only should be given. Vindictive or punitive damages can not be recovered against a municipal corporation. *

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

The opinion states the case.

Mr. S. A. IRVIN and Mr. H. DAVIS, for the appellant.

Messrs. WALKER and DEXTER, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

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*See also, *City of Chicago* v. *Martin et ux.* 49 Ill. 241.

Opinion of the Court.

This action was brought by appellees to recover for injuries sustained by Mary Langlass, in falling from the sidewalk at the northeast corner of Union and Lake streets, in the city of Chicago. On the trial in the court below, the jury found the issues for appellees, and assessed their damages at the sum of $4750. A motion for a new trial was overruled, and the court rendered judgment on the verdict, and the city has appealed the case to this court, and assigns various errors.

It appears from the evidence that Mary Langlass, one of the appellees, with her daughter, on the evening of the 24th of December, 1867, between eight and nine o'clock, while passing along Union street at its intersection with Lake street, slipped or fell from the sidewalk to the ground below, a distance of some six feet, and received serious injuries. The daughter says, that as they turned the corner, her mother suddenly fell, and she heard her scream, but it was so dark she could not see her. The evidence shows that at this intersection, Lake street is six feet above the level of Union, owing to the difference in grade; that the sidewalk on the east side of Union street, extending north from Lake street, was but some four feet in width, and descended quite abruptly from Lake street, until it reached the level of Union street, some twenty-five or thirty feet north of its intersection with Lake street, the descent being six feet in that distance.

It also appears that there was an open space between this sidewalk and a building on the north-east corner of Lake and Union streets, some four feet in width; that this sidewalk was not protected by railing or guards, to prevent persons from stepping to the ground below, a distance of six feet; that there was some ice on the sidewalk on Union street at the time, and there were cleats nailed across this inclined plane or sidewalk, which extended to within about a foot of the east edge thereof; that the weather was cold, the night dark and the ground frozen.

It appears that Mrs. Langlass, as she was in the act of turning north to go on Union street, fell as before stated, and struck

upon her head. It appears that there was a lighted lamp at the corner of Lake and Union streets, but the daughter testifies that it was so dark that she was unable from above to see her mother on the ground below. We are not able to say from the evidence that Mrs. Langlass was guilty of negligence, or that the city had observed due care in rendering this public thoroughfare safe for the passage of pedestrians in the night time. But the question presents itself, whether the damages found by the jury were excessive.

That the injuries received by Mrs. Langlass were serious, there seems to be no doubt, and that she has been, and was at the trial below, somewhat disabled, seems to be established by the evidence. But to justify a verdict of the amount found in this case, the injuries should be of no ordinary character. It appears that she walked home, with the assistance of the witness Cassler. Dr. Marsh seemed to think that the principal injury was a wound on the skull, but not a fracture at the first examination, but some two months later discovered curvature of the spine; erysipelas set in, and seemed to render the symptoms alarming for some days. He also states that he believed her back was seriously injured; that she had a slight curvature of the spine.

Dr. Allen, another of appellees' witnesses, who was called in consultation with Dr. Marsh, testifies that the erysipelas caused the unusual swelling of the head, but there was no contusion on the back. Appellant called two surgeons of admitted ability, who state that it is uncertain whether the curvature was produced by the fall. Dr. Powell gives it as his opinion that had such been the case, it would have been impossible for Mrs. Langlass to have walked the distance of six blocks; that a slight curvature as this was described by Dr. Marsh would not in the slightest interfere with a person in performing ordinary labor, or indicate an incapacity to perform manual labor. And on his cross examination he says that half of the working people have slight curvature of the spine. And he concludes that it is not probable there was any injury to the spine from the fall.

Again, Dr. Bogue says, that slight curvatures of the spine do not interfere with the power to perform manual labor. He also thinks the fact that Mrs. Langlass walked several blocks immediately after the fall, is evidence that the spine was not injured by the fall. He infers, from the fact that the curvature was not discovered by the attending physician for nearly two months after the accident, that it existed previous to that time.

The attending physicians do not assert with any degree of certainty that the curvature was the consequence of the fall, but seem to entertain that opinion. We, after a careful examination of the evidence, are not prepared to say that Mrs. Langlass is permanently disabled, or if so, to any considerable extent. She must have suffered much pain from the erysipelas, and, perhaps, from some nervous derangement consequent upon the fall, and if occasioned by the negligence of the officers of the city in grading or improving the streets, then she should be permitted to recover reasonable compensation, sufficient to cover all expenses attending her sickness, and for loss of time and for pain from the injury, and any permanent injury.

But in fixing the compensation the jury have no right to give vindictive or punitive damages, against a municipal corporation. Against such a body they should only be compensatory, and not by way of punishment. This seems to us to be a very large verdict, in fact largely beyond a compensation for the loss and suffering and permanent injury. We must conclude that the jury have given exemplary damages, and that the case should be submitted to another jury. The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

The Chicago, Burlington & Quincy Railroad Company

v.

Leannah L. Dunn.

1. Married women—*what is "property," within the act of* 1861. The right of action accruing by reason of personal injuries received by a married woman from the negligence of a railroad company, is property, and coming to her from a source other than her husband, and, in good faith, it is her separate property, and comes under the operation of the act of 1861.

2. Same—*whether a married woman may sue alone for such injuries.* Such right of action being the separate property of the wife, she may sue alone to recover damages for the injury received.

3. Same—*power of the husband in respect thereto.* The right of action in such case being in the wife, the husband cannot, without her consent, adjust it or release it.

4. But where an action for the same cause had been commenced in the joint names of the husband and wife, and the former compromised the suit, and entered into an agreement to dismiss it, and release the cause of action upon receiving a certain sum from the defendant, it appearing that in so doing the husband acted as the agent of the wife, it was held such release operated as a bar to a subsequent action brought in her own name.

5. Construction of statutes. The rule in construing remedial statutes, though it may be in derogation of the common law, is, that every thing is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.

Appeal from the Circuit Court of Knox county; the Hon. Arthur A. Smith, Judge, presiding.

The opinion states the case.

Messrs. Frost & Tunnicliff, Mr. G. C. Lanphere and Mr. A. M. Craig, for the appellants.

Messrs. Kitchell & Arnold, for the appellee.

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

An injury having resulted to the plaintiff in this action, Leannah Dunn, by the locomotive of the defendants, at a street crossing in the town of Galesburg, her husband, Marvin R. Dunn, jointly with herself, brought an action to recover damages therefor, in the circuit court of Knox county, at the June term, 1867. At the same term a similar action was brought against the railroad company, by George E. Dunn, suing by Reuben Hawk, his next friend, for an injury received at the same time, by the same locomotive. Pending these actions, and at the June term, 1867, the following agreement was entered into: "It is agreed that the Chicago, Burlington & Quincy Railroad Company will pay to Marvin R. Dunn, Leannah Dunn and George E. Dunn, the sum of one thousand dollars within three days from this date, or as soon as the said M. R. Dunn can attend to it, and upon payment of the same, the above suits against the said railroad company are to be dismissed, and the said plaintiffs are to give the said company receipts in full of all damages. June 1, 1867."

M. R. Dunn, on the 3d of June, executed to the company a receipt for the amount specified in this agreement.

At the February term, 1868, Leannah Dunn commenced her action in the Knox circuit court, to recover damages for the same injuries which were the subject matter of the suit in which she and her husband were plaintiffs, and compromised by the payment to her husband of one thousand dollars, in pursuance of the above agreement.

To this action the defendants pleaded the above agreement, and claimed that the payment of this money was in full satisfaction and discharge of the grievances in the declaration mentioned, and which M. R. Dunn accepted in full discharge and satisfaction, and dismissed the suit.

To this plea the plaintiff put in six replications, admitting the identity of the cause of action, but denying that she accepted the money in satisfaction of her cause of action. She further replied that the first suit was instituted and carried

on by her husband, at his own option, without consultation with her and without her authority and consent; that she did not authorize the commencement or settlement of that suit by her husband; that the same was done for his sole benefit, and that she has never received any part of the said money.

The sixth replication alleged that the money paid to M. R. Dunn in satisfaction of the grievances complained of was paid to him upon consideration that she, the plaintiff, should accept the same and acknowledge the receipt thereof by proper receipt executed to the defendants, which she refused to do, and did not accept the money, or any part thereof.

Issues were made up on these allegations, and there was a trial by jury, and a verdict for plaintiff of two thousand nine hundred and thirty-three dollars and thirty-three cents in damages.

A motion for a new trial was overruled, and a judgment rendered on the verdict.

To reverse this judgment, the defendants bring the record here by appeal, and assign various errors.

The principal point made on the record is as to the effect of the agreement of June 1, 1867, and of the receipt by M. R. Dunn of June 3d, of one thousand dollars. The question is, do they bind this plaintiff and bar her action?

Another question made is, as to the right of the plaintiff to maintain this action in her own name.

As to this question, it is conceded, by the common law, she could not maintain it.

Appellee's counsel contend that the act of 1861, called "the married woman's act," has so changed the common law, in respect to *femes covert*, as to authorize the action by the wife alone.

The act of 1861 was evidently designed to relieve married women from some of the disabilities the common law had, for centuries, imposed upon them. By force of that law, the maxim obtained, that husband and wife are one person, and although property be the wife's, the husband is the keeper of it, being the head of the wife. Co. Lit. 112.

These maxims were law in this State up to the comparative modern date of February 21, 1861, at which time it was enacted by the Legislature 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 rule in construing remedial statutes, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.

Impressed with the force of this canon of interpretation, this court, soon after the enactment of this statute, not in terms giving to the wife the power to sue alone in matters affecting her separate property, held that, to render the act operative and effectual for the purposes intended by it, it was indispensable, she should have this right, and accordingly sustained an action of replevin brought by a married woman to restore to her the possession of personal property, being her own separate property, which had been seized by a constable, on an execution against her husband. *Emerson* v. *Clayton*, 32 Ill. 493. It was there said, the right to her property being vested in the wife, by the statute, it must, if the act is to be enforced, so remain until she consents to dispose of it, for this right includes full dominion over it; when these rights are the only rights affected, on the well-established principles of law, she must bring suit for an invasion of them.

The legislature designed to make, and did make, a radical change in this respect in the condition of a *feme covert.* Having the sole control of her property, there is no necessity of joining her husband in an action to recover it, or for trespasses upon it. The very object of the statute was to keep her separate property out of the control of her husband. If this were not so, the act would be futile and of no effect. The husband, for purposes of his own, might refuse to join in an action with his wife. He might connive with others to dispossess her of her property. The right of sole control over the separate property of the wife by her, includes the power to do whatever is necessary to the effectual assertion and maintenance of that right.

If, then, it can be established that the right of action for this injury to the wife, is property, as it came to her from a source other than her husband, and in good faith, then it was her separate property, and comes under the operation of the act of 1861. The statute is very comprehensive—*all* property.

Chancellor Kent, in his commentaries, says another leading distinction in respect to goods and chattels, is the distribution of them into things in possession and things in action. The latter are personal rights, not reduced to possession, but recoverable by suit at law. Money due on bond or other contract, damages due for breach of covenant, for the detention of chattels or *for torts*, are included under this general head or title of things in action. Comstock's Ed. 2 Kent's Com. 432, under the head, " of the nature and various kinds of personal property."

A right to sue for an injury, is a right of action—it is a thing in action, and is property, according to this authority. Who is the natural owner of this right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised ; it was she who suffered the agonizing, mental and physical pain. Indirectly, it is true, the husband was an injured party, also, during her disabilities, in deprivation of his comfort by

reason thereof, and by the further reason of his responsibilities for the charges for her care. For these he can undoubtedly sue and recover such damages as he may prove.

Why is not this right of action, property? Law commentators of distinguished ability say it is, and with good reason, speaking according to well recognized principles. It is true, it is a right which cannot be transferred to another, and dies, with the person entitled to it, but it is none the less property in that person, while living, which can be claimed, so long as the bar of the statute of limitations can not be interposed.

Would the purposes and object of the act of 1861 be carried out, indeed, could they be, should this court hold, in view of the decision in *Emerson* v. *Clayton*, that the wife could not sue alone for an injury to her person? Suppose she is slandered, and the husband chooses to pass the slander by, though he knows his wife is withering and agonizing under its influence? Suppose she is assaulted and beaten, and the husband, for causes satisfactory to himself, but having no foundation in reason or justice, refuses to prosecute the wrong doer? Can it be denied the wife has, in both these cases, a property in the right of action the law gives; that it is her separate property, and that she acquired it during coverture? It is conceded, she may sue for an injury to her horse, being her separate property, or bring her action of trespass for despoiling her of an earring, or any other personal ornament of value, but for grievous injuries to her person, she must await the consent of her lord and master. This is not, in our judgment, in accordance with the spirit of the act of 1861.

We are satisfied this right of action is property, included in the words, "all property;" it was the separate property of the wife, acquired during coverture, and from a source other than her husband, and she alone can control it.

The case of *Burger and wife* v. *Belsley et al.* 45 Ill. 72, cited by appellee, is, so far as it goes in this direction, not adverse to the doctrine we have endeavored here to establish. That was an action of trespass for personal injuries to the

wife. The action was commenced in the joint names of the husband and wife, and after a separation had taken place between them, the court would not allow a dismissal of the suit to her prejudice, or burden its prosecution by conditions onerous to the wife.

The right of action being in the wife, the question arises, could the husband, without the consent of his wife, adjust it or release it?

That he could not, of his own mere motion, release it or compromise it, is undeniable, on principle and authority. *Emerson* v. *Clayton*, *supra*. This court has, however, repeatedly held that the husband may be the agent of the wife in the management of her business, and in the employment of her capital, and but slight evidence of such agency will, ordinarily, be required.

For the purpose of establishing the agency of the husband in bringing, conducting and compromising the action brought in their joint names against the railroad company, appellants proved that the husband had, on a former occasion, instituted a suit in the name of himself and wife for the recovery of some property belonging to the latter, and prosecuted the same to a final recovery, he acting as the agent of his wife, and in the prosecution of that suit, had employed the services of the attorney, who, as attorney of appellants, had effected the compromise of the suit in which the agreement in question was made. This attorney had, therefore, good ground for supposing, inasmuch as the husband had acted as the agent of his wife in prosecuting the suit in which he was attorney and counsel for them, that the agreement to dismiss the action on the payment by the appellants of one thousand dollars was with her approbation and consent.

It is in proof, that she knew a joint action had been brought against appellants for the injury she had received; that she made no objection to bringing such suit; that she was well informed her husband was conducting the suit, employing attorneys for such purpose, and it is clearly to be inferred she

knew her husband was about to settle the suit. From the close and confidential relations existing between them, it is next to impossible she should not have known all about it. From all this, the jury should have inferred authority on the part of the husband to make this settlement as the agent of his wife, and sustained the plea of the defendants. It would be the height of injustice that the wife should now be allowed to repudiate the agency of her husband. She, by her silence, when a word from her would have prevented it, has enabled her husband to get possession of a large sum of money from the defendants, and which he had in his possession more than one month before she made any objection, and which he still has in his possession, which appellants have paid in good faith, and no portion of which, so far as the record shows, can be recovered back. In conscience, she ought to be estopped from prosecuting this claim, the injury having been fully atoned for by the defendants, with her knowledge and consent.

The objection, that a portion of the money paid on settlement was to be paid to George E. Dunn, can not invalidate the settlement, so far as Leannah Dunn is concerned. The settlement is binding upon her, through the agency of her husband, irrespective of the portion which may be her due, on the adjustment of the suits by the several parties to them.

We refrain from noticing any other points made in the case. The settlement of the first suit being with the knowledge and consent of this plaintiff, the second special plea of defendants being sustained, bars her action.

The finding of the jury is against the weight of evidence, and a new trial must be had, and for that purpose the judgment is reversed and the cause remanded.

Judgment reversed.

JOHN FORSYTHE

v.

JOHN L. BEVERIDGE.

ATTORNEY'S FEES—*lien.* An attorney at law has no lien upon a judgment for his fee in the litigation resulting in its recovery.

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

The opinion states the case.

Messrs. GOUDY & CHANDLER, for the appellant.

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

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Hurd, Booth and Kreamer, as attorneys of Ainsworth, obtained a judgment in the superior court of Chicago, against Turner and Nichols. The judgment was assigned to Forsythe, the appellant herein, and the money having been collected by Beveridge, the sheriff, and appellee herein, Forsythe seeks a rule upon him for its payment. This is resisted by Hurd, Booth and Kreamer, who claim an attorney's lien upon the judgment, to the extent of their fees in the litigation resulting in its recovery. The superior court sustained their claim, and directed the money to be paid into court, there to remain until the amount of their fees could be settled by a jury. The question for our determination is, whether, in this State, a lien of this character exists.

An analogous, though not identical, question was decided by this court in *Humphrey* v. *Browning*, 46 Ill. 477, which had not been reported when this case was decided in the court below. The question there was, whether such a lien existed

on land recovered in an action of ejectment. We held it did not, and said this lien should be recognized as applying to the judgment itself, only when statutes or rules of court allowed specific fees taxable as costs. The opinion in that case comments on nearly all the authorities cited by counsel in the present case, and it is unnecessary again to review them.

In addition to those authorities, counsel for appellee cite *Rowey* v. *Second Avenue R. R. Co.* 18 N. Y. 368, and *Warfield* v. *Campbell*, 38 Ala. 527, both which cases fully sustain their position.

The result of a review of the authorities is briefly this: In England, no precedent has been quoted, and probably none can be, in which a lien has been claimed to a greater extent than the taxable costs and disbursements. We are not able to speak with confidence as to the extent to which these costs and disbursements may go, but from our understanding of the English practice, we suppose it must often happen that attorneys advance from their own pockets, in counsel fees, a far larger sum than they are allowed to tax as costs, and yet we hear of no lien being claimed upon the judgment for such extra counsel fees.

In this country there is great conflict of authorities. New York, Alabama, Georgia and Florida, are among the States in which it has been distinctly held that the lien exists, even where the compensation of an attorney is upon the principle of a *quantum meruit*. In Vermont, New Hampshire, Pennsylvania, Indiana and Missouri, the contrary rule is held. Other States have shown an inclination, some to one rule, some to the other.

In this conflict of cases it can hardly be said there is a decided preponderance of authorities on one side or the other, and we must regard ourselves as quite at liberty to adopt that rule which we think the more reasonable and just. On this question we have but little doubt. When it is said, as it is in some of the cases cited by appellee, that there is no reason why the lien should be allowed in cases where the attorney's fees

are fixed, and form a part of the taxed costs, and not allowed when such fees rest wholly in a contract, express or implied, they seem to us wholly to beg the question.

In the first place, where the fees are taxable, they are made a part of the judgment, and though recovered in the name of the successful party, yet, as they really belong to his attorney, there is no reason why the court should not protect and enforce his claim. Although this is, for convenience, called a lien, yet as remarked by the supreme court of New Hampshire, in *Wright* v. *Cobleigh*, 1 Foster, 341, as there is no possession, it is not so much a strict common law lien, like that which an attorney has upon papers or money in his hands, as an equitable ownership in a certain part of the judgment; and as the judgment is indivisible, this equity is recognized as the paramount claim upon its proceeds. Persons dealing with the judgment creditor do so with notice of the existence of the equity and its extent. But very different is it where the fees are not taxable, and rest solely upon express or implied contract, as in this State. In that case they do not form a part of the judgment. The successful party recovers from the other side no part of the fees for which he has become liable to his attorney. The latter, therefore, has no equitable ownership in any portion of the judgment. No part of it represents the value of his services, and he has no equity in it which the court can be asked to protect.

But besides this distinction, there is another of quite a different character, but entitled to great weight. Where the fees are fixed by law or rule of court, and taxed, the attorney can exercise no unreasonable power over his client by means of this so-called lien. The amount of the attorney's interest in the judgment being easily determinable, the owner of the judgment can deal with it as he would with any other *chose in action* in which another person has a limited and fixed interest. There is little room for controversy between the client and his attorney, and if the sheriff collects the money on execution, he can ascertain the amount of taxed costs, and need

only retain for the attorney this amount. But suppose we hold this lien exists on the principle of a *quantum meruit*. What would be the result? A plaintiff obtains against a solvent defendant a judgment for a large amount. His attorney demands an exorbitant fee. The client demurs to the payment, and the attorney informs him, until his fees are paid, he can himself receive none of the fruits of his own judgment. If the money is in the sheriff's hands, that officer would not dare, without indemnity, to pay any part of it over, as he could not tell what sum might be allowed for fees. The client, then, is in this dilemma: He must either submit to the payment of an unreasonable fee, or he must go for an indefinite time without the use of his money, which may be of vital importance to him, and must engage in new and expensive litigation with his own counsel, with whom his relations had been confidential, and towards whom he would be very unwilling to take a hostile position.

In our opinion, it is not the policy of our law to place attorney and client in this position. We cannot consent to a rule which would lodge in the attorney's hands a power that might be so unreasonably and unjustly exercised, and which is not necessary to his protection. Honorable in their relations with their clients, as members of the bar, as a general rule, undoubtedly are, it must be admitted there are those by whom this power would be abused. It is of course desirable "that a party should not run away with the fruits of a cause without satisfying the legal demand of his attorney," as said by Lord KENYON in *Read* v. *Dupper*, 6 Term 362, but if we establish the principle here contended for, there would be cases in which a very unreasonable portion of the fruits would be demanded by the attorney, and collected under the pressure he could bring to bear upon his client. For the fifty years that Illinois has been a State, our profession has thriven in worldly goods, and its members have been the trusted leaders of society, without asking for the establishment of this rule, or deeming

it needful for their protection, and in our opinion its establishment would, in the end, bring discredit upon the profession at large, through its abuse in the hands of the unprincipled and avaricious.

The judgment is reversed and the cause remanded. The superior court will enter a rule requiring the sheriff to pay over the money to Forsythe.

Judgment reversed.

DANIEL T. ELSTON *et al.*

v.

CAROLINE KENNICOTT *et al.*

1. PRACTICE—*time within which to object to admissibility or sufficiency of evidence.* While it is the rule that the admissibility of evidence cannot be questioned, for the first time, in the appellate court, yet the sufficiency of the evidence to prove the issues may be questioned at any time and in all courts.

2. FORMER DECISION—*how far conclusive.* Where a case has been determined in an appellate court, and remanded for further proceedings, upon a second appeal the former decision will be deemed conclusive of the questions then presented; but if, upon the new trial below, further and material evidence be introduced, a new case is presented, so as to require the appellate court to consider the additional evidence in connection with that previously before the court, and to decide the case upon all the evidence thus appearing in the record.

3. PAROL EVIDENCE—*payment of taxes.* It is the settled rule of this court, that payment of taxes may be proved by parol, and receipts therefor may be explained or contradicted.

4. EVIDENCE—*sufficiency thereof, as to payment of taxes.* On the trial of a cause in which a party relied upon the bar of the limitation act of 1839, a prior owner of the premises testified explicitly that he paid all the taxes thereon every year during the time he owned it, being more than seven years. On a second trial, the same witness testified that he only remembered the amount of the several payments as shown by the receipts,

nor did he know otherwise that the entire amount due was paid. But the court considered the testimony given on the second trial, in connection with that on the first trial, when the witness proved the name of the person who paid the taxes, the lot on which they were paid, and that they were paid each and every year during the time. The evidence, taken all together, was sufficient to show the payment.

5. Even if a tax receipt is for a less sum than that extended on the collector's warrant against the property, that is not conclusive upon the question whether all the taxes were paid; and when it appears the person to whom the receipt was given called on the collector and offered to pay all the taxes, and did pay all that was claimed to be due, and the receipt states that the full amount had been paid, a jury may reasonably infer that the whole amount assessed was paid, and that a mistake was made in stating the amount in the receipt.

6. A mistake in the description of property on the assessment roll, will not invalidate a payment of taxes upon the proper lot, when it is correctly described in the collector's warrant. The property being properly described in the warrant, and the taxes paid according to such description, it will be presumed, for the purposes of the act of 1839, that it was legally assessed, and that the payment conforms to the requirements of the statute.

7. PAYMENT OF TAXES—*under color of title—by whom.* Where a party claiming land under color of title, conveyed the same, and on the next day he paid the taxes for the current year, which had been previously assessed against him, and which he was legally liable to pay, it was *held*, the payment would be regarded as having been made under and subordinate to the title he had conveyed, and would enure to the benefit of his grantee.

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

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

Messrs. GOUDY & CHANDLER, for the appellants.

Messrs. GOODRICH, FARWELL & SMITH, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This case was before us at a previous term, and is reported in 46 Ill. 187. The judgment was reversed and the cause

remanded, and another trial had; and from the judgment then rendered, this appeal is prosecuted. The parties, by agreement, submitted the case to the court without the intervention of a jury, and agreed that the cause should be tried upon the evidence heard on the former trial, together with such additional testimony as either party might choose to introduce on the trial. The title under which each party claims, appears in the case as reported, and is therefore not given here. We there discussed the question whether the appellees had color of title, and it was held to be sufficient, and we still so regard it. No question arises in regard to possession. The question which is presented is, whether there is proof of the payment of taxes so as to entitle appellees to the benefit of the statute.

The tax receipts used as evidence were the same on both trials; nor was any objection made to their admission on the trial; and it is urged that appellants can not object to the admissibility of the evidence for the first time in this court. Such is unquestionably the doctrine of this court, but the rule is equally as firmly settled that, after the evidence is admitted the other party may question its sufficiency to prove the issue. Any other rule would render the introduction of evidence almost, if not quite, impracticable. When the evidence is admitted, it is permitted in all courts to urge its insufficiency before the jury or judge trying the issues. And in this case, appellants are not objecting that the evidence was inadmissible, but are contending that, when admitted, it fails to prove seven consecutive years of payment of all taxes while appellee was in possession; and the question for our consideration is, whether the evidence sustains the finding of the court below.

The former decision of this court is urged as conclusive of the questions then presented, and of the case as it is disclosed by this record. So far as questions were then determined, that is true, but is not as to new questions and new facts. The very object of remanding a case for a new trial is to enable

the parties to introduce any other and further legitimate evidence. It is the purpose of the law to administer justice and afford protection to parties in their legal rights, and not to prevent its attainment by mere technical rules. When a case has been determined in an appellate court, and remanded for further proceedings, and on a new trial further and material evidence is introduced, it becomes a new case in so far as to require the additional evidence to be considered in connection with the evidence previously before the court, and decided upon all the evidence then heard.

When this case was previously before the court, Mong testified that he had paid all the taxes on the west third of the lot every year during the time he owned it, being more than seven years. His evidence was clear and explicit. On the last trial he testified that he only remembered the amount of the several payments as shown by the receipts, nor does he know otherwise that the entire amount due was paid. But this testimony must be taken in connection with his former evidence, in which he says he called on the officer each year, gave him the number of the lot, and informed him that he desired to pay all the taxes due on the same, and paid all the officer said was due. His evidence on the last trial but slightly, if at all, changes the effect of his previously given testimony. It still fully proves the name of the person who paid the taxes, the lot on which they were paid, and that he paid each and every year, during the time. We are satisfied that this is sufficient. He remembers calling on the officer, telling him he desired to pay the taxes, giving his name, the description of the lot, and that he received the receipts. His evidence is still as explicit on these questions as it was before, and on those questions further discussion is deemed unnecessary.

This court held in the case of *Hinchman* v. *Whetstone*, 23 Ill. 185, that payment of taxes might be proved by parol, and receipts therefor might be explained or contradicted. The same conclusion was arrived at in the case of *Rand* v.

Scofield, 43 Ill. 167, and the same conclusion was announced when this case was previously before this court, 46 Ill. 187. We regard this as the settled rule of this court, and decline its further discussion. While proof for that purpose may be introduced, it is important for the protection of all persons that, to have weight, it should be satisfactory and free from reasonable doubt. If it is loose, doubtful and unsatisfactory in its character it should receive but little weight. Those trying the issue would of course consider all the attendant circumstances, the remote or recent date of the payment, the intelligence of the witness, his memory, interest, fairness, and in short all that may disparage or support his testimony.

It is urged that receipt No. 1 for city taxes bearing date on the 7th day of November, 1845, is twelve and one-half cents less than the sum extended on the collector's warrant against the west one-third of the lot. After a careful examination of the record, we fail to find any portion of the collector's warrant in the bill of exceptions. But if it did appear, we are not prepared to hold that under the evidence in the case it could matter. Mong swears that he paid all the taxes that the officers severally claimed to be due, and that he designed to pay all, and supposed he had. When a party thus calls on the collector and offers to pay all of the taxes assessed on a tract of land, and the officer gives him a receipt in which he says the full amount has been paid to him, and receives the money, the presumption is strong that the full amount was paid and that the officer had made a mistake in the sum stated in the receipt, rather than in the amount received. We must presume the officer in such a case endeavors to get all, and when the tax payer endeavors to pay it, we may reasonable infer that the united efforts of the two would generally be successful. At any rate it is evidence from which a jury or a court may reasonably infer that all the taxes standing on the collector's warrant against the lot were paid.

The receipt No. 2, for State and county taxes for 1845, together with Mong's evidence, proves their payment, on the

1st of December, 1845. The receipt describes the lot as 30 feet on Madison street, by 189 feet deep, and as a part of lot 3, block 95, school section addition. The receipt shows that he paid on the proper quantity, in the proper lot, and although the sum is not specified in the body of the receipt, yet each kind of tax, and its amount, is indicated at the foot of each column, and the receipt states that dollars and cents "being the amount of county, State and special tax for the year 1845," was received on the property described; and Mong's testimony fully proves that he paid this tax. The statute, then, began to run on the first day of December, 1845, and the seven years were completed on the corresponding date in 1852, and if all taxes legally assessed during that period were paid by Mong, or some person else under and in subserviency to the color, the bar then became complete.

The objection to receipt No. 3 is, that it is a payment on the west third of the lot, while the lot was assessed as the south, north and middle thirds.

We have looked into the record and find that the assessor's roll so describes it. The south third is assessed to W. H. Kennicott, the middle third to George Brown, and the north third is not assessed in the name of any person; but the collector's warrant has the east third in the name of Kennicott, the west third in the name of D. Mong, and it is marked paid on the warrant. Mong, then, paid the tax that stood against his third of the lot on the collector's warrant, and he paid according to that description and the requirements of the warrant. He saw that the tax was against that third, and paid it, and in doing so he did not go back of it to learn whether the assessor had made any mistake in the description. When the tax warrant issues, and the property is there properly described, we will presume that it was, for the purposes of the statute giving this bar, legally assessed, and that when the payment is made, it conforms to the requirements of the statute.

When the case was previously before this court, it was held that an assessment, technically illegal, would not render his payment nugatory, and the same doctrine was announced in the case of *Chickering* v. *Faile*, 38 Ill. 342. When he found his property correctly described on the tax warrant, and paid the taxes there appearing against it, he did all the law required, nor can that payment be destroyed by showing that there was a mis-description of the property on the assessor's roll. It was a warrant legally issued, and authorized the officer to enforce the payment of the taxes extended against this third of the lot, and the warrant would have justified the collector in enforcing payment by distress on Mong's property. And it was so far legal and valid that the tax would not have been enjoined, nor could Mong escape its payment. The tax was therefore legally assessed, if not for all purposes, it was for the purposes of the act of 1839, under which this bar is interposed. No objection is urged to receipt No. 4.

Receipt No. 5 fails to state in what portion of the city the lot upon which the tax was paid, was located. But that defect is fully supplied by the testimony of Mong. He says he owned no other property on Madison street, and never paid on any other, and that he always paid on this portion of lot three. Receipt No. 5 is for the city taxes of 1847, and is for $1.63, while it is urged the warrant for that year shows that those taxes amounted to $2.62½. Conceding this to be true, the objection is answered by what is said in reference to receipt No. 1.

Receipt No. 6 fails to contain a sufficient description of the lot, but the defect is supplied by the evidence of Mong. We pass over all the intermediate receipts, to No. 12, as what has already been said disposes of objections to them. That receipt was dated on the 30th of December, 1850, but the blank left to be filled to indicate the year for which they were levied, was not filled by the collector. We said, when this case was previously before us, that this receipt, with the other evidence, proved that the tax was for the year 1850. As

receipts were produced for the previous and succeeding years, we can arrive at no other conclusion but this payment was for the taxes of the year 1850.

As to receipt No. 13, for the taxes of the city for 1851, we see it is for the entire lot, and for but $6.37\frac{1}{2}$, while the tax warrant shows a larger sum on the lot. It, however, appears that the sum paid was extended to the west third of lot three, and was the amount paid by Mong. This, then, proved that he paid the tax that was assessed against his third, and that payment can not be affected by a failure of the officer to describe his third in the receipt. Mong swears he never paid on any other portion of the lot.

It is urged that Mong paid the State and county taxes for the year 1852 after he had sold the property to Kennicott. It appears he conveyed by quit-claim deed to Kennicott on the 1st of February, 1852, and paid the taxes on the next day. He seems to have paid them for the benefit of the title he had sold, and not merely as a volunteer. They were assessed upon it while he was the owner, and under the revenue law then in force, the collector could have distrained upon his personal property, and thus collected this tax. He was, then, under a legal obligation to pay the tax, and it will, under the facts thus presented, be presumed that the payment of taxes which had accrued under this title, and paid by reason of a legal liability to the State arising therefrom, was under and subordinate to that title. Had he paid them when there was no legal liability, and no agreement to do so, but simply as a volunteer, or under another claim of title, then such a payment could not be counted as one of the seven, necessary to complete the bar of the statute.

Receipt No. 16 was for the city taxes of 1852, and was dated on the 8th of November of that year. It appears to be regular and properly admitted in evidence. This, then, completed the full payment of taxes for the required statutory period. And from what has been said here in connection with what was said when the case was formerly before

the court, it is seen that the proof of the payment of such taxes was properly made to render the statute availing. Appellees then showed that they were in a position to successfully invoke the aid of the statute to bar the action as to the west third of the lot, and as to it no error is perceived in the judgment of the court below.

We now come to consider the question whether payment of taxes for seven successive years on the east third of this lot has been proved. On this branch of the case there has been no change in the evidence since the case was previously before us, except the oral evidence of Taylor, which was introduced on the last trial in the court below. We have examined it carefully, but it fails to impress us with a conviction that he has proved the payment of the taxes, to which he swears. He had no interest in the transaction, and this being so, it seems to us almost impossible that, after such a length of time, a person could recall a transaction of this character, when there was no other occurrence or event immediately connected with it, in the slightest degree calculated to impress it so indelibly on the memory. It was an event of daily occurrence for a considerable period in each of several years, that he was in some manner connected with the payment and collection of taxes. And this witness, a number years previously, when examined in reference to the payment of taxes for the same year, knew nothing of it. At that time it had entirely faded from his memory, and it seems incredible that years afterwards it could be fully restored to his memory.

Again, when cross-examined as to other concurrent circumstances that must have fallen under his observation, his memory seems to be at fault. That, from constant effort, it may be that the witness has persuaded himself that he has recalled to mind the facts to which he testifies may be true, but he fails to show by what process his memory has again re-possessed itself of long-forgotten occurrences. Believing that such could not be done by ordinary minds, we cannot believe that the payment of that tax was sufficiently proved,

and without it there is no view of the case in which it can be held that the bar of the statute has been proved as to the east third of the lot. And failing to do so, the court below erred in finding that a bar had been proved as to it.

For this error, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

JAMES HENNESSEY

v.

JOHN V. HILL.

CONSIDERATION—*want thereof.* Where a party gave to a constable his written obligation to pay a sum of money, the sole consideration for which was the forbearance on the part of the officer from levying a writ of attachment on the property of a third person, and the evidence showed there was no intention on the part of the officer to make the levy, the property being exempt from execution: *Held*, the contract was void for the want of consideration.

WRIT OF ERROR to the Court of Common Pleas of the city of Elgin, Kane county; the Hon. RICHARD T. MONTONY, Judge, presiding.

This was an action of assumpsit, originally brought by James Hennessey, against John V. Hill, before a justice of the peace, and afterwards appealed to the court of common pleas of the city of Elgin, Kane county, to recover on the following obligation, written on the back of an attachment writ, against one Andrew Ashbaugh:

"RUTLAND, April 16, 1868.

"I, John V. Hill, hold myself special bail to James Hennessey, constable, for the debt, interest and costs on this attachment, payable three months after date.

"(Signed) J. V. HILL."

It appears that Hill entered into the obligation to prevent Hennessey, as constable, from levying upon the property of Ashbaugh, but on the trial of the cause in the court below the evidence showed that Ashbaugh's property was exempt from execution, and Hennessey testified that he had no intention of making the levy. Judgment for the defendant. The plaintiff thereupon sued out this writ of error.

Messrs. BOTSFORD & HEALY, for the plaintiff in error.

Messrs. JOSLYN & WING, for the defendant in error.

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

The evidence fails to show any consideration for this undertaking of defendant in error, and this instruction to the jury was proper and the verdict correct:

"That unless the jury believe from the evidence in this case that the said plaintiff, at the time of the execution of the writing on the back of the attachment, had levied, or intended to levy on the property of Ashbaugh, then there was not a consideration in law for the contract or bail, signed by the defendant, and the jury should find for the defendant."

The plaintiff had not attached the property, and there was, therefore, no consideration for the promise. The judgment is affirmed.

Judgment affirmed.

JOHN LEINDECKER *et al.*

v.

ELLA WALDRON.

1. PRIVILEGED COMMUNICATIONS—*what are not.* It is not error to permit an attorney, as a witness, to answer a question, the object of which was merely to ascertain whether the relation of attorney and client actually existed, not what was disclosed to him in that relation. Such question calls for no breach of professional confidence.

2. FORCIBLE ENTRY AND DETAINER—*when sub-tenant can not be dispossessed under a judgment against the tenant.* Where a landlord recovers a judgment in an action of forcible entry and detainer against his tenant, a sub-tenant, who was not a party to such judgment, can not be put out of his possession under the writ, unless he entered *pendente lite.*

3. SAME—*against whom the action will lie.* A sub-tenant is, by the express provision of the statute, liable to this action, and it has so been held by this court.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

The facts in this case are fully presented in the opinion of the court.

Messrs. ASAY & LAWRENCE, for the appellants.

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

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action of trespass, in which the record shows substantially the following facts: Leindecker had rented a house in Chicago to Granger, and the latter had sub-let the upper story to Mrs. Waldron, the appellee. Some difficulty occurred between Granger and her, from her delay in the payment of rent, and he brought an action of forcible entry and

detainer against her, but was defeated on the trial. His attorney then had an interview with Leindecker, and commenced an action of forcible entry and detainer in his (Leindecker's) name, against Granger, who at once appeared, waived process, and allowed judgment to be entered against himself, the alleged ground being that he had violated a clause in the lease against sub-letting. A writ of restitution was issued and executed, not against Granger, but against Mrs. Waldron, who was not a party to the suit. The constable had several men to assist him, and her furniture, in the course of an hour, was all taken from the house and placed upon the sidewalk, except a piano, which was deposited in a feed-store near at hand. She was a dress maker, and had two daughters and two employees. Her business was, of course, damaged, and this forcible expulsion into the streets seriously affected her health. The whole proceeding was a wrong without even the color of law. The officer, who acted under the direction of the attorney, did not disturb Granger, against whom alone his writ ran, but Granger himself went through the farce of moving a few articles of his furniture from the house, and moving them back again. This suit was brought against both Leindecker and Granger. There have been two trials, in the first of which the plaintiff recovered a verdict for $1700, and in the second for $1000.

No question is made by the appellant's counsel on the instructions, but it is contended that the attorney who conducted these proceedings was not the duly authorized attorney or agent of Leindecker. That question was fully and fairly submitted to the jury upon the instructions, and their finding is, we think, fully sustained by the evidence. The attorney swears he had several interviews with Leindecker before commencing the suit, in which the subject was discussed, and in consequence of those interviews he commenced the suit. After the constable had executed the writ, he locked the rooms and delivered the keys to Leindecker, to whose house he went with Granger. The jury, probably, concluded, and with

good reason, that the entire proceeding was carried through by arrangement between Leindecker and Granger, in order to free themselves from the appellee as a tenant, having failed to accomplish that by an action against her.

It is further objected that, if the relation of attorney and client did exist, the court erred in permitting the attorney, as a witness, to answer the following question: "Who authorized you, if any one, to make out the affidavit and commence the suit?" We do not consider the question open to the objection made. It called for no violation of professional confidence. It asked for no fact revealed in the relation of counsel and client. The attorney had prosecuted a suit in the name of one of the defendants, and the object of the question was merely to ascertain whether the relation of attorney and client actually existed, not what was disclosed to him in that relation.

It is also claimed by counsel for appellant, that a landlord, who has recovered a judgment in an action of forcible entry and detainer against his tenant, may, under the writ, dispossess a sub-tenant, not a party to the suit. Undoubtedly he may, if such sub-tenant has entered pending the suit, but not so if he was previously in possession. The rule may be different in Massachusetts, where the entire law in regard to the action of forcible entry and detainer seems to be administered upon quite different principles from those which have always obtained in this State. Our statute, in terms, contemplates an action against the sub-tenant, and so it has been construed by this court. *Clark* v. *Barker*, 44 Ill. 349; *Reed* v. *Hanley*, 45 ib. 41. This court also held in *Brush* v. *Fowler*, 36 Ill. 56, as a principle of universal law, that a person can never be turned out of his possession by virtue of a judgment and execution in a proceeding to which he was not a party, unless he entered *pendente lite.*

The damages are not so excessive as to justify us in reversing the judgment on that ground alone.

Judgment affirmed.

Syllabus.

JOHN PARKER

v.

JOSEPH H. TIFFANY.

1. TRANSFER OF GOODS *in fraud of creditors—when the transaction ceases to be fraudulent in its character.* Although the owner of goods may have placed them in the hands of a third person with the purpose of hindering and delaying the creditors of the former, the owner receiving the note of the other party to give color to the transaction as a sale, yet, if the debtor afterwards pays his debts, the transfer would cease to be a fraud upon creditors, and a surrender of the note to the maker would constitute a sufficient consideration for an agreement on the part of the latter to hold the property as bailee, and such a change of the character of the arrangement would not, under such circumstances, be deemed fraudulent.

2. ASSUMPSIT—*when it will lie.* While the general rule may be, that assumpsit will not lie for the value of property which has been bailed, unless it has been sold and converted into money, or money's worth, yet where the bailee fails to return the property, and agrees to pay for it, the bailment is converted into a sale, and assumpsit will lie as in case of any other sale of goods.

3. FORM OF ACTION—*when it can not be questioned.* But where the defendant in an action of assumpsit, himself asked an instruction to the jury, which was given, and which, when considered in the light of the evidence in the case, amounted to an admission of his liability, it was *held*, the jury finding in strict accordance with such instruction, no question as to the form of the action could be raised.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

The opinion states the case.

Mr. A. N. WATERMAN, for the appellant.

Messrs. HUMPHREVILLE & DUNNE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that appellee, who had his house destroyed by fire in the spring of 1862, had placed his household furniture in a building in the possession of one Fergus. After a short time, Fergus desiring to use the room in which the furniture was stored, appellee removed the property to appellant's building on Dearborn street, used by him as an auction and commission house. The furniture seems to have been almost new, and of fine quality, and had been but little used. Appellee took no receipt for the goods, although he made and kept a list, and Parker seems not to have made an inventory of the goods received or returned to appellee. Appellant sold a portion of the furniture under the direction of appellee, and sold a part, and sent some more to Alexander's auction store to be sold, without authority from appellee.

Appellee gave an order on appellant to one Pratt for a few articles, and appellee's wife got some of the goods, but it appears that the portion thus received was of no great value. Appellee received from appellant some small sums of money, and gave orders on him, which were paid, but the amount was not large. Subsequently, appellant changed his business, cleared his store house of all goods belonging to himself and others, being either sold by himself or sent to Alexander's auction rooms, where they were sold.

It appears from appellee's evidence that appellant, on different occasions after going out of business, acknowledged that he owed appellee, and promised to pay him when he should have the money, but seems to have altogether failed. Appellant testified that he sold $131.90 worth of appellee's goods, and Alexander sold $100 worth, and deducted ten dollars for commissions, and that he received in all from the sale of the goods but $231.90, and paid on the orders $25.15, and that he had charged $125 for storage, and that appellee owed him $10. He admits that a portion of the goods, when he was repairing his house, were covered with old plaster, and he does not know what became of them.

Appellee gives a list of the furniture, which foots up the sum of $943, which he swears does not embrace the articles returned to his wife and to Pratt. The jury found a verdict for $571.49, and the case is brought to this court on appeal, and a reversal is asked, because, as is claimed, the court refused to give a portion of appellant's instructions, and because the evidence fails to sustain the verdict.

From a careful examination of the evidence, the jury might infer that appellant had sold all the goods. When asked for the money, he did not refuse to pay because he had not sold them, but if appellee and another witness are to be credited, he promised to pay the money. He received the furniture, and admits he sold, and had Alexander to sell, a part, and fails to account for the remainder. He was in the auction business, and when he closed out to change his business, we must conclude that he sold the property, as he fails to show what he did with it, and if so, the evidence warrants the amount of damages assessed by the jury. We think the evidence sustains the verdict.

It appears from the evidence that appellee's wife returned to appellant the note he gave for six hundred dollars at the time the property was stored with him. Whatever might have been the design of the parties when the note was given, when it was surrendered appellant became simply a bailee, and we must conclude that they both understood that thenceforth, at least, such was their relation to each other. Hence, we see that appellant swears that he had charged appellee with storage and commissions, and had paid orders drawn on him, and had promised to pay appellee the balance. From this it appears that long after the transaction occurred, appellant, in various modes, recognized appellee as the owner. Appellant also swears he requested appellee to remove the goods from his store. It would be difficult to perceive how he could have more clearly, or in stronger terms, recognized appellee's ownership of the property.

Had appellant, after the property came to his hands, if placed there for the purpose of hindering or delaying appellee's creditors, never recognized him as the owner, or promised to pay him, then it may be that appellee could not recover. But the note was surrendered, and appellee's ownership afterwards fully recognized in various ways, and it may thence be inferred that a new arrangement had been entered into by them. For aught that appears, appellee may have paid all his debts, and if so, the transaction was then no longer a fraud on creditors, and appellee, holding the note against appellant, could have sued and recovered it, and there could have been no fraud in rescinding the previous arrangement, and the surrender of the note was a sufficient consideration to sustain an agreement to hold the property as a bailee of appellee. That such an agreement was made may be inferred, when we see appellant so clearly recognizing the ownership in appellee. It can not be that, after having obtained his note, which could have been enforced against him, appellant may turn around and hold the property. Whatever the nature of the first transaction and its consequences, the subsequent surrender of the note and recognition of appellee's ownership of the property could not be affected by it. The court below, therefore, did right in refusing the first and second instructions asked by appellant.

It is insisted that the action of assumpsit will not lie for property which has been bailed, unless it has been sold and converted into money or money's worth, and that the evidence in this case fails to show that a large part was sold or thus converted. This is, no doubt, true when properly limited. Where a party bails property to another, and the bailee fails to return it, and agrees to pay for it, in that case, the bailment is converted into a sale, and assumpsit may be maintained as in case of any other sale of goods. But in this case, appellant asked, and the court gave, this instruction:

"The jury are instructed that if they believe, from the evidence, that Mr. Tiffany left any furniture with Mr. Parker, and that Mr. Parker has not sold the same, or converted it to his own use, or disposed of, or assumed dominion over the same, inconsistent with the rights of the plaintiff, then before Mr. Tiffany can recover the value of such furniture from Mr. Parker, he must have demanded it from Mr. Parker; and unless the jury believe, from the evidence, that Mr. Tiffany made such demand before bringing this suit, they can not allow the plaintiff anything in this action for the value of goods, neither sold, nor converted, nor disposed of, nor treated as above stated."

This instruction, asked by appellant himself, fully warranted the jury in finding for all the goods. He admits he received them, and fails to produce them or to show their loss or destruction. What other conclusion can be drawn than that he had sold, converted, or disposed of them. He must have done one or another of these things with the goods, and the instruction impliedly admits that if he did either, then he was liable. No other reasonable construction can be given to this instruction. And as the jury have found in strict accordance with it, the question as to the form of action can not be raised. The judgment of the court below is affirmed.

Judgment affirmed.

Illinois Central Railroad Company

v.

Martin Weldon, Administrator, etc.

1. Witness—competency—*under act of* 1867. In an action against a railroad company to recover damages for the death of a person caused by the alleged negligence of an employee of the company, such employee is a

competent witness, under the act of 1867, in behalf of the company, notwithstanding his interest in the result of the suit by reason of his liability over to the company.

2. Error will not always reverse—*where a witness ruled to be incompetent is rendered competent by a release.* Where a witness was improperly ruled to be incompetent on the ground of interest, and was afterwards rendered competent, under the common law, by means of a release, and allowed to testify, such erroneous ruling will not avail the party against whom it was made, as he had the full benefit of the witness' testimony.

3. Negligence—*of contributory negligence.* In an action against a railroad company to recover damages for the death of a person, caused by the alleged negligence of the company while the deceased was engaged in unloading a coal car, it was deemed the central question whether the deceased used proper care and caution in entering upon the car under the circumstances then existing, the company's employees being at the time engaged in switching upon the track where the coal car was standing, in making up a train; for however discreet and careful the deceased may have been when on the car, the question remained, and to be submitted to the jury, was he justified in being there at that time, and under the circumstances?

4. Instruction—*should be based upon the evidence.* In such an action, brought under the statute, for the benefit of the widow and next of kin, there was no evidence that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training, and for want of such evidence, it was held to be a misdirection to the jury, to instruct them that such training and instruction by the deceased, of his children, were proper elements to consider in ascertaining the pecuniary loss suffered by the children.

5. Measure of damages—*in such action.* In such an action, the damages can be only for the pecuniary loss to the widow or next of kin; nothing is to be allowed by way of solace.

6. Same—*what may be considered as a proper element of damages.* In estimating the pecuniary injury, the jury may, in a proper case, where there is evidence authorizing them to consider the subject, take into consideration the support of the widow of the deceased, and the minor children, and the instruction, and physical, moral and intellectual training of the minor children by the deceased.

7. Same—*of the amount of damages—when excessive.* In an action of this character, it appeared the deceased was a common laboring man, who left a widow and several minor children, but what wages he was receiving or earning was not shown, yet a verdict of $5000 was regarded too much, in view of there being no evidence that he earned, annually, as much even as one half the interest on that sum. Some evidence should be given of the

profits of the labor of the deceased, and what he might probably earn for the future support of his family, to justify so large a verdict in such a case.

Appeal from the Circuit Court of Whiteside county; the Hon. W. W. Heaton, Judge, presiding.

This was an action on the case, brought under the statute, by Martin Weldon, as administrator of Christopher Weldon, deceased, for the benefit of the widow and next of kin, against the Illinois Central Railroad Company, for wrongfully causing the death of the said Christopher.

The circumstances attending the accident were briefly these: the deceased, being in the employment of a coal dealer, as a laborer in unloading coal from cars at the company's depot in Dixon, in this State, on the day of the accident had been unloading coal from a car standing on one of the tracks, and on returning to his work, after a short absence, he found the coal car removed from the place at which he had been unloading it, it having been drawn away with some other cars by the employees of the company, who were engaged at the time in switching upon that track in making up a train. The coal car was soon put back in its former position, when the deceased got into the car and commenced the work of shoveling out the coal, the switching still going on upon that track. While so at work, other cars were run against the coal car with such force as to throw deceased upon the ground, and he was run over and killed.

A trial resulted in a verdict and judgment for the plaintiff, for $5000. The railroad company appeals. The opinion of the court sufficiently presents the grounds of the alleged error.

Messrs. Goodwin & Williams, and Mr. B. C. Cook, for the appellants.

Mr. William Barge, for the appellee.

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

Several objections are made on this record, but we shall address ourselves to those bearing upon the instructions. Preliminary to this, an objection raised on the rejection of the testimony of Woolley, a witness called for appellants, will be disposed of. Woolley, the rejected witness, was an employee of appellants in a capacity connecting him with the making up of trains for the road, and when offered as a witness, was rejected, on the ground of interest, being liable over to appellants.

The rule of the common law in relation to the interest of a witness is familiar to all, and operated in full force in this State until the enactment of the law of 1867. However much the existence of the rule was regretted by the most learned and distinguished courts of this country and of England, it was inexorably enforced, and witnesses of the highest character in the community were excluded from the stand, if it appeared they had an interest in the event of the suit. To make such competent, resort was had to a written release executed with all the forms of law. Our legislature, in a spirit of enlightened policy, abolished this rule, by declaring that no person should be disqualified as a witness in any civil action, suit or proceeding, or by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime. Sess. laws, p. 183.

By the common law, and under the authority of the case of the *Galena & Chicago Union Railroad Co.* v. *Welch*, 24 Ill. 33, this witness was incompetent, but this act of 1867 removed his disability, and he should not have been rejected, or the appellants compelled to execute to him a release of whatever claim they may have had on him for prospective damages, and did the cause rest upon this point, we should be inclined to hold the error sufficient to reverse the judgment. But the appellants were not deprived of the testimony of this witness. He was sworn and examined, and testified fully in the cause.

Now, as to the instructions. Those given for appellee are for the most part confined to the conduct of the deceased whilst engaged in unloading the coal cars, without any reference to the question of going upon that car at the time and under the circumstances he did enter upon it. The central question is, did the deceased use proper care and caution in entering upon this car under the circumstances then existing? This is an important question in the case, and to which the attention of the jury was not called. However discreet and careful the conduct of deceased may have been when on the car, the question remains, was he justified in being there at that time, and under the circumstances?

On another trial, the attention of the jury will be called to this central fact.

Exception is taken to the tenth instruction given for appellee. It is as follows:

"The jury are instructed that in estimating the pecuniary injury, if they believe from the evidence that the widow and minor children of said Christopher Weldon, deceased, have sustained any injury for which the defendant is liable, they have a right to take into consideration the support of the said widow and minor children of the deceased, and the instruction, and physical, moral and intellectual training, of the minor children of the deceased, and also the ages of the said minor children, and the pecuniary condition of the said minor children and widow of the deceased, in determining the amount of damages in this case, if they believe from the evidence that said Weldon left a widow and minor children."

To the principle contained in this instruction, we perceive no objection. The matter of it has been elaborately discussed in the courts of several of the States, but in none, perhaps, with more ability than in the court of appeals of the State of New York, in the case of *Tilly, Admr.* v. *The Hudson River R. R. Co.* 29 N. Y. 252. That case was more than once

before the court of appeals, and it was held that the nurture, and instruction, moral, physical and intellectual training, by the deceased, of her children, were proper elements to enter into the consideration of pecuniary loss suffered by the children. In that case there was evidence on which to base that instruction; in this case there is no such evidence, and therefore it should not have been given. In the absence of such evidence, it was a misdirection of the court. There was no proof tending to show that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training. On another trial this may be shown.

A point is made upon the amount of damages allowed. It will be perceived the jury have gone to the extent of the law, and, without any proof other than the fact of death, have said the pecuniary loss thereby to his widow and next of kin is five thousand dollars, and no less.

By section two of the act under which this action is brought, a jury is permitted to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death, to the widow and next of kin of the deceased, not exceeding five thousand dollars. The only injury for which a jury can estimate, is a pecuniary injury, that is, what have the widow and next of kin lost, in a money view, by the death? Nothing is to be allowed by way of solace. In *Conant* v. *Griffin, Admr.* 48 Ill. 410, which was a case under this statute, it was distinctly announced, as it had previously been, in other like cases, that the damages could only be for the pecuniary loss, not for the bereavement. *City of Chicago* v. *Major*, 18 ib. 349; *Chicago and Rock Island Railroad Co.* v. *Morris*, 26 ib. 400. The amount awarded by the jury, placed at interest, would yield five hundred dollars per annum. There was no proof that deceased earned, annually, one-half of that amount by his labor, or that his prospects were such, and such his business capacity, as to justify a reasonable expectation that he would, in the future, earn

one-half the interest on that sum. He was a common laboring man, but at what wages there was no proof. This court said, in the case of the *Chicago and Alton Railroad Co.* v. *Shannon, Admr.* 43 Ill. 338, if the deceased was poor, the loss may consist in the fact that his personal exertions can no longer support those dependent upon him, but the subject itself does not lie within the limits of exact proof. While this is so, yet surely some evidence should be given of the profits of the labor of the deceased, and what he might, in all probability, earn for the future support of his wife and children. In this consists essentially the loss to the family. If some rule is not prescribed by which juries must be governed in such cases, the result will be in all cases a verdict to the extent of the law. The jury have no right to find arbitrarily, that the death of any husband and father results in a pecuniary loss to his widow and next of kin of five thousand dollars. A verdict rendered without evidence on a material point, and for the largest amount provided by law, bears very much the appearance of being the result of prejudice and passion.

For the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

Chicago, Rock Island & Pacific Railroad Company

v.

Moses McAra.

1. Negligence—*in railroads.* In an action against a railroad company for personal injury received by the plaintiff, by reason of the train in which he was a passenger having struck a cow which suddenly run upon the track, and the cars thrown from the rails, it appeared that cattle were

in the habit of resorting to the station where the accident happened, being attracted there by the corn liable to be scattered upon the ground, and that a few days before this accident, a train had run over a cow at that station. There was no watchman there to keep the track clear, and the train was passing the station with more than ordinary speed. With the known liability to such accidents at that place, this was inexcusable negligence.

2. Excessive damages. In this case, it appeared the plaintiff had no bones broken. He stated at the time of the accident that he was not much hurt. On the trial he stated that he was severely bruised on his left side. His physicians said it was merely a muscular injury. He kept his bed nearly all the time for a month, getting up, however, and walking about the house every day, and claimed to be still lame at the trial, which was about ten months after the accident, though there was some reason for supposing his recovery would have been more rapid if he had had no claim for damages. A verdict for $5000 was considered excessive, and the judgment was reversed for that cause.

Writ of Error to the Circuit Court of Rock Island county; the Hon. George W. Pleasants, Judge, presiding.

The opinion states the case.

Mr. George C. Campbell, for the plaintiffs in error.

Mr. John B. Hawley, for the defendant in error.

Mr. Justice Lawrence delivered the opinion of the Court:

The appellee was a passenger on one of appellants' trains in July, 1867. As the train, early in the morning, was passing a flag station, it struck a cow that had suddenly run upon the track, and the car in which appellee was sitting was thrown from the rails and turned over. For the injury then received the jury gave a verdict of $5000.

The jury were properly instructed on the question of negligence, and their finding in that regard is sustained by the evidence. The evidence shows that cattle were in the habit of resorting to the station, being attracted there by the corn liable to be scattered upon the ground, and that, a few days before

this accident, a train had run over a cow at that station. A proper consideration for the safety of its passengers would very clearly impose on the company the duty, either of checking the speed of a train intending to pass the station without stopping, so as to remove all danger of such accidents, or of having a watchman stationed at the approach and passage of such a train, for the purpose of keeping the track clear. In this case there was no watchman, and the weight of the evidence goes to show the train, so far from slackening its speed, was running with more than ordinary velocity, being on a descending grade. With the known liability to such accidents at that place, this was inexcusable negligence.

We can, however, find no warrant in the evidence for the amount of damages. The plaintiff had no bones broken. He stated at the time of the accident he was not much hurt. In describing the extent of the injury, in his own testimony, he says he was severely bruised on his left side. Dr. Peck testifies that he and Dr. Conway agreed, when they examined him, that it was merely a muscular injury. He kept his bed nearly all the time for a month, getting up however, and walking about the house every day, and claimed to be still lame at the trial. The physicians who testified are unable to give a satisfactory explanation of his lameness, the theory advanced by some of them being pronounced impossible by the others. Four or five different witnesses testify to have seen him on as many different occasions, when in a state of some excitement, walking and even running for a short distance, without showing any appearance of lameness. While we can not accept the theory of appellants' counsel, that his lameness was wholly feigned, we can not, on the other hand, resist the conviction that his recovery would have been much more rapid if he had had no claim for damages, and that a verdict of five thousand dollars, which the statute fixes as the maximum limit of damages for death itself, in a suit brought for the benefit of the

widow and next of kin, is wholly disproportionate to the injuries received by this appellee.

We think it our duty to send this case to another jury.

Judgment reversed.

THE BOARD OF SUPERVISORS OF HENRY COUNTY

v.

THE WINNEBAGO SWAMP DRAINAGE COMPANY *et al.*

1. LIMITATIONS — *in equity.* The fact that a statute of limitations is positive in its terms, will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction, and enforce the right for the prevention of a fraud.

2. So, where a bill in chancery, by which it was sought to enforce a right in respect to which the defendant had been guilty of fraud, alleged that the complainant had no knowledge of the fraud until within the time prescribed by the statute as a bar, the remedy was enforced, notwithstanding the limit of the statute had expired before the filing of the bill.

3. PLEADING IN CHANCERY—*to avoid the statute of limitations.* In order to prevent the statute of limitations being availed of on a demurrer to a bill in chancery, if there be grounds which take the case out of the statute, they should be stated in the bill.

4. SAME — *of the allegation of fraud—when sufficient.* In a bill filed by the board of supervisors of a county against a drainage company, to recover the proceeds of drafts which had come to the State from the general government, for swamp and overflowed lands sold by the latter after their selection, and which had been obtained from the State by the defendants, it was alleged that the secretary of the drainage company obtained the drafts from the State by some fraudulent pretense, the character of such pretense being unknown to the complainants, and that the secretary converted the drafts into money, and paid it over to the company: *Held*, upon demurrer to the bill, that, although all the circumstances attending the fraud were not stated, yet the allegation was as full as it could be made, and this was admitted by the demurrer, and was deemed sufficient.

5. SAME—*allegation as to time when the fraud was discovered.* The bill alleged that a knowledge of the facts connected with the receipt of the drafts by the secretary of the company, and their conversion and application, did not come to the complainants until within two years before the filing of the bill, and this was regarded a sufficient allegation on that subject, without an allegation of facts and circumstances tending to explain the reason why the information did not reach them at an earlier period.

6. DEEDS—*what will pass thereby.* A conveyance of swamp lands by a county to a third party, will not pass the right of the county to drafts or scrip given by the general government to the State, and by the State to the county, for swamp and overflowed lands sold by the general government after they had been selected under the act of congress on that subject.

APPEAL from the Circuit Court of Henry county; the Hon. GEO. W. PLEASANTS, Judge, presiding.

The opinion states the case.

Messrs. SHAW & CRAWFORD, for the appellants.

Messrs. BENNETT & VEEDER, Mr. GEORGE E. WAIT and Mr. IRA O. WILKINSON, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit in chancery, brought by appellants, in the Henry circuit court, against appellees, to recover money received on two drafts drawn by the United States treasurer, in favor of the Governor of the State, on account of the sale of swamp and overflowed lands, which had been sold by the general government, after they had been selected under the act of Congress granting them to the State. The general assembly, on the 14th day of February, 1855, adopted an act incorporating appellees, under the name of the Winnebago Swamp Drainage Company, for the purpose of reclaiming such lands in Bureau, Lee, Whiteside and Henry counties. The general assembly having granted these lands to the

county, it transferred them to the company on certain conditions.* Under the agreement thus entered into, in which nothing was said in reference to the drafts or land scrip issued in lieu of lands sold after their selection, the company claimed and obtained the drafts, amounting to $3616.58, and appropriated it.

A demurrer was filed to the bill, the principal grounds being, that the cause of recovery did not accrue within five years before exhibiting the bill. On a hearing, the court below sustained the demurrer and dismissed the bill. Appellants bring the record to this court, and ask a reversal of the decree of the court below in dismissing the bill.

The demurrer admits the allegation that the quit-claim deed made by the county to the swamp drainage company did not assign or transfer the right of the county to receive the drafts or scrip from the Governor of the State, but the demurrer relies upon the statute of limitations as a bar to the recovery. It is insisted that, as more than five years have elapsed since they received the drafts, this bill cannot be maintained. The bill alleges that the knowledge that appellees had received these drafts was not acquired until within two years of the filing of the bill.

There are cases in which courts of equity will interpose to prevent the bar of the statute of limitations, as in cases of a fraud, which has not been discovered until the statutory bar would ordinarily apply at law.

The fact that the statute is positive in its terms, will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction, and enforce the right for the prevention of a fraud. Angel on Lim. 28; *Hovenden* v. *Annesley*, 2 Schol. & Lef. 630; 2 Story's Eq. 906; *South Sea Co.* v. *Wymondsell*, 3 Pr. Wms. 143; *Delorain* v. *Brown*, 3 Bro. ch. cases, 633. The case of *Hovenden* v. *Annesley*, announces the doctrine, that if the plaintiff has

any ground of exception to prevent the bar, or the presumption arising from the length of time, then the bill should state it, and it would not be subject to a demurrer. To the same effect are the cases of *Sherington* v. *Smith*, Bro. P. C. 62; *Beckford* v. *Close*, 4 Ves. 476; *Foster* v. *Hodgson*, 19 Ves. 180. These cases fully establish the practice in a court of equity, that the grounds which take the case out of the statute of limitations should be stated in the bill, and thus prevent it from being demurrable.

It is alleged, the secretary of the company, by some fraudulent pretense, obtained the drafts from the Governor, but that the pretense employed is unknown to complainants; that he had converted them into money, and paid it to appellees. The demurrer admits that the drafts were obtained by fraud, and the means employed to procure them was unknown to complainants. This, then, although not a statement of all the circumstances attending the fraud, is as full as it is alleged it could be made, and it is so admitted.

Under these circumstances, we are at a loss to know how appellants could have made a fuller allegation, and this averment must be held sufficient.

Appellants also allege that a knowledge of the facts connected with the reception of the drafts, and their conversion and application, did not come to the county authorities until within two years of the filing of the bill, and this allegation is admitted by the demurrer. We regard this as a clear, concise statement of a fact that is traversable. Nor do we see that it was necessary to allege facts and circumstances tending to prove or explain the reason why the information did not reach them at an earlier period. Owing to the annual election of the board of supervisors, the body is constantly changing, and the board of this year, who may enter into a contract, may be superseded next by men who have no knowledge of its details or its situation Hence, we would not expect that such a body would be as active in the pursuit of claims due the county, or as apt to learn of such transactions

as would an individual, or the same persons continuously occupying the same position. Hence, we should not infer, against the allegation, that appellants had the knowledge at an earlier period. We are clearly of the opinion that the court below erred in sustaining the demurrer on the ground that the suit was barred by the statute of limitations.

The contract and deed set out in the bill all refer to the title and claim of the county to the lands. There is nothing said about money, drafts or scrip that the county was or might be entitled to receive from the general or State government. And under a contract to sell lands by a party, we are aware of no rule of construction which can extend or torture such a contract into a sale of lands, and also of *choses in action*. We are at a loss to perceive, from anything contained in the bill, how there can be the slightest pretense of a claim to these drafts or the money arising from them. From the bill it appears that appellees have received and retained money belonging to the county, and to which appellees have no claim. For these reasons we think the court below erred in sustaining the demurrer and in dismissing the bill, and the decree is therefore reversed and the cause remanded.

Decree reversed.

Daniel O'Hara

v.

Simeon W. King.

1. Public offices—*of the right of private persons to enter the same.* Every person, has a right to enter and remain in a public office, such as the office of the clerk of a court, even from motives of curiosity, merely, during such hours as the same may be open for the transaction of public business, so long as he conducts himself properly, and in no way interferes with, or impedes the business being transacted.

Syllabus. Statement of the case.

2. Instructions—*of oral statements by the court to counsel.* The act of February 25, 1857, which declares that "Hereafter, no judge of the circuit court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing," should not be construed as prohibiting the court from confining counsel in their argument, to such points of law as he may suppose control the case, and from stating, orally, to the counsel, in the presence of the jury, what those points are.

3. Bill of exceptions—*presumption.* When it is alleged, on error, that the court below made remarks to counsel, orally, in violation of the statutory rule that instructions to the jury must be in writing, if it does not appear by the bill of exceptions what the court did say, it will be presumed the oral remarks were not of such character as to come within the rule. Per Mr. Justice Walker.

Appeal from the Superior Court of Chicago; the Hon. William A. Porter, Judge, presiding.

This was an action of trespass, *vi et armis*, brought by Simeon W. King, against Daniel O'Hara. The facts are these: On the 6th day of April, 1868, the defendant was clerk of the recorder's court of the city of Chicago, and in possession of a room in the court house building, where he conducted his business. About seven o'clock in the evening, while the defendant was in the office transacting public business, the plaintiff entered, having, as he testified, no business, for the purpose of whiling away the time; the office was crowded, and on being asked by the defendant if he had any business to be attended to, replied he had none. He was then told that he was standing in the way of others who had business, and was requested to depart. He refused to go, whereupon the defendant forcibly ejected him from the office. And upon the trial below, the jury awarded the plaintiff a verdict of $166, for which judgment was rendered. The defendant appealed to this court.

Mr. Francis Adams and Mr. William K. McAllister, for the appellant.

Mr. John Lyle King, for the appellee.

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

We perceive no error in this record. The plaintiff below was rightfully in the office of the defendant, it being a public office, he interfering with no one, in no way impeding the business then being transacted, and conducting himself in a quiet and orderly manner. We know no law forbidding a person, conducting himself properly, from entering a public office from motives of curiosity merely, at such hours as the office may be open for the transaction of public business.

That such was the condition of this office at the time of the assault, is shown by the proof.

It is not like the case of *Woodman* v. *Howell*, 45 Ill. 367. The office, in that case, was a private office, and the intruder had been requested to leave, and on his failing to do so, it was held he was properly ejected by force.

The objection to this record, which has had some weight upon our minds is, the exception taken by the defendant to the action of the court, after his counsel had risen to address the jury.

The bill of exceptions states that the court, after all the testimony had been offered, by both parties, and after Mr. Adams, defendant's counsel, had commenced his argument to the jury, interrupted the counsel, and proceeded to state, and did state, orally, in the presence and hearing of the jury, the opinion of the court as to the law of the case, and which statement was not reduced to writing.

It is insisted by appellant, that this conduct of the court was equivalent to an instruction to the jury, and as it was not in writing, was in violation of the act of February 25, 1857, and should reverse this judgment.

The act referred to is as follows: "Hereafter, no judge of the circuit court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing." Scates' Comp. 261.

Giving to the term "instruct," as here used, its technical meaning, and confining it to that, the record fails to show that the court gave any instruction to the jury. It is unavoidable, on the trial of a cause before a jury, that the judge will be required to state points of law on which he may suppose the case turns, and it is right, and his duty also, to confine counsel, in their argument to the jury, to such points of law as he may suppose control the case. In deciding upon a question of evidence, the court may have occasion to discuss many points of law involved in the case, and this, necessarily, in the presence of the jury. The statute, we conceive, was not designed to meet any such case. Taking the record as it is, we fail to see that the court gave any oral instructions to the jury, and, consequently, did not disregard the act of the legislature above cited. It is not like the case of *Ray* v. *Wooters*, 19 Ill. 82. There, the court modified orally a written instruction, and for that reason alone the judgment was reversed.

This case falls far short of that case. The facts are not the same, and nothing in the record warrants the conclusion that the oral remarks of the court to the opening counsel were equivalent to instructions to the jury, or intended for their ears. The remarks were made to the counsel, and for his guidance alone. We see no error in the record, and must affirm the judgment.

WALKER, J. The bill of exceptions fails to show, in terms or in substance, what the court did say to the attorney. Whether it only confined the attorney to the legal questions involved in the case, or was, in substance, an instruction to the jury, we are not informed, and we must presume the court below acted properly until the contrary is shown. Plaintiff in error must show that error has intervened to his injury before he has a right to claim a reversal. As he has failed to

present in his bill of exceptions what was said by the court, we are unable to say the statute has been violated. If error existed, he should have shown in what it consisted.

Judgment affirmed.

THEODORE H. EATON

v.

WESLEY TRUESDAIL *et al.*

1. LIEN—*as between an attaching creditor and a factor of the debtor.* A person having property of another in his possession as a factor, accepted a draft drawn by the owner of the property in favor of one of his creditors; the draft was made specifically payable out of the property, and it was agreed between the debtor and his creditor that the factor should retain the custody and control of the property, as their mutual agent, for the specific purpose of paying the draft: *Held*, that the effect of the transaction was to give to the factor a lien on the property to secure him against his liability as acceptor of the draft, and while the property thus remained in his possession, no purchaser from the owner, or creditor, could acquire an interest in it paramount to such lien.

2. The debtor, at the same time he made the draft, also gave to the creditor, in whose favor the draft was drawn, a chattel mortgage upon the property, in which it was stipulated that the property should remain in the custody of the factor, as their mutual agent, and that he should sell the same, and after discharging certain other acceptances of his for the debtor, should pay the balance to the mortgagee, to be applied on the draft. Power was given the mortgagee to take possession of and sell the property, in case of default. The mortgage was not recorded. The mortgagee, however, advertised and sold the property, buying it in himself, and afterwards sold it to the factor for the amount of his acceptance, which he paid. It was *held*, although the mortgage might be inoperative as such as against third persons, by reason of not being recorded, yet it was an agreement valid between the parties, and the transaction might be regarded as a voluntary payment of the draft by the acceptor, for which he was liable, and which he was authorized to do out of the property, by virtue of his lien, and there could be no liability in respect thereto on the part of the creditor who thus

obtained payment of his draft, to another creditor of the same debtor, who had levied an attachment upon the property after the mortgage and draft were made, but before the sale.

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

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

Mr. E. S. SMITH, for the plaintiff in error.

Messrs. BECKWITH, AYER & KALES, for the defendants in error, George Smith & Co.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 21st of March, 1856, Wesley Truesdail, of Detroit, and Isaac L. Lyon, of Chicago, entered into a written agreement, by which Lyon was to receive and sell at his lumber yard in Chicago, all lumber shipped to him by Truesdail.

The agreement specified that Lyon was to advance the freights, established the rate of his commissions, and provided for rendering an account of sales at the beginning of every month. On the 21st of February, 1857, Truesdail, being then indebted to George Smith & Co. bankers in Chicago, in the sum of $21.794.24, drew a draft for that amount on Lyon in their favor, payable out of the proceeds of lumber belonging to Truesdail in the hands of Lyon. This draft was to fall due on the 1st of September, 1857, with interest at ten per cent, and was accepted by Lyon on the day it was drawn.

At the same time Truesdail executed and delivered to Smith & Co. a chattel mortgage upon the lumber, to secure the payment of said draft. It was stipulated in the mortgage that the lumber should remain in the custody and control of said Lyon as the mutual agent of the parties; that he should sell the same, and after discharging certain other acceptances of his for said

Truesdail, estimated at $15,000, should pay the balance to said Smith & Co. to be applied upon said draft. Power was given to Smith & Co. by the mortgage to take possession of and sell said property in case of default in payment. The mortgage was not recorded. Lyon agreed to hold the property subject to the trusts specified in this instrument.

Truesdail continued to ship lumber to Lyon through the summer of 1857, and until the 1st of October, when Eaton, the appellant herein, a resident of Detroit, commenced suit by attachment against Truesdail, and levied the writ upon his interest in the lumber in Lyon's yard, and summoned Lyon as a garnishee. On the 13th of October Truesdail caused his appearance to be entered in the suit, and judgment was rendered by agreement against him for $9807.54, on which a special writ of *fi. fa.* was issued. Interrogatories were filed against Lyon, as garnishee, who answered that he had in his possession about $30,000 worth of lumber, consigned to him by Truesdail, on which he had a lien for acceptances and advances amounting to about $40,000.

On the 7th of October, 1857, Smith & Co. advertised the lumber for sale under their mortgage, and on the 17th it was offered for sale at public auction and struck off to Smith & Co. for $9807.54, who, the next day, sold it to Lyon for the amount due on the acceptance. Lyon gave them his note for the money, which he swears was afterwards paid.

On the 9th of January, 1858, Eaton filed this bill in chancery, setting up the attachment proceedings, the issuing of the special writ of *fieri facias* against the property attached, which writ was then in the hands of the sheriff, and claiming that he had thereby acquired a lien upon all the lumber in Lyon's yard, which had been consigned to him by Truesdail. The bill alleges that Lyon pretended to have a lien on the lumber for commissions and advances, on account of which he insisted upon holding the property, but that he had, in fact, no just claim against Truesdail, or one only for an inconsiderable amount; that the defendants, Smith and Willard, who

were copartners, doing business as bankers, under the name of Geo. Smith & Co. also pretended to have a lien on said lumber, or a portion of it, by virtue of a pretended chattel mortgage from Truesdail to them, and that after the levy of the attachment they took possession of and sold two millions feet of lumber and 1,500,000 pieces of lath, of which they became the purchasers; that they claimed to have thus become absolute owners of so much of the said lumber and lath, but that in fact no valid mortgage existed at the time of the attachment; that the same was fraudulent and void as against the complainant, and that said Smith & Co. had no legal or equitable right or title to any part of the property; that the pretended sale under the mortgage was merely colorable, and the pretense of ownership derived therefrom was calculated and designed to hinder the complainant in the collection of his debt.

The bill prays for an account from Lyon touching his alleged claims on the lumber and lath, and that on payment of what shall be found due, the said claims may be discharged; that the chattel mortgage set up by George Smith & Co. and the sale thereunder, may be declared fraudulent and void; and that all the lumber in Lyon's yard at the time of the attachment may be subjected to sale upon the special execution issued on the complainant's said judgment.

Separate answers were filed by Lyon and George Smith & Co. denying that any lien on the lumber was acquired by the complainant's attachment; alleging that the lumber had been consigned to Lyon for sale on commission, and that he had a lien upon it for more than its value; and insisting upon the validity of the chattel mortgage and of Smith & Co.'s title to the property covered by it.

Proofs were taken, and on a final hearing the bill was dismissed.

It is insisted by counsel for plaintiff in error that the mortgage was void, as to creditors, for want of compliance with the

statutory requirements; that all the proceedings under it were of no avail as against complainant, and that Smith & Co. wrongfully interfered with the lumber, and must be held liable to complainant, as an attaching creditor, for its value. The bill, as originally filed, sought also an account and decree against Lyon, but he became insolvent, and it seems to have been finally prosecuted and brought to this court for the purpose of establishing a liability against Smith & Co. The argument by counsel for plaintiff in error has been directed to this end, and Lyon does not appear by counsel in this court.

Notwithstanding the elaborate argument of counsel for plaintiff in error, we are wholly unable to perceive any ground upon which a decree against Smith & Co. can be rendered. Admit the mortgage and all proceedings under it to have been invalid, so far as depended upon its claim to be regarded as a statutory chattel mortgage; it was, nevertheless, an agreement perfectly valid as between the parties, and when taken in connection with the terms of Truesdail's draft, which was made specifically payable out of the proceeds of the lumber, and with Lyon's acceptance, by which he made himself personally and primarily liable for the payment of the draft, and with the specific agreement that Lyon should have the custody and control of the lumber for that purpose, the unquestionable effect of the transaction was to give to Lyon a lien upon the lumber in his possession to secure himself against all liability; and while the property thus remained in his possession, no purchaser from Truesdail, nor creditor, could acquire an interest in it paramount to such lien. He could be required to give up the possession, only by relieving him of his liabilities.

It is, then, wholly unnecessary to consider whether Smith & Co. had a lien which they could enforce for their own protection as against an attaching creditor. Admit they had none, and that their purchase under the mortgage upon one day, and their sale to Lyon upon the next, were void; it amounted then, simply to a voluntary payment by Lyon of his accept-

ance. The draft was overdue—he was liable as acceptor—and he took it up with his own note, Smith & Co. relinquishing to him whatever interest they had in the lumber, and he holding it, with a power of sale, as Truesdail's factor, and subject to the right of Truesdail to call upon him for an account. In all this Smith & Co. were surely guilty of no wrong to any one. They simply received payment of their debt from Lyon, who had undertaken to pay it out of the proceeds of certain property placed in his hands by Truesdail for that purpose, and upon its payment they relinquished to Lyon their interest in the property, whatever it may have been. It is not pretended the debt was not honestly due, and how the acceptance of its payment from Lyon, who had agreed to pay it, can be construed into a wrong to plaintiff in error, which entitles him to a decree against Smith & Co. for the money thus paid, we are not able to understand. Their interference with the property by selling it to Lyon, placed the plaintiff in error in no worse position. If they had remained quiescent, the attachment of the plaintiff in error would still have been subject to Lyon's right, as acceptor of Truesdail's draft, to have the property applied to its payment, and to retain and sell it for that purpose.

As we have already remarked, Lyon seems to have become insolvent, and does not appear in this court by counsel. We see no reason why, after dismissing the bill as against Smith & Co. the court might not have retained it as against Lyon, and referred the case to a master for the purpose of stating an account between Truesdail and him for the benefit of complainant. But this was not asked; and as Truesdail, who is evidently acting in accord with complainant, states the amount of lumber in the yard at the time of serving the attachment at about $20,000, and as the debt paid by Lyon to Smith & Co. was more than that sum, it is probable nothing would be due Truesdail on a statement of the account, giving Lyon credit for the amount paid by him. The garnishee process

against Lyon was dismissed after the commencement of this suit.

The decree of the circuit court is affirmed, without prejudice, however, to future proceedings against Lyon.

Decree affirmed.

GEORGE E. FORD *et al.*

v.

THOMAS CRATTY, Administrator, etc.

1. CONTRACTS—*compounding a criminal offense.* An attorney having money of his client in his hands, and refusing to pay it over, the client sued out a warrant for his arrest on the charge of larceny for embezzlement, which was shown the attorney, who was told that unless he paid the claim or secured it, the prosecution would be pushed to a conclusion; the attorney thereupon gave his note for the amount, with security: *Held*, in an action on the note, that it would not be regarded as having been given to compound a criminal offense, inasmuch as the statute allows the injured party to receive from the wrongdoer that which belongs to him.

2. Nor was the character of the transaction, so far as respects the validity of the note, affected by the fact that it would not have been given had the principal maker not been threatened with the criminal prosecution.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

This was an action of assumpsit, brought in the court below by Thomas Cratty, as administrator of Frederick Furch, deceased, against George E. Ford, and others, his securities, upon a promissory note given by the defendants to the intestate in his lifetime. The circumstances under which the note was given, and the questions arising in respect thereto, are set forth in the opinion of the court.

A trial resulted in a judgment for the plaintiff, from which the defendants appealed.

Mr. H. GROVE, for the appellants.

Messrs. INGERSOLL & MCCUNE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears from the record in this case, that appellant Ford, as an attorney at law, was employed by Frederick Furch to sell certain lands, to collect debts, etc. while Furch was absent in the army. It appears that Ford had sold the land, and collected debts, and in May, 1866, had in his possession about the sum of $1374. That Furch, on his return from the service, called on Ford for the money, but failed to get it. That he thereupon employed O'Brien and Cratty to collect it for him. After ascertaining that he had collected the money, and failing to obtain it, they had Furch make an affidavit of the facts, and sued out a warrant for his apprehension on the criminal charge of larceny for embezzling the money.

O'Brien took with him the affidavit and warrant, and showed them to Ford, and informed him that he must settle or secure the claim, or the prosecution would be pushed to a conclusion. Ford then saw the other appellants, and they became his sureties on the note.

It is first insisted that the court erred in refusing to permit O'Brien to testify that Ford would not have given the note had he not been threatened with the criminal prosecution. The defense was, that the note was given to compound a criminal offense.

The 23d section of division 9 of our criminal code (Gross' Comp.) defines such an offense to be, the taking of money, goods, chattels, lands or other reward, or promise thereof, in consideration of an agreement not to prosecute a criminal offense, and fixes a fine in double the sum or value of the thing received; but expressly declares that no person shall be debarred from taking his goods or property from the thief

or felon, or receiving compensation for the private injury received by the commission of any such criminal offense.

The 23d section of the 7th division of the criminal code (Gross' Comp.) declares that if any county judge, police magistrate, justice of the peace, constable, or attorney, or counselor at law, shall fail, neglect or refuse to pay over money collected to the person entitled to receive the same, upon a demand thereof, every such person so offending shall be deemed guilty of a misdemeanor, and punished by fine in double the amount retained, and imprisoned in the county jail for a term not more than a year, nor less than three months, and be removed from office and thereafter rendered ineligible to hold office.

This last section authorizes the injured party to reclaim his property or receive compensation for the wrong done to him. Then, whether a prosecution could be maintained under the first of these sections or not, if the injured party, for a compensation, were to agree not to prosecute for a misdemeanor, does not matter, as the statute authorizes him to regain his property or to receive compensation for the injury he has received. In this case, Furch did no more than receive that compensation when he obtained the note. There is no pretense that Ford had not collected the money, and still owed it to him. He had a right to receive the note, and whatever may be said of the means employed in obtaining it, we cannot hold that it was received to compound a criminal offense. In this view of the question, the answer to the question propounded to the witness was immaterial.

It is next urged that the court below erred in giving instructions for appellee, and in refusing instructions asked by appellants. It will be seen that the instructions given, accord with the views we have here expressed, and those refused were the reverse of the rule we have announced. It then follows that there was no error in giving or refusing to give instructions.

A number of authorities have been referred to, to establish the position that a note given to compound a criminal prosecution is illegal and void. The rule is well settled that such a note

is illegal, but here the note was given, not as a reward for not prosecuting, but for a debt due from Ford to Furch, and that being the only and true consideration, it is not like a note given simply to prevent the prosecution for a misdemeanor or felony. That would be a different question; nor is any question before us whether Furch and his attorney incurred any liability by using the criminal process to influence Ford to give the note with security. Nor is the question of duress before us, as that defense has not been interposed in this case.

The evidence sustains the verdict, and the judgment is affirmed.

Judgment affirmed.

Margaret O'Connor, Administratrix, etc.,

v.

Catharine O'Connor.

Delay *in presenting a claim against an estate—to be considered.* A claim against an estate, bearing such marks as induced a suspicion as to its fairness, was not presented until some three years after the death of the intestate. This delay in presenting the claim was regarded as so important a circumstance for the consideration of the jury in determining whether the claim ought to be paid, that a modification by the court below of an instruction asked on behalf of the estate, which would be likely to exclude the consideration by the jury of that circumstance, was held to be ground for reversal of the judgment allowing the claim.

Appeal from the Circuit Court of Grundy county; the Hon. Josiah McRoberts, Judge, presiding.

Catharine O'Connor presented a claim against the estate of Martin O'Connor, deceased, in the probate court of LaSalle

county, for services alleged to have been rendered by her son, for the deceased, in his life time, the latter being an uncle of the boy. The proceeding was taken into the circuit court of LaSalle county, on appeal, and finally, on change of venue, removed into the circuit court of Grundy county.

Upon the trial below, the administratrix asked the following instruction to the jury:

"In determining the question as to whether the claim of the plaintiff in this suit was paid or settled during the lifetime of Martin O'Connor, the jury have the right, and it is their duty, to consider all the circumstances surrounding the case, the fact, if it be a fact, that the plaintiff delayed presenting her claim for the period of over three years, from the time the services for which charged ended, in determining the character of the claim made, together with all the other circumstances of the case as they appear in evidence."

The court refused to give the same as asked, but gave it with the following modification:

"But the jury are instructed that, should they believe, from the evidence, that the plaintiff, Mrs. Catharine O'Connor, did not bring suit or make any demand for the claims in question in this suit within three, or even four years, from the time of rendering said service, yet, such fact in no way or manner debars or prejudices said plaintiff in her said claims and demands in this suit."

The jury returned a verdict in favor of the plaintiff for the sum of $800, for which judgment was rendered. The administratrix appealed.

Mr. D. L. Hough, for the appellant.

Messrs. Bushnell & Avery and Messrs. Olin & Armstrong, for the appellee.

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

This was a claim against an intestate's estate, presented three years or more after the death of the intestate, and there are circumstances developed by the testimony which would lead to the conclusion that it had but slight foundation in justice. It is not difficult to induce a jury to allow such a claim as this, the one making it being a widow claiming for her son's services to a childless relative who died leaving a considerable estate, of which he made no testamentary disposition. A struggle not infrequently arises in such cases among the relatives of the deceased, as to who shall get the largest share. The fact that this son, when about fourteen years of age, was in some kind of service for his uncle, afforded a good opportunity to the mother to make her claim on his estate, while there are strong grounds for believing the deceased stood to the boy *in loco parentis*, no idea then existing of any contract for service, or of any responsibility therefor. No claim was presented or made during the life time of the uncle, and he lived some time after the boy left his service, and not until three years after his death was it thought expedient to make a claim.

Under these circumstances the court should have given the second instruction asked by the defendant, without any qualification, for it was a case in which a jury should be warned by the court to consider well all the circumstances attending the claim, and long delay in prosecuting it ought to have some influence on the jury, unexplained as it was, and should have induced the jury to look upon the claim with suspicion.

We are not inclined to believe from the facts in the record, developing the kind of case they do, that any obligation rests upon the estate of the deceased to pay the plaintiff the large amount found by the jury, or any very considerable amount. The claim, under the circumstances, was a suspicious claim. The delay in prosecuting it, wholly unexplained, ought to have prejudiced it.

The modification by the court tended very much to nullify that portion of the instruction given, for delay in bringing suit was one of the circumstances in the case, and in the portion of the instruction given, the jury were told by the court to regard them.

We think the case should be considered by another jury. The judgment, for the reason given, is reversed and the cause remanded.

Judgment reversed.

PETER KOELER

v.

SAMUEL R. EATON.

The decree in this case is reversed for want of any evidence to support it.

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

Messrs. BANGS & SHAW and Mr. L. NEWELL, for the plaintiff in error.

Mr. JOHN CLARK, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, brought by Eaton against Koeler, to compel the conveyance of a tract of land. The bill alleges that the complainant had entered the land at the government land office, and that the defendant afterwards bribed a clerk in the office to erase complainant's entry, and substitute an entry by defendant. The defendant answered,

denying the allegations of the bill; a replication was filed, and the deposition taken, of the register's clerk charged to have received the bribe. Nothing of the kind, however, was proven by him and no other testimony was taken. The case seems to have stood on the docket for some years without action, but a decree was finally pronounced in favor of the complainant, directing the defendant to convey. As there was no evidence, whatever, upon which to base such a decree, we presume the case was heard *ex parte*, and the decree rendered under misapprehension of the facts. It must be reversed and the cause remanded.

Decree reversed.

HENRY MANSFIELD, Administrator, etc.

v.

ANDREW HOAGLAND.

CONSIDERATION—*whether a further consideration necessary.* Where a sale of land has been made under a judgment, and a certificate of purchase issued to the plaintiff therein, who afterwards assigns the judgment to a third person, for a valuable consideration, upon an assignment of the certificate of purchase to the assignee of the judgment, subsequent to the assignment of the judgment, and to carry out the original intention of the parties, no further consideration is necessary to support the transaction.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

This case was before the court, at the January term, 1868, when the decree of the court below was reversed, and the cause remanded for further proceedings. It is reported in 46 Ill. 359, where the facts will be found sufficiently set forth in the opinion of the court. Upon a re-trial in the court below,

additional evidence was introduced, in reference to the question whether the assignment of the judgment and certificate of purchase by Joseph C. Hoagland to Andrew Hoagland was fraudulent. A final decree was rendered on the 17th of July, 1869, reciting that the cause came on upon the bill as amended, the answer of Andrew Hoagland and replications, the exhibits and proofs, and the court being advised, found the equities to be with the defendant, Andrew Hoagland.

It was ordered that the bill, so far as it affected Andrew Hoagland, be dismissed; that the decree of March 15, 1859, and all proceedings under it, so far as they affected the rights of Andrew Hoagland, be vacated and set aside; that the deed of the master in chancery to Joshua J. Moore, so far as it affects the rights and interests of Andrew Hoagland, be set aside, and he restored to all his rights as if no such deed had been made, and that the master execute a deed to Andrew Hoagland upon demand, reconveying the premises, without prejudice to the rights of subsequent purchasers from Andrew Hoagland. And it was further ordered, that Andrew Hoagland recover his costs against the complainant, to be paid in due course of administration.

From that decree the complainant appealed.

Messrs. GOUDY & CHANDLER, for the appellant.

Mr. D. MCCULLOCK, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This case was before this court at a previous term, and is reported in 46 Ill. 359. It was then held, that the judgment against Joshua J. Moore, was valid and binding on him, and as his land had been sold under it, an innocent purchaser or an assignee for a valuable consideration from the purchaser, could not be compelled to surrender the land because the judgment, in equity, might have belonged to other parties; that

if the *cestuis que trust* permitted a person wrongfully to obtain a judgment in his name, when it should have been in theirs, they have no right to require an innocent person to suffer the consequences of their carelessness; that they can only look to the person who wrongfully obtained the judgment in his name, or wrongfully used it for his own benefit; that under the facts then before the court, the heirs or administrator of Joseph I. Moore must look to Joseph C. Hoagland for the amount he received under the judgment, as by his default he admitted that it was for their benefit.

It was also held, that as Andrew Hoagland denied the allegation that the assignment was fraudulent, and having alleged that it was taken in good faith and for value, and the evidence failing to disprove his answer and failing to connect him with the fraud charged in the bill, he was to be held an innocent purchaser for a valuable consideration; that his title could not be divested on account of any equities that existed in the maker of the note, or the heirs of Joseph I. Moore of which he had no notice. But since the case was then before the court, further evidence has been taken, and the cause again tried in the court below, and it is insisted that the court should, on the evidence thus before it, have decreed that Andrew Hoagland's title was fraudulent, and granted the prayer of the bill.

It now appears that Joseph C. Hoagland on the 4th day of August, 1857, assigned the judgment to Andrew Hoagland, by an instrument in writing which was acknowledged before a notary public, in the city of New York. This assignment only professed to transfer the judgment, and makes no allusion to the certificate of purchase issued by the marshal to Joseph C. Hoagland, bearing date on the 1st of September, 1857, almost a year before the formal assignment of the judgment was made.

Afterwards, about the 8th day of August, 1857, Joseph C. Hoagland being in Lewistown in this State, was arrested on a writ of *ne exeat*, and to procure bail for his appearance, he produced the certificate of purchase which was in his possession, and assigned it to Andrew Hoagland and gave it to L.

W. Ross, with a power of attorney, authorizing him to control the land, or money if it should be redeemed, and Ross then became bail for his appearance to answer the writ. Ross and Shope both testify that Andrew Hoagland was not there at that time. It also appears that Joseph C. Hoagland was then insolvent. Andrew testified that he had never seen the certificate of purchase for this tract of land, and did not know whether or not it was assigned to him. He says he has no distinct recollection that the judgment was assigned to him but presumes it was, as an attorney was employed to prepare papers, and he gave to Joseph C. Hoagland a power of attorney to collect the judgment. He had no recollection of the amount paid, but says he thinks he had loaned Joseph C. money before that time, but was unable to state the amount. Said he could not state the amount paid, but that he made payments at different times; that he held notes against Joseph which he then gave up to him; that he was unable to say how much he was to give for the judgment, as they were brothers-in-law and did business loosely, and he kept no account of the money paid or of the transaction.

Joseph Hoagland in his testimony, does not speak of having given Andrew his notes for borrowed money previous to the assignment, or then being indebted to him. He is more definite as to the sums of money which they both say were afterwards paid by Andrew. He gives amounts and places where the money was paid. Although it may be that their accounts of the transaction are not so full and specific as we should have expected had the testimony been given soon after the assignment was made, still, it is not so inconsistent with a fair transaction as to induce us to wholly disregard their testimony and set aside the conveyance, independent of other evidence. And when we turn to the other evidence in the case, we find it so clearly contradictory that we are wholly unable to reconcile it, or to learn any thing satisfactory of the truth of the case.

It is true the assignment of the certificate was not endorsed until near a year after the transfer of the judgment, but it

was made to carry out the original intention of the parties. If such had not been the case, we can readily suppose that the assignment would have been directly to Ross. It may be asked, why he would use another person's certificate of purchase for his own use, but it must be remembered that he was in custody, and unable to obtain his release otherwise; although not right, he would, perhaps, be strongly tempted to take such a liberty with a brother-in-law, with whom he was on friendly and intimate terms.

Both Joseph and Andrew swear that they were not aware of the fact that this quarter of land had been sold under the execution at the time the transfer of the judgment was made; and, as they lived in other States and the collection of the judgment was entrusted to an attorney, we have no doubt this was true.

That the actual assignment of the certificate of purchase was proved to have been made after the assignment of the judgment, is true, and it was also shown that no money was then paid as a consideration, but it is evident that there was no intention to reserve any portion of the judgment, or avails thereof already received from it. Suppose the entire judgment had been collected and in the hands of the attorney at the time, would any one have doubted that Andrew was entitled to receive it? We presume not. And if so, why did not the certificate of purchase, in equity, pass to him by this assignment? As the intention was to transfer the judgment, and all the money recovered by it if collected, no reason is perceived why Andrew should not have the benefit of the certificate of purchase, as well as the balance of the judgment. When Joseph, therefore, wrote out the assignment on the certificate of purchase, he did no more than chancery would have compelled him to do. He was only carrying out the intention of himself and Andrew when the judgment was assigned.

We are clearly of the opinion that any further consideration was unnecessary to be paid to support the assignment of the certificate of purchase.

As to whether that assignment was only colorable, we think that appellant, even with the additional evidence introduced on the last trial, has failed to prove that fact. Both Joseph and Andrew swear that the assignment was *bona fide* and that a sufficient consideration was paid to support the transaction. It is true that Joseph seems to have become insolvent not a great while afterwards, but that would probably afford an inducement to pay a brother-in-law any sum he may have owed him, and to have obtained means out of a claim that, it is said, was regarded doubtful, and at best likely to require time and expense for its collection. The whole case considered, we do not see that appellants have established that the assignment of the judgment or the certificate of purchase was fraudulently made. The proof devolved on appellants to establish the fraud, and we think they have failed.

The decree of the court below is therefore affirmed.

Decree affirmed.

Chicago & Northwestern Railway Company

v.

Honora Sweeney, Administratrix, etc.

1. Negligence—*comparative.* In actions to recover damages resulting from the alleged negligence of the defendant, the doctrine of comparative negligence obtains in this State; so the question of liability does not depend absolutely upon the absence of all negligence upon the part of the plaintiff or the defendant, but upon the relative degree of care, or want of care, as manifested by both parties.

2. It is the duty of a person about to go upon a railroad track, to do so cautiously, and ascertain whether there is danger; and especially does this duty devolve upon a person who, from long employment upon the road at the particular place, is familiar with its peculiar dangers, from the numerous tracks there, and their constant use in the switching of cars.

Syllabus.

3. In an action to recover damages, under the statute, for the death of a person alleged to have been occasioned by the negligence of a railroad company, it appeared the deceased was a track repairer in the service of another company, with whose road the defendants' track connected at the place where the accident occurred, and with which the deceased was very familiar, having worked about it, or near it, for several years. It was a point where the tracks were numerous, and engines constantly in motion in great numbers. While cars were being pushed by an engine, the deceased stepped upon the track in front of the moving cars, with his back to them, and his cap drawn closely over his ears, not looking about to see if there was danger, which he could easily have discovered, and of which he should have been aware from his long familiarity with the place. The cars overtook him, and he was struck and killed. He was held to have been guilty of such gross negligence, and even recklessness, that there could be no recovery, unless a greater degree of negligence on the part of the company could be shown.

4. There seemed to have been no negligence on the part of the company. The switchman walked along the track about sixty feet in advance of the moving train and saw the track was clear. While doing so, the deceased stepped on the track between him and the train, with his back to the train, without noticing its approach, although it was in plain view. So soon as he was seen by the switchman, he shouted to him, but he gave no heed to the warning. The train was moving very slow, and had the usual complement of men about it, who attended to their duties, and the engine bell was ringing continuously.

5. There was no watch upon the forward car to give warning, but there was an engineer and fireman, and a switchman and his assistant who was in a favorable position along side of the train to receive signals from the switchman on the track and communicate them to the engineer. But even if a man stationed on the forward car would have been more serviceable in giving warning, his not being there was slight negligence compared with the recklessness of deceased.

Appeal from the Superior Court of Chicago; the Hon. William A. Porter, Judge, presiding.

The opinion states the case.

Mr. H. W. Blodgett and Mr. George C. Campbell, for the appellants.

Mr. M. F. Heenan, for the appellee.

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

This was an action on the case, brought to the Superior Court of Chicago, by Honora Sweeney, administratrix on the estate of Michael Sweeney, deceased, against the Chicago and Northwestern Railway Company, to recover damages for their negligence, resulting in the death of Michael Sweeney.

The deceased was a track repairer, in the service of the Pittsburgh, Ft. Wayne & Chicago Railroad Company, whose switches and lines of road connect with those of appellants, and they use, in common, a curved track, known and called the "Galena Y," by which trains are readily changed from one track to another.

It was at this "Y" the accident occurred, a place with which deceased was very familiar, having worked about it or near it for several years. It was a point where engines were constantly in motion, in greater number, perhaps, than at any other point on the continent. The ground is covered with railroad tracks, as the proof shows, and in constant use.

The deceased having been at work for two or three years, among these rails, knew it was a place full of dangers, demanding the keenest exercise of all one's faculties to escape them.

The proof is, that on the thirteenth day of December, 1867, deceased, with his shovel in hand, with a cap upon his head drawn closely down over his ears, and without looking to the right or left, or behind him, stepped upon the track of the Fort Wayne road, a few feet north of the point where the "Y" joins it, and while cars pushed by an engine were being backed over the "Y" on to the the track of the Fort Wayne road, and was run over and killed, deceased having his back to the car when it struck him.

That these facts show negligence on the part of the deceased, of the grossest character, cannot be questioned. The place was a very dangerous one, and, in proportion to the magnitude of the dangers, should have been his care and caution. Deceased manifested neither, but, in the most reckless manner,

rendering nearly useless a most important faculty, at such a place, and not using another no less important, he lost his life.

The rule of the English courts, as well as of this country and of this court, in such cases, is well settled.

If a very high degree of care is required of strangers coming upon a railroad track, to avoid injury, as much, or more, should be demanded of one who is familiar with the place, and can not but know it is pregnant with danger. Neither can go recklessly upon the road, taking no proper precautions to avoid accidents.

The deceased appears to have been in a condition quite similar to that of *Still*, as reported in 19 Ill. 499. The party injured in that case was driving a two-horse wagon along a highway, crossed by a railroad track, and sitting down in the bottom of his wagon, with his back towards an approaching train, with his coat collar turned up, and a comforter about his neck. Any man of ordinary prudence, who would take the trouble, could see the approaching train, and could hear it if his sense of hearing was not obstructed. Under these circumstances, this court held that a person crossing a railroad track, who could have seen the cars approach, but turned his back to that direction, and had his ears so bandaged that he could not hear, was guilty of such negligence as would prevent his recovery for injuries, unless he can prove a greater degree of negligence on the part of the railroad company.

In the late case of the *Chicago & Alton Railroad Co.* v. *Gretzner*, 46 ib. 74, this court said it was the duty of every person about to cross a railroad track, to approach it cautiously, and ascertain if there is present danger in crossing, as all such persons are bound to know that such an undertaking is dangerous, and they must take all proper precaution to avoid accidents in so doing, otherwise they could not recover for an injury thereby received. Both parties must use care.

But it is said by appellee, the railroad company was guilty of great negligence in not using the necessary precautions for the protection of persons about the tracks. Were they derelict

in this regard? It is in proof that the switchman walked along the "Y" about sixty feet in advance of the train to see if the track was clear, and saw it was clear. While so doing, the deceased stepped on the track between him and the train, with his back to the train, it being backed up by an engine in the rear, and with his ears covered up by his cap. So soon as he was seen by the switchman, he shouted to him, but his ears being covered, the shout was not heard, or if heard, no attention was paid to it. It appears deceased could have seen the train for a considerable distance, but he did not take the trouble to look about him. The train was moving very slow, so slow that it was stopped within sixty feet of the place where the deceased was struck. It is in proof this train had the usual complement of men about it, who were attentive in the performance of their several duties, and the usual signal, by ringing a bell, was continuous.

Complaint is made by appellee that no watch was upon the forward car to give the necessary warning. It is shown, however, that the train had the usual complement of hands; an engineer and fireman, a switchman and his assistant, who was in a favorable position along side of the train to receive signals from the switchman on the track and communicate them to the engineer. It is a disputed point, on which the witnesses are not agreed, whether this duty of observing the track could not be better performed by a person on the car than by one on the track, and, be that as it may, it can have no influence favorable to the deceased. His conduct was grossly negligent, and, although a man stationed on the cars might have been more serviceable, his not being there was negligence of a slight character, compared to the recklessness of the deceased.

In the case of the *Chicago & Alton Railroad Co.* v. *Gretzner*, *supra*, the question of comparative negligence was again discussed, and it was said, to render a railroad company liable, there must be fault on their part, and no want of ordinary care on the part of the plaintiff; and when both parties are in fault, the plaintiff may, in some cases, recover, as when it

appears that his negligence is slight, and that of the defendant gross, and that the rule holds, even when the slight negligence of the plaintiff contributed, in some degree, to the injury. If the defendant has been guilty of a higher degree of negligence, slight negligence on the part of the plaintiff does not absolve the defendant from the use of all reasonable efforts to avoid the injury.

As some misapprehension seems to exist in respect to the extent this court has gone in discussing the doctrine of comparative negligence, it may not be amiss to review the several cases on that subject.

But for that purpose it is not necessary to go back of the case of the *Galena & Chicago Union Railroad Co.* v. *Jacobs*, 20 Ill. 478, as in that case all the previous decisions were reviewed and commented upon.

Jacob's case was the first case announcing the doctrine of comparative negligence, the received rule prior thereto having been, if there was any negligence on the part of the plaintiff he could not recover. The English cases on this point were cited and commented on.

In Jacob's case this court said that the question of liability did not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties, for all care or negligence is, at best, but relative, the absence of the highest possible degree of care, showing the presence of some negligence, slight as it might be. The true doctrine, therefore, this court thought, was, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff. The degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of defendant gross, the plaintiff shall not be deprived of his action.

Following this case was the case of the *Chicago, Burlington & Quincy Railroad Co.* v. *Dewey*, 26 ib. 255, where it was said, it was not enough to show a railroad company guilty of

negligence, but it must appear that the injured party was not also negligent and blamable. Each party must employ all reasonable means to foresee and prevent injury, and if the negligence of one party is only slight, and that of the other appears gross, a recovery may be had.

In the case of the same railroad company against Hazzard, ib. 373, the ruling in Jacob's case was commented on and approved.

The next case in the order of time, having reference to injury to persons, is that of the *Chicago, Burlington & Quincy Railroad Co.* v. *Triplett, Admr.* 38 ib. 482, in which it was again said, although the plaintiff may have himself been guilty of some degree of negligence, yet, if it be but slight, in comparison with that of the defendant, it should be no bar to his recovery. No inflexible rule can be laid down. Each case must depend upon its own circumstances, and the question of comparative negligence must be left to the jury, under the supervision of the court.

The next case was Gretzner's case, before cited, 46 ib. 74. See also, *Chicago & Alton Railroad Co.* v. *Pondrom*, 51 Ill. 333.

The rule is the same in actions against railroad companies for injuries to personal property.

The deceased was within the rule. His conduct, as compared with that of the railroad company, was, under the circumstances, recklessness, as we believe, after an attentive examination of the evidence in the record. His own conduct contributed vastly more to his death than any negligence established against the defendants. Had he used ordinary prudence, the casualty could not have happened. Having failed in this, the company ought not to be liable.

We perceive no objection to the manner in which the court disposed of the various instructions. They accord with the ruling in the cases cited. We reverse the judgment on the ground that the verdict is against the evidence.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN CROW

v.

SAMUEL MARK.

1. TENANTS IN COMMON—*remedies as between themselves.* One tenant in common of realty can not maintain an action of assumpsit against his co-tenant for his proportion of the rents, the latter having had exclusive possession. His only remedy is by an action of account under the statute, or by a bill in chancery.

2. JURISDICTION *of justices of the peace.* A justice of the peace has no jurisdiction in an action of account.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

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

Mr. JOHN J. GLENN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought before a justice of the peace by one tenant in common against a co-tenant, to recover the plaintiff's portion of the rent for a tract of land, of which the defendant had had exclusive possession. The case was brought by appeal to the circuit court, and on the trial there, after the plaintiff closed his evidence, the court, on motion of the defendant, dismissed the suit. There was no error in this. One tenant in common of realty can not maintain an action of assumpsit against his co-tenant for his proportion of the rents. His only remedy is by an action of account under the statute, or by a bill in chancery. *Sherman* v. *Ballou*, 8 Conn.

306; *Wheeler* v. *Howe*, Willes, 208. A justice of the peace has no jurisdiction in an action of account, and therefore this suit was properly dismissed.

Judgment affirmed.

LEANDER READ

v.

MRS. WALKER.

1. PLEADING—*of the declaration—what sufficient averment of consideration.* Where, in an action of assumpsit for goods, wares and merchandize sold and delivered, the declaration averred that the plaintiff sold and delivered to the defendant goods, wares and merchandize, at her instance and request, amounting to a specified sum "which sum said defendant then and there promised to pay the said plaintiff for such goods, wares and merchandise:" *Held*, a sufficient averment of consideration.

2. SAME—*averment of time.* So an allegation in the declaration, that goods, wares and merchandize were sold and delivered at divers times between specified dates, where the transaction runs through a long space of time, is a sufficient averment of time, and, in such case, it is not necessary to aver that the transaction occurred on a single specified day.

3. SAME—*locus in quo—venue.* In transitory actions, it is only necessary to state a venue, and the county alone is a sufficient venue, without stating the city.

4. SAME—*demurrer.* On special demurrer, no objection to pleading, not specifically pointed out, will be considered.

APPEAL from the Superior Court of Chicago.

This was an action of assumpsit, brought by Leander Read against Mrs. Walker, to recover for certain goods alleged to have been sold to her. A special demurrer was filed by the defendant to the plaintiff's declaration, which was sustained, and judgment rendered on the demurrer in favor of the

defendant. To reverse this judgment, the plaintiff appealed. The special causes of demurrer assigned are set forth in the opinion.

Mr. GEORGE E. BELLOWS, for the appellant.

Messrs. RUNYAN & AVERY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee filed a special demurrer to appellant's declaration, which was sustained by the court, and judgment was rendered on the demurrer, which is assigned as error. The special cause of demurrer assigned is, that there is no sufficient consideration for the promise, averred in the declaration. The averment is, that appellant sold and delivered to appellee, at divers times between specified dates, goods, wares and merchandize, at her instance and request, amounting to a specified sum, "which sum said defendant then and there promised to pay the said plaintiff for such goods, wares and merchandize." This does not, in terms, aver that the promise was made in consideration of the indebtedness incurred in the purchase of the goods, but such is the necessary and manifest implication. The language employed will leave no other reasonable construction. We do not understand that a declaration, to be good in form, must copy the precise language of approved precedents. In assumpsit, the declaration must express a consideration, and a promise based on that consideration, and we think, although unskillfully drawn, that this averment does state a consideration, and a promise based thereon, in such a manner as to be sufficient.

It is next assigned as special cause of demurrer, that there is not sufficient certainty of time averred in the declaration. The averment is, "between the first day of March, 1864, and the third day of July, 1864," appellee sold and delivered the

goods. It is said there should, in general, be a distinct averment of time to every material fact. 1 Chit. Pl. 259. But we are aware of no rule which requires that the averment of a transaction running through a long space of time should be stated to have occurred on a single specified day. It would be singular if the law should require a party to state his case falsely. On the contrary, one of the elementary rules of pleading, as well as morals, requires the party to aver his cause of action or defense truly. In this case, then, if it is true that the goods were purchased between the dates named, no objection is perceived to permitting the averment to be so made.

In trespass, it is usual, when there have been repeated wrongful acts, to lay them between different days, and this is because the parties may aver the truth. But in such cases, the party is confined to acts within the specified period. The plaintiff, by such an averment, narrows his case, and of that the defendant should not be permitted to complain.

The third special ground of demurrer is, that the *locus in quo* is not properly set forth. We are unable to perceive any ground for this objection. This is a transitory action, and only requires that a venue be stated, and the venue is given, as the city of Chicago and county of Cook. This is sufficient, and more than sufficient, as the county alone would have been a sufficient venue. The ancient rules of pleading in local actions, requiring the *locus in quo*, so far as our knowledge extends, have never been applied to assumpsit, or other transitory actions. The declaration is sufficient in substance, as it states all the essential grounds for a recovery. In fact, no ground for sustaining a general demurrer is urged in argument.

The other formal objections urged on the argument are not set down in the demurrer, and hence can not be considered, although they would, perhaps, have been availing had they been specifically pointed out in the demurrer. While the declaration is not artistically drawn, and is, in several respects, a departure from approved precedents, still the special grounds

set down in the demurrer fail to reach them. We must say that it is a matter of surprise that counsel did not remove the objections by amendments, that could have been so readily made without delay or expense to the parties litigant, and thus have reached the merits of the case, and especially where the decision of the questions involved settle no principle or answer any good end. The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ROSANNA HEWARD

v.

HENRY SLAGLE *et al.*, Administrators, etc.

1. ADMINISTRATOR—SURVIVING PARTNER. A surviving partner should never be appointed administrator on the estate of his deceased partner, because, as such survivor, he becomes accountable to the estate, and could not well account to himself as its representative.

2. SETTLEMENT OF ESTATES—*remedy of the heirs.* Where the heirs of an estate are dissatisfied with the settlement of the same, an appeal from the order of the county court, approving the settlement and discharging the administrators, is not the proper remedy. They should proceed by bill in chancery.

3. PRACTICE—*who entitled to the opening of a case.* Upon an appeal, by the heirs of an estate, to the circuit court, from an order of the county court approving the settlement of the estate and discharging the administrators, the latter, alleging they had fully administered, held the affirmative, and were entitled to the opening to the jury.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

The opinion states the case.

Messrs. COOPER & MOSS, for the appellant.

Messrs. PRETTYMAN & WARE, for the appellee.

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

The appellant, a daughter and one of the heirs-at-law of Nathan Dillon, of Tazewell county, deceased, who died on the twenty-eighth of January, 1863, not satisfied with the final settlement of the estate of her father by his administrators, Mary Dillon, her mother, and Henry Slagle, her brother-in-law, appealed from the order of the county court approving the settlement, discharging the administrators, and directing distribution of the small amount claimed to be all that was remaining, out of a large estate not owing a dollar, and on which no necessity whatever existed for administration, unless it might be the commissions to the administrators and probate fees.

The circuit court approved the settlement of the county court, and discharged the administrators, and gave judgment against the appellant for the costs.

To reverse this judgment, this appeal is prosecuted.

That the appellant, with the co-heirs-at-law, had important interests in this estate of her father can not be denied, but it is very questionable if she has pursued the right course to have them properly adjudicated. The matter is so complicated by reason of the lease of the intestate to Slagle, in 1861, for five years from the first of March, 1861, more than three years of which were unexpired at his death; the deed of the heirs-at-law to their mother of the property during her life; applying for letters of administration by her and Slagle on the very day this deed bears date, and the subsequent course of the administrators in regard to the estate, by which, at its final settlement, a trifle only was left to the heirs-at-law, that it is somewhat difficult to ascertain where the true right of the case really is.

We will give, as briefly as we can, the views we entertain of the case from the facts developed, without pausing to discuss the many small points which have been raised, or which of the parties in the circuit court had the opening to the jury. The cause was tried by a jury, and they found, under the instructions of the court, that the administrators had fairly and fully settled the estate.

By the agreement executed by the intestate and Slagle, of March 1, 1861, they became partners in the concern, in which they engaged on the terms specified in the agreement. At the death of Dillon, Slagle became surviving partner, and should never have been appointed administrator on the estate, because, as such survivor, he became accountable to the estate, and could not well account to himself as one of its representatives. There was a positive wrong done in so appointing him. But he was appointed, and he claims that he settled this partnership concern with his co-administrator, Mrs. Dillon, she having become, by the deed of the heirs to her, entitled to the proceeds. This deed from the heirs, about which so much has been said, to their mother, was signed on the twenty-eighth day of January, 1863, the day their father died, but was not acknowledged before the magistrate until the tenth of February following. The administrators also claim that the whole estate was settled by the receipt executed by Mrs. Dillon, asserting her power to do so under this deed.

This position being taken, it becomes important to inquire, what was the intention of the parties in executing this deed, and what effect should it have upon the administration of the estate.

It appears that letters of administration were applied for on the same twenty-eighth day of January, 1863, while the corpse of the deceased was uncoffined and unburied. The letters of administration were not granted until the thirty-first, on which day the bond was also filed.

It is claimed by some of the heirs, as appears from their testimony, that their father had expressed a wish there might be

no administration on his estate, as he was not in debt, and had, near three weeks before his death, executed a deed to his heirs of all his real estate. There was no sort of necessity for administration, and these heirs insist, that they released all their interest in the estate to their mother for the very purpose of avoiding the expense and delay of administration, and it looks quite plausible and reasonable, for why should they have left the whole estate with their mother, precisely in the condition their father left it, were it not from considerations of this nature? It was understood by some of the heirs, that their mother was to give back some writing which should evidence her understanding of the effect of the deed, which, acting on the advice of Slagle, she did not do. But the deed itself fully expresses the terms on which it was made, and that the property described in it was to revert to the grantors after the death of their mother. The administrators set up the provisions of this deed as justificatory of the manner in which they have disposed of this estate. If they claim indemnity for their acts as administrators under that deed, then they should have acted in strict conformity with its plain intent and object. After setting off the widow's share, the remainder should have been turned over to her under the deed, and in specie, an inventory having been first taken. Her share so set off was her own, absolutely, which she could sell and dispose of according to her own pleasure. The bulk of the property was hers during her life, which, on her death, together with its income or proceeds, reverted to the heirs-at-law. The road to be pursued was so unmistakable that it was difficult to go astray, but from design, and for a sinister purpose. Had the course indicated by the deed and provided for by it been pursued, instead of the mere pittance exhibited on this final settlement, a good estate would be in course of creation for the heirs-at-law, awaiting their enjoyment on the death of their mother.

An appeal from the county court was not the proper mode in which to adjust these important rights and interests. Nor does it appear from the papers and exhibits produced in the

circuit court, that a full account has ever been exhibited of this estate.

Slagle, as surviving partner of Dillon, was bound to account with the representatives of Dillon. The record fails to show he has so done. As administrator, he was bound to show an account current, which he has not done, and there is much testimony in the record showing much of the personal property was never inventoried or sold. There is proof, also, of a considerable amount of gold on hand at the death of Dillon. No account whatever is given of this gold, or of any other money. An amount quite large was proved to have been in his possession about eighteen or twenty months before his death, and as he was a man of careful habits, engaged in no speculations, or business requiring the use of money, and knowing well the value of money, and as the widow said she did not intend to give in to the assessor for taxation more than seven hundred dollars, the inference is inevitable there was money on hand, to a large amount, at Dillon's death.

We do not think a full settlement of this estate has been shown. The property should have been passed over to the widow, under the deed, in specie, after an inventory was taken of it, or if a sale was made, then the proceeds should have been paid over to her for investment for her benefit, and for the benefit of the heirs-at-law.

We reverse the judgment on the general grounds here stated.

Upon the question, which party held the affirmative in this case, we are of opinion, as appeals are tried *de novo* in the circuit court, the administrators held the affirmative, they alleging they had fully administered.

As this judgment is reversed, we take occasion to say, in a case of this kind, the probate court should, on the trial of it, proceed as though a bill in chancery had been filed, hear the evidence, and investigate the account without the intervention of a jury, unless it should appear to be necessary to impannel

a jury to try some issue of fact that may be made up, as in ordinary chancery cases.

For the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

IRA A. PALMER

v.

WILLIAM S. WEIR *et al.*

NEW TRIAL—*verdict against the evidence.* Where the evidence was contradictory the court refused to set aside the verdict as clearly against its weight.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. STEWART & PHELPS, for the appellant.

Mr. JAMES STRAIN, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action for the value of materials furnished and labor performed by the plaintiffs for the defendant. The jury found a verdict for the plaintiffs for $540, which the appellant insists is too large. We have carefully examined the evidence, and find it altogether too uncertain and contradictory to justify us in setting aside the verdict as clearly against its weight. The parties were all sworn, and it belonged to the jury to weigh this conflicting testimony. There is no question of law presented by the record, and it would answer no good purpose to review the evidence.

Judgment affirmed.

WILLIAM WISDOM *et al.*

v.

CORNELIA D. BECKER, Administratrix, etc.

1. PLEA OF FRAUD—*in the consideration of a note.* In an action upon a promissory note, the defendant averred in a special plea that the note was given for a leasehold estate, to which the plaintiff falsely and fraudulently represented he held title, and that all taxes were paid, and that the defendant was obliged to surrender the premises. The plea was bad, as it did not aver that defendant had not enjoyed the benefit of the term, or that the plaintiff did not subsequently acquire title to the same. For aught that appeared, the surrender may have been on the last day of the term, or to a person not entitled to the premises.

2. The plea was defective also in not stating the manner in which or why the title failed.

3. A plea of fraud, to be sufficient, must aver that the defendant relied upon the fraudulent representations.

4. PLEA OF FAILURE OF CONSIDERATION. A plea in an action upon a note, which avers that the note was given in consideration of a leasehold estate purchased by the defendant from the plaintiff, to which the latter had no title, is not good as a plea of failure of consideration, in the absence of an averment that the defendant did not enter upon and enjoy the term.

5. EXECUTORS—*where a part fail to qualify—power of those who do.* Where a will confers power upon two executors to lease lands, and one of them fails to qualify, and the other does qualify, the power vests in the latter to execute the lease.

6. ADMINISTRATION OF ESTATES—*acceptance by an executor of a draft drawn by a distributee of the estate.* Where an executor accepts a draft drawn upon him by a distributee of the estate, even though the acceptor has money in his hands, in his fiduciary capacity, belonging to the drawer, the estate will not be bound by the acceptance, but only the executor individually.

7. SAME—*when distribution can be enforced.* Payment of the distributive shares of heirs in an estate can not be enforced until there has been an order for the purpose made by the probate court, and the distributee has executed a bond to refund the money, if necessary, to pay debts owing by the estate.

8. SET OFF. The individual indebtedness of an executor or administrator can not be set off against a debt due the estate.

APPEAL from the Superior Court of Chicago.

This was an action of assumpsit, brought in the court below, by Cornelia D. Becker, as surviving administratrix of Vroman Becker, deceased, upon a promissory note, against William Wisdom and Robert H. Wisdom. The pleadings upon which the questions in the case arise are set forth in the opinion of the court.

Mr. S. K. Dow, for the appellants.

Messrs. HUTCHINSON & LUFF, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, on a promissory note, against appellants, in the superior court of Chicago. The declaration contained three counts; one, special on the note, and the others, common counts. Appellants filed the general issue, and seven special pleas. Appellee filed a general demurrer to all but the first, which was sustained, and a trial was had before a jury, resulting in a verdict in favor of plaintiff. A motion for a new trial was entered, but was overruled by the court, and judgment rendered on the verdict, from which defendants appeal to this court; and urge reversal because the court sustained the demurrer to these pleas.

Appellants insist that the demurrer, inasmuch as it was several, should have been overruled to any one of the pleas if it presented a defense to the action. They also insist, that the pleas were all sufficient. The second plea averred that appellants had purchased a lease from appellee, and her co-administrator, which was owned by their intestate, on a lot in Chicago; that they, as administrators, represented that they held the title to the term and all taxes were paid; that they, in fact, did not own the term, nor were all taxes paid, which they knew, and that the representations were falsely and

fraudulently made, and that the leasehold estate, with the personal property, was the only consideration of the note; that relying on the representations, they executed the note, for the term, the buildings, machinery and personal property.

This plea is clearly bad. It nowhere avers that appellants had not enjoyed the benefit of the term, or that appellee had not subsequently procured the title to the term, or that they had been or could be in the least damnified. It is true, it is averred that they were obliged to surrender the premises, but when, or to whom, is not stated. For aught that appears, they may have only surrendered on the last day of the term. Or they may have surrendered to a person not entitled to receive the premises. They do not aver that they were evicted from the premises before the lease expired, or at any other time. Again, it avers, in the conclusion, that the note was given for the term, buildings, machinery and personal property.

There is no averment that there was any false representations as to the buildings, machinery, or personal property, or that such articles did not constitute the principal part of the consideration. The plea is defective in not stating the manner in which or why the title failed.

The third plea avers that the note, with others, was given to appellee and her co-administrator as a part consideration for the purchase of an unexpired lease on a lot in Chicago, which term was created by a lease from Ann Peck, executrix, as a trustee, with one John M. Underwood, of Azael Peck, deceased, to one George Sloat, which lease was regularly assigned to appellee's intestate, with certain buildings, and a lot of machinery and personal property, which term and property were appraised and sold by appellee and her co-administrator for $12,000; that the term was valued and sold to appellants for $2500 "bonus," a part of the $12,000; that the term was illegal, null and voidable in this, that said Ann Peck executed the lease alone, and in contravention of the will creating the trust, and without the consent of Underwood, a co-trustee with her; that appellee and her co-administrator

fraudulently represented that the title to the property belonged to the estate of their intestate, and they had good right to sell the same, whereas the estate had no title thereto; that the property before described was the sole consideration for the note.

The plea avers that the consideration of the note had failed. This plea fails to aver that appellants relied upon the representations claimed to be fraudulent, and hence it is not sufficient as a plea of fraud. It nowhere is averred that appellants did not enter upon and enjoy the full term; and if they did, then the consideration did not fail. For the want of such an averment, this was not sufficient as a plea of failure of consideration. The fourth plea was entered to present the defense of a partial failure of consideration. This plea presents substantially the same facts as those set up in the third. It, however, fails to aver to whom or when they were obliged to surrender the possession. And the averment that the taxes were not paid as represented, could not constitute a defense unless injury had resulted therefrom, and there is no averment that it had. They may have surrendered to a wrong person, or at the end of the term, from anything appearing in the plea.

The fifth plea avers that the title to the leasehold estate arose by the granting of a term by Ann Peck, sole executrix of Azael Peck; that he, by his will, appointed her and one John M. Underwood, executors, and that Underwood failed to qualify as such, and that she alone qualified and made the lease without having a trustee appointed in the place of Underwood; that the lease was regularly transferred to appellee's intestate, and that she and her co-administrator represented that they had title, and sold the term to appellants, and for which they gave the note, and that the consideration of the note had failed. According to the averments of this plea, appellee's title to the term was good. If Azael Peck, by his will, conferred power on his executors to lease the premises, and one of them failed to qualify, and the other did, the power vested in the latter

to execute the lease. *Clinefelter* v. *Ayres*, 16 Ill. 330, and *Wardell* v. *McDowell*, 31 Ill. 364. Nor does this plea aver that appellants did not occupy the premises under the assignment of the term to them.

The sixth is a plea of set-off. It avers that appellee was indebted to appellants in the sum of $1000; that John W. Becker drew a sight draft on appellee in favor of appellants for $850, on the thirty-first of October, 1866, which they presented to her for payment; that she had $1000 in her hands as a portion of the distributive share of Becker, as an heir, and that she accepted the same, and they receipted to Becker for that amount. A copy of the draft is set out in the plea, but no acceptance given.

But even if she accepted the draft, it only bound her personally, and not the estate. Payment of the distributive shares of heirs in the estate can not be enforced until there has been an order for the purpose made by the probate court, and the distributee has executed a bond to refund the money, if necessary, to pay debts due from the estate. See section 165, Statute of Wills (Gross' comp.)

A compliance with these requirements of the law is not averred. If liable at all, she was personally so, and the individual indebtedness of an executor or administrator can not be set off against a debt due the estate.

The same objections apply to the seventh plea, as to the fourth and fifth. It avers that the title to the term was voidable and defeasible, but it fails to aver that it was avoided. Nor does it aver that the estate was ever terminated by the defeasance.

The eighth plea avers that John W. Becker was indebted to appellants in the sum of $850, and appellee was, as administratrix, indebted to him in the sum of $1000, for his share as an heir of the estate, being a dividend in her possession ready to be paid to him; that it was agreed by appellee, as administratrix, and appellants and Becker, that appellants

should abandon their claim against him, and he should relinquish his claim against her to the amount of $850, and appellee should pay appellants that sum in lieu of paying him; that appellants receipted to Becker for their claim against him.

If appellee became liable by this arrangement, it was personal, and did not bind the estate. We have seen that Becker could not compel appellee to pay him his distributive share of the estate without an order of the probate court. This, like the sixth plea, is an effort to set off a liability, if one exists, of the administratrix individually, against a debt owing by appellants. This, we have seen, can not be done. Again, there is no averment in the plea that Becker had executed a refunding bond to appellee.

For the reasons given, we are of the opinion that the special pleas were severally insufficient, and the demurrer was properly sustained, and the judgment of the court below must be affirmed.

Judgment affirmed.

MARTIN O. WALKER

v.

HUGH MARTIN.

1. EXCESSIVE DAMAGES. Although there is no fixed criterion for assessing the damages in an action for a personal tort, yet they should be so assessed as to preclude the idea that passion or prejudice controlled the jury, or their sensibilities were worked upon by unworthy appliances.

2. In an action for malicious prosecution, it appeared the defendant had caused the arrest of the plaintiff on a charge of larceny, the latter being confined in jail for a period of nine days, when he was discharged. The prosecution was malicious and wholly unjustifiable. The defendant was a man of large wealth, while the plaintiff was a poor man, who obtained his living by his labor. On the first trial the weight of the evidence was, that the plaintiff's character was bad. A verdict of $20,000 was considered

excessive, and the judgment was reversed. On a second trial the evidence in regard to the character of the plaintiff was conflicting, yet, while the greater number of witnesses testified to his good character, the impression was made that he was not in such position, in society or among business men, as to be greatly injured by the wrongful prosecution. On the second trial, a verdict was returned for $25,000, and a remittitur being entered for $5000, a judgment was rendered for $20,000, which was reversed upon the sole ground that the damages were outrageously excessive.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

This was an action on the case brought by Martin against Walker and Cutting, for malicious prosecution. A sufficient statement will be found in the opinion of the court.

Messrs. JEWETT & JACKSON, for the appellant.

Mr. GEORGE W. BRANDT, for the appellee.

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

This action was originally brought by Martin against Walker and Cutting, and on a trial by jury, a verdict was rendered for the plaintiff for the sum of twenty thousand dollars, and judgment entered for that amount.

On appeal to this court, the judgment was reversed on the ground, chiefly, that the damages were excessive. The cause was remanded for a new trial, and, on the second trial, against Walker alone, Cutting having died in the meantime, the jury awarded the plaintiff twenty-five thousand dollars as damages. On remittitur being entered of five thousand dollars, judgment was rendered for the sum of twenty thousand dollars.

To reverse this judgment, the defendant, Walker, has appealed to this court.

The case first here is reported in 43 Ill. 508. In that case, each of the defendants was responsible, so that, in fact, the

finding amounted to no more than a verdict of ten thousand dollars against each of them. We considered, on a full examination of the case, such damages were excessive, out of all proportion to any conceivable injury the plaintiff may have suffered, and accordingly reversed the judgment, deeming it a case eminently worthy the consideration of another jury.

The present verdict is two-fold greater than the first, inasmuch as there is but one defendant to respond to it. If the first verdict against the two defendants was excessive, this is outrageously so, and must be set aside. In the opinion delivered in the former case, we said, cases are numerous in which this court has exercised the power to set aside verdicts for the reason that the damages assessed were excessive, and it appeared probable, from the amount assessed, the jury had acted under the influence of prejudice or passion. In such cases, it would be a severe reflection upon the law, and a stigma upon the trial by jury, to say that no redress could be afforded; to admit that a jury is "a chartered libertine," free to indulge their worst passions, and, through their influence, victimize every man who may be so unfortunate as to have a case before them, in which his conduct does not show to the best advantage.

We are more deeply impressed than we were before that this verdict is the result of passion and prejudice, in which the judgment of the members of the jury had no share.

We are free to admit, the conduct of the defendant throughout the whole transaction, was unjustifiable, and that malice actuated him in the proceedings instituted against the plaintiff. Yet it must be borne in mind that many reputable business men of the city of his residence concurred in the opinion, that his character was not the best. It is true, a larger number of the same citizens testified to the plaintiff's good character, notwithstanding which, the impression is made, that he was not in such a position, in society or among business men, as to be greatly injured by the rude course the defendant pursued toward him. He has lost no character by the prosecution; his business, such as it may be, has not been injured

thereby. A few hundred dollars would fully compensate for all the pecuniary loss he may have suffered, yet something is undoubtedly due as atonement for the actual wrong done him by the invasion of his civil and natural rights under the forms of law. What that something shall be, is, for the most part, left to the sentiment of the jury, the law failing to furnish a rule by which it shall be measured. But while this is so, while a jury can indulge this sentiment, and give it free play in actions of this nature, they must take care their verdicts shall not bear on their face such indications of partiality, corruption or prejudice, as to compel courts, in the exercise of their powers given them for the protection of the citizen, to set them aside.

Although there is no fixed criterion for assessing the damages in such a case, yet they should be so assessed as to preclude the idea that passion or prejudice had usurped the judgment seat, or unworthy appliances worked upon their sensibilities. No impartial man can suppose, for a single moment, that there is any reasonable measure between the injury done in this case and the compensation allowed by the jury. They were undoubtedly told by the plaintiff's counsel that the plaintiff was a poor man, making a precarious living by hard labor, while the defendant was rolling in wealth, possessed of millions, and who would not feel the deprivation of the small sum of twenty, or even thirty, thousand dollars. It was by such arguments as this, doubtless, the jury were influenced, and to take from the defendant's millions a few thousand dollars, and put them in the pockets of a poor man, was an act of benevolence, and charity, and justice, which would redound to their credit. They did not, it would seem, for one moment consider the real nature of the case, or their duty in respect to it, but came, hastily, to the conclusion, as the defendant was a rich man, he ought to pay heavily for the poor man's wrong. Had it been a case between the plaintiff and his equal in social position and property, no one can believe such a verdict would have been rendered, or anything like it. But

we must not be understood as arguing that the pecuniary condition of parties should not engage the attention of juries in such a case as this. We hold, it is a fit subject for consideration. If a rich man, presuming upon his wealth, shall causelessly injure a poor man, by personal violence toward him, or by any malicious proceeding, he ought to be visited by vindictive damages, but, at the same time, they must bear some sort of proportion to the injury done, and the victim should have a good standing in society. It is not expected of a jury that, for a mere personal wrong, such as this case presents, if done to a vagrant, or to a person of but little character in community, they should award to him the same damages they would give a man whose station and respectability were unquestioned.

Witnesses of respectability differ as to the character of the plaintiff, and while it may be admitted the evidence preponderates in his favor, still the verdict is so outrageously excessive that, with all our respect for juries and their findings, this can receive no favor from us. This verdict is unprecedented in the annals of judicial proceedings. It bears upon its face the stamp of prejudice, partiality and oppression, and ought not to remain on our records.

Such verdicts as this is, outrage that sense of justice which has a lodgment in every well regulated mind, and if sustained by this court, could not but tend to increase that tide of opposition to the jury system, which is now rising and advancing in more than one State of this Union. If sustained, juries will be regarded as instruments of oppression, rather than a bulwark of our liberties. It may not be that either of the ancient ordeals, that of the Anglo-Saxon, of red-hot iron and boiling water, or that of the more chivalric Norman, by battle, will be revived, yet there is no small danger the institution will sink into contempt, to end at last in its utter overthrow. This is said in view of the material of which juries are composed in modern times, but, however composed, it is quite time they should understand they do not possess despotic power.

The maxim, "*sic jubeo, sic volo, stat voluntas pro ratione*," has no place in jury trials. It is the maxim of the despot, whose own unbridl'd will is the law for him, and for all within his power.

For the reasons given, the judgment is reversed and the cause remanded, that a new trial may be had.

WALKER, J: The majority of the court having previously held that the amount of this verdict was excessive, and the judgment reversed for that reason, I am not inclined to dissent. The judge of the court below and the jury have disregarded the opinion of the court, and for that reason this judgment should be reversed.

Judgment reversed.

MARTIN O. WALKER
v.
FREDERICK R. WILSON.

PAROL LICENSE—*revocation.* A parol license by a lessor to his lessee, to remain in possession after the expiration of the lease, made without consideration, is subject to revocation, and will be considered revoked by a subsequent demand of possession.

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

This was an action of covenant, brought by Wilson against Walker and others, partners, upon a lease, in which it was sought to recover double rent, under the statute, on the allegation that the defendants, lessees, wilfully held over after the expiration of the lease.

A trial resulted in a finding and judgment for the plaintiff, from which the defendant, Walker, appealed.

Mr. OBADIAH JACKSON, for the appellant.

Messrs. JONES & GARDNER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

There is no ground in this record for reversing the judgment. The court did not, as we understand the case, allow double rent. By the terms of the lease the lessees were to pay one half the taxes. They occupied the lot from September, 1865, to May 1, 1868, under their lease, and held over until July 6, 1868. It appears, from the testimony of plaintiff's attorney, that when he presented the bill for one half the taxes of 1867, the lessees refused to pay them, and it is not claimed they ever have paid them. These taxes and single rent, at the rate which the premises are sworn to have been worth, would make the amount of the judgment.

That the lessees held the premises until July 6, can not be denied. They had discontinued their coal business, but they retained possession of the lot, by keeping on it their office, barn, scales, and a quantity of coal which one of the witnesses estimated at a hundred hogsheads. It is suggested the lessor had given them leave, before the lease terminated, to remain in possession in this way, but if so, it was a mere parol license, without consideration, subject to revocation, and was revoked by the formal demand in writing for possession made on the second of May. Besides, whatever permission of this kind was given, related only to the office and scales.

It is unnecessary to consider the question of double rent, as such rent does not seem to have been allowed.

Judgment affirmed.

GEORGE BOWEN *et al.*

v.

ROBERT PROUT.

1. DESCRIPTION—*of land in a deed.* In describing lands in a conveyance, no set form of words is required, but only such language as clearly designates the lands conveyed.

2. A deed described the lands conveyed, as follows: "The following tracts or parcels of land, all of which lying and being in the military tract in the State of Illinois, that is to say, the north west ¼ section 27, 11 S. 2 W." following with the numbers of several other tracts, describing them thus: "N. E. ¼ 17, 15 N. 6 E." without the use of the word "section" preceding the quarters. The description of the tracts succeeding the first one was sufficient; the word "section" would be understood, as though it were expressed, before the numerals representing all the other quarters.

3. PRIOR UNRECORDED DEED—*from the ancestor—its effect upon a subsequent bona fide purchaser from an heir.* A subsequent purchaser, for a valuable consideration, from an heir, without notice of a prior unrecorded conveyance from the ancestor, will be protected in his title as against such prior conveyance.

4. SAME—*of one of the heirs as a bona fide purchaser.* And where one of several heirs exchanges, for the interest of his co-heirs in a certain tract of land which they all inherited from their father, his interest in other parcels of land which descended to them in the same way, he will be protected, as a purchaser for a valuable consideration, in his title to the portion so acquired from his co-heirs, as against a prior unrecorded deed for the same from his ancestor, of which he had no notice.

5. But he could not hold the portion claimed by inheritance, as against such prior unrecorded deed of the ancestor, as he would take such interest as a volunteer.

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. EDWIN S. LELAND, Judge, presiding.

This was an action of ejectment brought by Prout against Bowen and another, to recover the undivided three-fifths of the north east quarter of section seventeen, in township number fifteen north, of range six east, in Bureau county.

In one of the deeds in the chain of title sought to be established by the plaintiff, a deed from Jonathan Prout and others to Robert Prout, the description of the lands was as follows: "the following tracts or parcels of land, all of which lying and being in the military tract in the State of Illinois, that is to say, the N. W. ¼ section 27, 11 S. 2 W; N. E. ¼ 21, 10 S. 2 W; N. W. ¼ 24, 8 S. 3 W." and giving a similar description of a large number of tracts, including the "N. E. ¼ 17, 15 N. 6 E."

A trial below resulted in a judgment for the plaintiff. The defendant thereupon sued out this writ of error.

Mr. M. SHALLENBERGER, for the plaintiffs in error.

Mr. MILTON T. PETERS, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by defendant in error to recover the undivided three-fourths of a quarter section of land, against plaintiffs in error.

Subsequently, the declaration was so amended as to claim an undivided four-fifths. After a trial was had, and a recovery by defendant in error, a new trial was had, and there was filed a new count, claiming the undivided three-fifths, and Strong was made a defendant. The plea of the general issue was filed to the amended declaration.

On the trial in the court below, defendant in error produced and read in evidence a connected chain of title to the undivided three-fifths of the premises, and the court so found, and rendered judgment in his favor for that portion of the land. The record is brought to this court, and a reversal is asked on various grounds.

It is first objected, that in the deed from Jonathan Prout and others to Robert Prout, the land is described as "N. E. ¼ 17, 15 N. 6 E." Before this description by numerals, it is

stated that the lands conveyed, of which there were a large number of tracts, were situate and being in the "military tract in Illinois." In describing the first tract in the list, this language is employed: "That is to say, the N. W. ¼ section 27, 11 S. 2 W." Then follows the numbers of the other quarters, without the use of the word "section" before each. According to the strict rules of grammar, it is believed that the word section would be supplied before the description of each succeeding quarter. Such would be the understanding of a large majority, if not all persons, who might read the deed.

No doubt can be entertained that the language employed conveys to the mind precisely the same idea as if the word "section" had been written before the numerals 17. All persons would undoubtedly so understand the description. In describing lands in a conveyance, no set form of words is required, but such language as clearly designates the lands conveyed. The cases of *Dougherty* v. *Purdy*, 18 Ill. 208; *Worden* v. *Williams*, 24 Ill. 74, and *Dickenson* v. *Breeden*, 30 Ill. 270, sustain the views here expressed. This deed was therefore properly admitted in evidence.

It is urged, in favor of reversal, that plaintiffs in error proved an outstanding paramount title in Warren. It is true, they produced a certified copy of a deed for this land from William Prout, the ancestor of defendant in error, to James Warren, bearing date the fifth of December, 1817, and recorded on the fifth of August, 1862. The deed of partition, under which defendant in error claims, bears date on the twenty-fourth day of October, 1831, which was duly recorded on the fourteenth day of December of the same year. The question is then presented whether the unrecorded deed from the ancestor of defendant in error, from whom he inherits, constituted paramount title, notwithstanding he received a release of title from the other heirs of his father to this quarter of land. It is not the question which would have arisen had he derived title directly from his father as his heir. But in the partition

of the lands owned by his father at his death, he gave other lands, or rather his interest in others, for this. He conveyed his interest in other tracts in exchange for the interest of the other heirs in the list they released to him which embraced this tract. Had they sold this land to a stranger before the deed to Warren was placed on record, for a valuable consideration, no person would pretend that the title would not have passed, unless notice had been brought home to the purchaser. In this case, defendant in error occupied the same relation to the property as would a stranger, as he gave as valuable a consideration by conveying his interest in other lands in exchange for the title to this, as if he had paid the money or exchanged other lands in which his co-heirs had no interest. He was a purchaser for a valuable consideration, and there is no pretense that he had notice of the prior conveyance by his father. There is no such proof in the record, nor can it be inferred from the fact that he was one of the heirs of William Prout, senior.

In this case, defendant in error did not recover the interest he claimed to have inherited from his father. He could not recover that, as he took that interest as a volunteer, and his father's prior deed, although unrecorded, estopped him from claiming it, unless he had impeached it as a fraud or forgery. *Kennedy* v. *Northup*, 15 Ill. 148. But having paid value by releasing his title to other lands, to his co-heirs, he is a purchaser, as to three-fifths, and, unless he had notice, his claim to protection is as strong and just as though he had not been an heir. He should not be subjected to the loss of his property simply because he was the heir of the grantor. At the time he parted with his title, the deed from his father had been unrecorded for about fourteen years, and it subsequently remained unrecorded for about thirty-one years — such a length of time as would, no doubt, render it impracticable to obtain a further partition or any other restoration to his rights. He answers all the requirements of the statute to claim the

portion he received by the partition as a *bona fide* purchaser. The judgment of the court below must be affirmed.

Judgment affirmed.

MADISON Y. JOHNSON, Administrator, etc.

v.

ORLIN H. GILLETT.

1. EXCEPTIONS—*when necessary.* An objection to the ruling of the court below in refusing to quash a writ of *certiorari* sued out under the statute, to remove a cause from a county court to the circuit court, will not avail in the appellate court, on error, unless exception was taken to the decision of the circuit court on that subject.

2. FORM OF JUDGMENT—*in inferior courts.* No particular form is required in the proceedings of an inferior court, to render its order a judgment. It is sufficient if it be final, and the party may be injured.

3. SAME—*in a county court, on adjudicating a claim against an estate.* So, where the order of a county court, in respect to a claim presented against an estate, was, "after having taken the matter under advisement, the court this day, after due deliberation, rejects the claim," this was held to be a sufficiently formal judgment from which an appeal or *certiorari* would lie.

4. ADMINISTRATION OF ESTATES—*of claims in favor of the administrator.* If an estate is not fully settled, and the administrator has exhausted the personal assets in the payment of other debts than his own, he may prove a claim due to himself personally, from the estate, preparatory to obtaining an order to sell the real estate. If he chooses to postpone the payment of his own claim, and the assets are exhausted, he is not prohibited from making application for an order to sell the real estate, and thus convert it into assets.

5. SAME—*of paying debts pro rata or in full.* Regularly, perhaps, if there are not sufficient personal assets to pay all the debts owing by an estate, without resorting to the real estate, the administrator should pay the debts *pro rata* out of the personalty, his own debt, if he have one against the estate, included; but if he pays all of the debts, except his own, in full, and thereby exhausts the personal assets, the result would be the same, and he may still prove his own claim, and have an order to sell real estate to pay it.

Statement of the case.

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

Orlin H. Gillett, who was administrator of the estate of Benoni R. Gillett, deceased, presented a claim on his own behalf, against said estate, for allowance in the county court of Jo Daviess county. An administrator *pro tem.* was appointed to defend the estate. The following orders were entered of record in the county court, concerning said claim:

"Now at this day, the court took up the claims of O. H. Gillett against the said estate of Benoni R. Gillett, deceased, for $1900.86, as a balance due him. D. W. Jackson, Esq. appeared for the administrator, and M. Y. Johnson, Esq. appointed by the court administrator *pro tem.* to defend the interests of said estate, and objected to said claim being allowed, and after hearing the evidence and the arguments of counsel the court took the case under advisement."

And afterwards, the following order was made:

"In the matter of the claim of Orlin H. Gillett against the estate of Benoni R. Gillett, deceased, for $1900.86, having taken the matter under advisement, the court this day, after due deliberation, rejects the claim."

Subsequently, Orlin H. Gillett removed the cause into the circuit court of Jo Daviess county, by *certiorari* under the statute, where such proceedings were had that the claim was allowed. The administrator *pro tem.* thereupon appealed to this court. The other matters concerning which questions arise, are set forth in the opinion of the court.

Mr. MADISON Y. JOHNSON *pro se.*

Mr. D. W. JACKSON, for the appellee.

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

It appears by this record, that, on the sixth of October, 1868, Orlin H. Gillett, administrator on the estate of Benoni R. Gillett, deceased, by letters of administration granted him by the county court of Jo Daviess county, in April, 1848, filed an account in his favor against the estate, amounting to nineteen hundred dollars and eighty-six cents, as a balance due him. The appellant, representing one of the heirs at law of the intestate, was appointed by the county court, to defend against this claim and to take care of the interests of the estate, when, upon investigation by the court, and after due deliberation, the claim was disallowed.

The cause was brought to the circuit court by *certiorari* under the statute, the time for taking an appeal having expired.

In the circuit court, appellant entered a motion to quash the writ of *certiorari* for reasons which appear in the record. The court denied the motion, and this is the first error assigned.

It is a sufficient answer to this, to say, that no exception was taken to this ruling of the court, and consequently its merits are not before us for consideration.

The next point is, that there was no judgment of the county court, from which an appeal or *certiorari* would lie.

An inspection of the record from the county court, shows that no formal judgment was rendered in the cause, not even for the costs, but the claim presented was, by the consideration of the court, rejected. This was absolute, and was, in effect, a judgment against the claimant.

It was held long ago, by this court, that no particular form was required in the proceedings of an inferior court to render their order a judgment. It is sufficient if it be final, and the party may be injured. *Wells* v. *Hogan*, Breese (2 *Ed.*) 337.

In the case before us, the order rejecting the claim was absolute and final. It concluded the claimant, and could be pleaded in bar to any claim for the same cause the administrator might afterward set up against the estate, so long as it remained

upon the records of the county court. It was such a final order, and tended so to injure the claimant as to be the basis of an appeal.

Having disposed of the preliminary questions, we now come to the merits of the controversy.

The question is, did the administrator establish by his proofs before the circuit court an indebtedness by the estate of Gillett, to him, to the extent found by the circuit court, or to any extent.

It is the acknowledged duty of all courts, when the claims of an administrator are preferred against an estate he represents, that all matters pertaining to it, and to the administration of the estate, should be closely scrutinized. Such is the relation he bears to the estate, and to all the parties interested in it, that courts can hardly be too careful and scrutinizing, so that the true facts and the real condition of the estate, and the acts and doings of the administrator, can be readily seen and easily comprehended by those in interest. It is a lamentable fact, that in some of the county courts having jurisdiction of such matters, sufficient caution is not used, and their records will show the discharge of many an administrator on final settlement, who has never rendered a full account of his stewardship, or such an one as could be understood by an heir or creditor, if examined within even a brief time after such settlement. We do not remember many cases where an administrator has pursued the law in stating and proving his account, or wherein a county court has applied the rules of law to him.

We understand, from the briefs of counsel in this cause, that the administrator claims to have made a final settlement of the estate, having paid and satisfied all claims against it, except his own, and for which he is seeking an allowance, to enable him to procure an order of court to sell the real estate, he having, in the payment of these claims, exhausted the personal assets.

It appears from the record, that the administrator was cited to appear before the county court, at the February term, 1868, to make a final report and settlement. At this term, it was ordered that he make such report on the 9th of March, 1868.

This not having been done, he was cited to appear to make such report and settlement at the August term, at which term he presented his report, and it was rejected by the court.

Up to this time, it is apparent there had been no final settlement of the estate. While matters were in this position, on the sixth of October following, the claim in question was filed against the estate, the administrator claiming a balance due himself of nineteen hundred dollars and eighty-six cents. On the third day of December, the claim was examined by the court, the administrator being represented by counsel, and the estate, by appellant, when on the fifth of December, after evidence and arguments were heard, the court, "on due deliberation," rejected it.

It appears from the record, that there was a judgment rendered in the circuit court of Jo Daviess county in favor of the claimant, against the intestate, in his lifetime, on the sixth day of November, 1846, for nine hundred dollars.

The judgment of the circuit court was for nine hundred and thirty-two dollars and thirty-six cents.

It does not appear that the validity of this judgment was attacked, or that it was objected to as a subsisting claim against the estate. Although more than twenty-two years had elapsed since its rendition, appellant did not contest the right of the plaintiff to the remedy he sought, nor does he here, his principal ground of complaint being that the administrator has not shown that he has made a full settlement of the estate, and he does not now dispute the fairness of any item allowed as a credit to the administrator. We have examined carefully the various reports of the administrator to the county court, with the action of the court thereon, going to show from time to time partial settlements and accountings, and have scrutinized them, and we can not discover any error therein. All that has come to the hands of the administrator, he appears to have fully accounted for, deferring his own claim to payment to that of other creditors not of kin to the intestate.

We do not perceive why, if an estate is not fully settled, and the personal estate exhausted, an administrator may not prove his claim, preparatory to obtaining an order to sell the real estate. His claim, if just, is as much entitled to payment as that of any other creditor. If he chooses to postpone its payment, and when the assets are exhausted, what should prohibit him from making application for an order to sell the real estate, and thus convert it into assets?

An objection might be urged in this case, that it appears the administrator paid the full amount of all the claims made against the estate, whereas he should have paid them *pro rata*, his own included, after he had established it in the mode pointed out in the statute, but the result would be the same. Such creditors as were not paid in full could require the administrator to convert the real estate into assets. Another objection might be urged, but it is not, that no notice was given by the administrator to creditors of the estate to present their claims, on a day named, for adjustment. The object of this is to enable the administrator to know the true condition of the estate as to its solvency, and when known, to be guided thereby in paying the claims, whether in full or *pro rata*, as he knows by the sale bill and the inventory he is required to make, the extent of the assets. No such papers appear in this case, nor is any objection made to their absence; in short, appellant does not put his finger on any matter alleged to be contrary to law and right.

The claimant reposes on the confirmation of his several reports made to the county court, and upon them appellant has raised no question. We have carefully examined all of these, from that of May 4, 1853, to the last one, made April 17, 1861, with the order of court thereon made January 22, 1862. That made on the fourth of April, 1854, is a compendium of that of May 4, 1853, February 7, 1854 and March 21, 1854.

That report shows on the debit side of the account rendered, nineteen hundred and sixty-eight dollars and ninety-nine cents

which the administrator had collected from mineral rents and from other sources. The credit side showed disbursements, eleven hundred and forty-five dollars and forty-nine cents, commissions on nineteen hundred and sixty-eight dollars and ninety-nine cents, one hundred and eighteen dollars thirteen cents. The judgment in favor of the administrator in the circuit court, rendered November 6, 1846, nine hundred dollars, and interest thereon up to the date of the report, four hundred and thirty-two dollars. These several credits amount to twenty-five hundred and ninety-five dollars and sixty-two cents. From them deduct the amount in the hands of the administrator, nineteen hundred and sixty-eight dollars and ninty-nine cents, and a balance is found in his favor of six hundred and twenty-six dollars and sixty-three cents.

At the March term, 1855, of the county court, the administrator presented a claim in his own favor, against the estate, of three hundred and twelve dollars, money loaned to the intestate, claiming interest thereon to the amount of one hundred and twenty-nine dollars and forty-eight cents, which the court allowed, Thomas Robinson having been appointed by the court to defend the estate against the claim, to the amount of four hundred and forty-one dollars and forty-eight cents. This same claim was presented by the administrator for allowance in his report of February 7, 1854, and rejected by the court, and if any exception had been taken to it here, we should have been strongly inclined to reject it, unsustained as it is by the least proof. But the heirs make no objection to it, and it must be allowed.

On the seventh of April, 1856, the court made two other allowances in favor of the administrator, amounting to twenty-four dollars and ninety-seven cents, to which no objection has been raised.

These several sums make the total of ten hundred and ninety three dollars and eight cents allowed the administrator over and above his receipts. From this sum, there was deducted by the court, on account of a supposed discrepancy in the sale

bill and the amount stated in the report of April 4, 1854, and another sum collected by the administrator since his last report, the two sums amounting to one hundred and sixty dollars and twenty-two cents, which left a balance remaining due the administrator of nine hundred and thirty-two dollars and thirty-six cents, for which the court rendered judgment.

These claims allowed the administrator by the county court, and by the circuit court on appeal, are *prima facie*, at least, valid against the heirs, who have contested this suit. They had the right to appear and contest their validity to protect their inheritance from sale, but in the presence of the fact that not one of the items allowed was objected to, the circuit court could not do otherwise than approve them.

In affirming this judgment, as we do, we must take the occasion to say, we are not satisfied with the manner in which this estate has been managed, and which, after an administration running through twenty-one years, is not yet settled, and no excuse shown for the delay. There are no creditors complaining, it is true, yet the interests of the heirs at law of the intestate demanded a more speedy adjustment of its affairs.

As the abstract furnished by the appellee does not conform, in its preparation, to the rules of court, no costs will be taxed therefor, against appellant.

Judgment affirmed.

RUFUS OGDEN

v.

GEORGE CLAYCOMB.

1. ASSAULT AND BATTERY—*self-defense.* It is not essential to the right to maintain an action for an assault and battery, that the plaintiff should have been guilty of no provocation. It is immaterial what language he may have

used toward the defendant, so far as the right to maintain an action is concerned.

2. And even if the plaintiff went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense.

3. So, if it appear, in such an action, that the plaintiff advanced upon the defendant in a threatening manner for the purpose of fighting, and a fight followed, no more violence can be used by the party attacked than a reasonable man would, under the circumstances, regard necessary for his defense. If he strikes a blow not necessary to his defense, or after all danger is past, or by way of revenge, he is guilty of an assault and battery, for which an action will lie. He will not be justified in exceeding the just bounds of self-defense, even though he desist as soon as the attacking party asks him to do so.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Messrs. STEWART & PHELPS, for the appellant.

Messrs. KIRKPATRICK & GLENN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action for assault and battery, in which the jury found for the defendant. The verdict was against the evidence, and there was error in the instructions for the defendant. From the first instruction the jury would understand, if the plaintiff advanced upon the defendant in a threatening manner, for the purpose of fighting, and a fight followed, the plaintiff could not recover, even though the defendant had far exceeded the just bounds of self-defense, and inflicted an inhuman beating, provided he desisted as soon as the plaintiff asked him to do so. The rule is, on the contrary, that no more violence can be used than a reasonable man would, under the circumstances, regard necessary to his defense. If

he strikes a blow not necessary to his defense, or after all danger is past, or by way of revenge, he is guilty of an assault and battery. The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words, and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense. All the instructions for the defendant are pervaded to a greater or less degree by these errors, and should have been refused. The judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN D. GARDNER

v.

THE NORTHWESTERN MANUFACTURING COMPANY.

1. EVIDENCE—*to prove a partnership.* The declaration of a purchaser of goods to the vendor, that some other person not present is jointly interested as a partner in the purchase, is no evidence whatever against such person to establish the partnership.

2. Nor is it competent, where the existence of the partnership is the issue on trial, for the court to decide that a partnership has been proven by evidence *aliunde*, and then admit the statements of one of the alleged partners to prove the partnership, on the principle that the statements of one partner are admissible against the other as to partnership matters.

3. Where the existence of the partnership is not the issue on trial, however, and the statements are not offered to establish a partnership, but relate to some other question, it may undoubtedly be sometimes the duty of the court to decide, in the first instance, whether a *prima facie* partnership has been proven, and if it has been, to let the statements go to the jury, with proper explanations.

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

The opinion states the case.

Messrs. HOYNE, HORTON & HOYNE, for the appellant.

Messrs. WAITE & CLARK, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the appellee against John D. Gardner and William D. Nichols, as partners, to recover the value of certain articles sold and delivered on the order of Nichols. Nichols made default, and Gardner pleaded the general issue, and a special plea denying the partnership. The issues thus formed were tried together, according to the rule laid down in *Stillson* v. *Hill*, 18 Ill. 262, and found for the plaintiff.

The business, in which Gardner had an interest of some kind, was transacted in the name of W. D. Nichols, and on the trial Nichols was sworn as a witness on behalf of plaintiff, and asked, on the examination in chief, "What he said to appellee as to who constituted 'W. D. Nichols,' when the goods were purchased?" Crane, the vice-president of the manufacturing company, was also sworn, and was asked, "What representations, if any, did Nichols make to you before he got the credit?" These questions were asked for the purpose of establishing the joint liability of Gardner, and were objected to by his counsel, but the objection was overruled. The answer was, that Nichols represented to the appellee, when he made the purchase, that Gardner was a silent partner, and Crane swears that appellee would not have sold the goods to Nichols alone, on credit. This evidence would undoubtedly have a strong influence with the jury, which would not be counteracted by any of the instructions afterwards given.

These questions should not have been allowed. What Nichols said to appellee, as to the silent partnership of Gardner, is not evidence against Gardner to prove that fact. The declaration of a purchaser of goods to the vendor, that some other person not present is jointly interested as a partner in the purchase, is no evidence whatever against such person to establish the partnership. It is, however, urged by counsel for appellee, that they had already proved the partnership, or made *prima facie* proof of it, by the evidence of Nichols, and if the court was satisfied by the proof made, it was its duty to admit this evidence, on the principle that the statements of one partner are admissible against the other as to partnership matters. Where the existence of a partnership is not the issue on trial, and the statements are not offered to establish a partnership, but relate to some other question, it may undoubtedly be sometimes the duty of the court to decide, in the first instance, whether a *prima facie* partnership has been proven, and if it has been, to let the statements go to the jury, with proper explanations. But where the existence of a partnership is the very issue which the jury are to try, as in the present case, and where the statements are offered merely to prove such issue, it is manifestly illogical to say the court may first decide the partnership has already been proven by evidence *aliunde*, and then decide that such statements are admissible in order to prove a partnership. It is plain, on a moment's consideration, that if a partnership, in fact, existed, and had been proven by evidence *aliunde*, Gardner would be liable for these goods, no matter what Nichols may have said to appellee, and the evidence should therefore have been rejected as immaterial, or, if there was no partnership, then the statements of Nichols, made in the absence of Gardner, and without his authority, could not bind him. There either was a partnership, or there was not, and either horn of the dilemma is fatal to this evidence. If Gardner had authorized Nichols to make these statements to the appellee, they would, then, of course, have been evidence, as the statements of Gardner himself; and if

he had thus held himself out as a partner, he could not now deny it. But it is not claimed by counsel, and there is no evidence, whatever, that Nichols was authorized by Gardner to make these statements.

The instructions are substantially correct. The third asked for the defendant and refused, was embodied in those given in a much better and clearer form. The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN T. HARPER *et al.*

v.

MELISSA ROOKER.

1. SUIT FOR SEPARATE MAINTENANCE—*subsequent decree for alimony.* Where a married woman has commenced a suit against her husband, for separate maintenance, under the act of 1867, and pending such suit obtains, in another suit, a decree for a divorce, and for alimony, the decree for alimony will operate as a dismissal or discontinuance of the former suit, without any formal order disposing of it.

2. SAME—*out of what fund alimony may be decreed.* So, where the wife, upon commencing her suit for separate maintenance, caused her husband to be arrested under a writ of *ne exeat*, and to give bond, and certain United States securities belonging to the husband were placed in the hands of the surety on the *ne exeat* bond as an indemnity therefor, and to secure the attorney's fees in that suit and a suit for divorce also then pending, it was proper for the court, in decreeing alimony in the latter suit, at the instance of the wife, to direct the surety on the *ne exeat* bond to pay over to her, as a portion of her alimony, the residue of the securities held by him as an indemnity, after deducting the attorney's fees therefrom, although the former suit was not formally disposed of by any order therein, because the surety could not be held liable upon his bond after the decree for alimony, nor could any further proceedings be had in the suit for separate maintenance.

APPEAL from the Circuit Court of Woodford county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The opinion states the case.

Messrs. HARPER & CASSELL, Messrs. INGERSOLL & MCCUNE and Mr. S. D. PUTERBAUGH, for the appellants.

Messrs. JOHNSON & HOPKINS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that on the third day of October, 1868, Nelson Rooker filed a bill in the Woodford circuit court against appellee, for the purpose of obtaining a divorce. Appellee answered the bill, and filed a cross bill, in which she made appellant and others defendants, and prayed a divorce and for alimony. On a hearing upon the original and cross bills, the court rendered a decree, granting a divorce to appellee, and allowing her $12,000 alimony, and appellants were ordered to pay appellee $4578 as a part of the amount.

After filing the original bill, and before the cross bill was filed, on the thirteenth day of October, 1868, appellee commenced a suit against her husband for separate maintenance, under the law of the fifth of March, 1867, and sued out a writ of *ne exeat*, requiring him to give bond in the sum of $5000.

He was arrested, and appellant, Harper, became his security on the *ne exeat* bond in that sum. Emmet Hickox, one of the defendants, placed in the hands of appellants $5000 in United States bonds to indemnify Harper for becoming security for Nelson Rooker on the *ne exeat* bond, and to secure Ingersoll, Harper & Cassell their attorneys' fees in the two suits then pending.

The suit commenced by appellee has not been tried, and no order made formally disposing of it. This case is brought to this court by appeal, and it is assigned for error, that the court below decreed that appellants should pay to appellee $4578, the balance that remained of the bonds after deducting attorneys' fees.

It is urged that the decree is wrong, inasmuch as the suit for separate maintenance, so far as this record discloses, remains undisposed of in the court below. That court, on the evidence, found that the bonds placed in the hands of appellants by Hickox, belonged to Nelson Rooker, and he, having fled the country, as is conceded, it was decreed to appellee as part of her alimony.

It is not contested that, had the suit for separate maintenance been dismissed, the decree would have been proper, and the question is presented, whether the decree rendered in this case has not, in effect, produced the same result.

It is manifest that the rendition of this decree renders it impossible for appellee to proceed further in that case. In this case, all of the questions in reference to alimony and separate maintenance that could arise on that bill have been heard and adjudicated. Should appellee sue upon the *ne exeat* bond, this decree could be pleaded as an effectual bar to a recovery. The questions which would arise in such a suit have been presented and determined in this, and have become *res adjudicata.*

It is true, there was no formal order of the court consolidating the two cases, but the result was the same. The bill for a divorce presented the question of alimony as fully as did the suit for separate maintenance, and when the divorce was granted, it became the duty of the court to proceed, on the application of appellee, to hear and determine that question. Had the divorce been refused, then it may be that the other suit might still have progressed to a hearing and final decree. But that question is not before us for decision. The decree of the court below is affirmed.

Decree affirmed.

Syllabus.

SCHOONER "NORWAY"

v.

CHRISTIAN JENSEN.

1. PLEADING—*claiming a statutory benefit or remedy.* A party claiming a benefit or a remedy given by statute, must bring himself, by proper averments and pleadings, within its provisions.

2. ATTACHMENT OF BOATS AND VESSELS—*under act of* 1857—*whether confined to boats navigating rivers.* The act of 1857, giving a summary remedy in certain cases, against steamboats and other water craft, is not confined in its operation to that class of vessels navigating the rivers within or bordering upon this State, but embraces those employed upon any of our navigable waters, whether lake or river.

3. SAME—*for what cause the statutory remedy may be invoked.* This act gives the remedy against the craft or vessel, by seizure, &c., "for injuries done to persons by such craft," the bearing and spirit of which provision is, as inanimate things have no will to direct them, but must be controlled by intellect, that the vessel or craft assumes the personalty of the owner, who is liable for an injury done by it.

4. So, where a sailor on board a vessel was injured by reason of the negligence of the owner to provide ropes in a sound and safe condition, with which to cat the anchor, this was held to be within that clause of the statute giving the remedy "for injuries done to persons by such craft," and it is sufficient, in such case, to allege that the injury was the result of the negligence of the owners.

5. MASTER AND SERVANT—*injuries to the latter from negligence of the former.* A master is responsible to his servant for injuries received by him from defects in the structures or machinery about which the services were rendered, which defects the master knew, or ought to have known.

6. BOUNDARIES OF THIS STATE—*embracing a part of Lake Michigan.* By the act of congress prescribing the boundaries of this State, and by the constitution of the State conformable thereto, so much of Lake Michigan as is included by lines, one running north from the point where our eastern boundary strikes the southern bend of the lake to a point in the middle of the lake, in north latitude 42 degrees 30 minutes, and thence west along that parallel, is within the limits of this State.

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

Statement of the case.

This was a suit commenced in the court below, by Christian Jensen, against the schooner "Norway," to recover damages sustained by the plaintiff, in consequence of injuries received by him when employed as a sailor on board said vessel, caused by the falling of a block connected with the "fish tackle," upon the plaintiff, by reason of the breaking of the "fish tackle pennant," a portion of the rigging used in "catting" or raising the anchor from the catheads on board the vessel.

The suit was commenced on June 15, 1868, by the filing of an affidavit of the plaintiff, as follows:

That on or about May 1st, 1868, he was employed as a seaman to serve on board defendant, by Enoch Swanson, master, for a voyage from Chicago to the port of Muskegon, Michigan.

That plaintiff, on said 1st day of May, went on board said vessel, and commenced his services as seaman.

That on the same day, while plaintiff was in the discharge of his duty, and obeying the commands of the officers of said vessel, in taking in the anchor, the fish tackle pennant, a part of the rigging attached to the mast, and used for hoisting or catting the anchor, broke, and the block connected with and being part of said tackle, fell on plaintiff with great force, breaking his arm and doing him other bodily injury.

That said injuries were entirely owing to said vessel being unseaworthy, in that said tackle and rigging connecting the mast with the anchor were unsound and in a rotten condition.

That said injury was not owing to any negligence or want of care on his part, but entirely owing to the negligence of the owners of said vessel, in keeping said vessel in an unsound and unsafe condition.

That said vessel, at the time of the said injuries, was running upon the navigable waters within and bordering on the State of Illinois. That by reason of said injuries he was damaged to the amount of $2000.

Prays that said schooner may be seized by the sheriff of Cook county according to the statute in such case provided.

Upon this affidavit or complaint, and a *præcipe* accompanying the same, a warrant for the seizure of said vessel was issued, under the provisions of the act of 1857, giving a summary remedy against boats and vessels in certain cases.

In respect to the waters which were being navigated by the vessel, the declaration alleged that, at the time of said injury, she was employed in commerce and navigation, and was running on "waters within and bordering on said State" of Illinois, being then in the port of Chicago, and destined on a voyage from that port to a port in the State of Michigan.

A trial resulted in a verdict and judgment for the plaintiff for $1000. This appeal was taken on behalf of the vessel.

Messrs. MILLER, VANARMAN & LEWIS, for the appellant.

The affidavit does not show a state of case sufficient to give the court below jurisdiction, under the act of 1857, which only attempts to give this summary remedy against such boats and vessels as are navigating the "rivers within and bordering upon this State." The affidavit states that this vessel was navigating the *waters* within and bordering the State, and, at the time of the alleged injury, was lying in the port of Chicago, and bound thence on a voyage to a port in another State. The vessel was engaged in the navigation of Lake Michigan, and therefore not embraced in the description of vessels navigating the "rivers within and bordering upon" the State.

If the act is to be construed as applying to the lakes outside the State, it would be void, by reason of its conflict with the law of Congress, of 1789, vesting all admiralty jurisdiction in the district courts of the United States, to the exclusion of the State courts. *Williamson* v. *Hogan*, 46 Ill.—and cases there cited.

Conceding, however, the act of 1857 to be valid, it does not cover the injury complained of in the present case.

It provides for injuries to persons, &c. "done by the vessel or craft, &c."

Was the injury complained of done or caused by the said vessel, according to the meaning and spirit of the above provision?

The plaintiff, in his declaration, alleges that the injury was caused by the negligence of the owners of the vessel.

The act provides a remedy for injuries done by the vessel, officers or crew, but not for injuries done or committed by owners.

This injury is not alleged to have been done by the vessel, officers or crew, but to have been caused by the misconduct of the owners.

We insist that an injury caused as this is alleged in the declaration to have been caused, solely by the misconduct of the owners, is not, according to the meaning of said act, done by the vessel, and therefore is not one of the injuries for which such summary remedy is provided.

Messrs. RAE & MITCHELL, for the appellee.

The objection to the jurisdiction in this case is founded on the fact that the affidavit, which is the foundation of the suit, uses the word *waters* instead of *rivers*.

The 11th section of the act provides "that the act shall be so construed as to authorize and enable any person or persons to bring said action, notwithstanding such water craft may not have been, at the time when such cause of action accrued, navigating the *waters* within or bordering upon this State."

The word "*waters*" seems there to be contemplated by the act, and if the craft is navigating *waters* within or bordering, &c., persons who are injured are expressly authorized to maintain such action.

The State of Illinois has no other waters naturally navigable within her territory except rivers.

Waters and rivers are sometimes used synonymously, and where a word is susceptible of two significations, one of which

represents a legal right, the court will so construe and interpret its use when employed in a legal proceeding.

The affidavit states the injury to have occurred while the schooner was running "upon the navigable waters of the State," and as the State has no navigable waters for schooners to run, except "*rivers*," the court will construe the word *waters* to mean *rivers*.

The statute should not be construed strictly in reference to this remedy. The law on the subject is briefly this: In 1845, Judge STORY framed an act, which was passed by congress on the 26th of February of that year, purporting to be an act to extend the admiralty jurisdiction on the great lakes. In this statute, the jurisdiction of the admiralty courts is not made exclusive, but is expressly made concurrent with "such remedies as may be given by State laws, where such steamer or vessel is employed." 5 U. S. Statutes at Large, 726.

Therefore, the State of Illinois is left at liberty, so far as concerns vessels navigating her waters, or bordering upon them, navigable from the lakes, to adopt such remedies as may be concurrent with those possessed by the admiralty over such waters. *The Hine* v. *Trevor*, 4 Wallace, 556.

The next objection is, that the plaintiff's cause of action fails to show such a claim against said vessel, as provided for in this statute.

The claim is, that he received an injury from said craft, "while a hand on such craft, at the time of such injury." This is the language of the statute, but it is contended that it is alleged by the plaintiff that such injury inflicted by said craft was in consequence of the negligence of the owners, &c., and that the act provides a remedy for injuries by the vessel, officers or crew, but not for injuries done or committed by owners.

The Supreme Court of the United States answered this proposition in the case of the brig James Gray, 21 How. 194, and re-affirmed in 24 How. 123, and 2 Wall. 556 and 59.

It is true, says the court, that the *res*, or thing which struck the James Gray, did the damage. But the mere fact that one

vessel strikes and damages another, does not, of itself, make her liable for the injury; the collision must, in some way, be occasioned by her fault. A ship, properly secured, may, by the violence of the storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it. Yet she certainly would not be liable for damages which it was not in her power to prevent.

Now, as a vessel could make no efforts *herself*, but only those in command of her, it must always necessarily be alleged that the injury occurred through human fault or unskillfulness.

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

The important question presented by this record is one of jurisdiction. Did the plaintiff, by his affidavit, bring himself within the provisions of the act of February 16, 1857, entitled, "Liability of Vessels"? Scates' Comp. 789.

Appellant's counsel contends that the class of vessels and boats against which the statute provides this summary remedy, consists only of such as are navigating "the rivers" within and bordering on this State, while the affidavit states only that the vessel was navigating the "waters" within and bordering thereon.

It is an admitted principle that a party claiming a benefit or a remedy given by statute, must bring himself, by proper averments and pleadings, within its provisions.

The act above cited is "an act to amend chapter 102 Revised Statutes, entitled, 'Steamboats,'" by the first section of which it is provided that owners of steamboats navigating the Mississippi, Ohio, Wabash, Illinois, and other rivers and lakes within the jurisdiction of this State, shall have a competent master, officers and crew on board, and to have a substantial and sufficient engine, boilers or boiler, and to have the same at all times in good and safe order and condition, and have the vessel supplied with all necessary boats, tackle and furniture, and in every respect seaworthy.

The act of 1857, by its first section, provides that steamboats and other water craft navigating the rivers within or pordering upon this State, shall be liable for debts contracted on account thereof by the master, &c. for materials, supplies, or labor in building, repairing, furnishing or equipping the same, or due for wharfage, and also for damage arising out of any contract for the transportation of goods or persons, or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, or mate, or other officer thereof, or by any person under the order or sanction of either of them, to any person who may be a passenger or hand on such steamboat or other water craft, at the time of the infliction of such damage or injury.

The second section provides that any person having such demand may proceed against the owner or owners, or master of such craft, or against the craft itself.

Section three provides, when suits shall be commenced against the craft, the plaintiff shall file his præcipe to that effect, naming such craft, if she have a name, and with it a bill of particulars of his demand, verified on his own affidavit, or that of his agent or attorney, or other credible person.

Section four provides for issuing a warrant by the clerk, returnable as other writs, directing the seizure of such craft, by name or description, or such part of her apparel or furniture, as may be necessary to satisfy the demand, and to detain the same until discharged by due course of law.

The fifth section provides for bonding the vessel by the owners. The sixth provides that the pleadings and other proceedings shall be as in other cases of process served and returned.

Section eleven provides that the act shall be so construed as to authorize and enable any person or persons to bring the action against the water craft, notwithstanding the cause of action may have accrued beyond or out of the limits or jurisdiction of this State, and although such water craft may not have been at the time such cause of action accrued navigating

the waters within or bordering upon this State. Session Laws, 1857, pp. 105, 107.

These statutes, the last being amendatory of the first named, must be considered together. They were designed to embrace vessels engaged in domestic navigation only—such vessels or craft as should be employed on our navigable waters. The counsel for appellee are surely mistaken when they say this State has no other waters naturally navigable within its territory, except rivers. By the act of Congress prescribing the boundaries of this State, and by the constitution of the State conformable thereto, it will be perceived no inconsiderable portion of Lake Michigan is within our territorial limits. The maps do not show it, yet the fact is nevertheless so, that so much of the lake as is included by lines, one running north from the point where our eastern boundary strikes the southern bend of the lake to a point in the middle of the lake, in north latitude 42 degrees 30 minutes, and thence west along that parallel, is undeniably within our limits. It is true, no portion of this vast body of water has been assigned to the counties bordering upon it, or received in any manner the attention of the legislature, yet it is, nevertheless, a portion of the navigable waters of this State and of our territory.

The language of the affidavit is, that the vessel, at the time of the injury, was running upon the navigable waters within and bordering upon this State. The objection is, that it should have alleged that the vessel was employed in navigating the rivers within or bordering upon this State.

When the purpose and object of the acts in question are considered, the terms, rivers and navigable waters, must be regarded as synonymous. The object of the statutes being to give a summary remedy against vessels employed in domestic navigation on the navigable waters of this State, the object is attained by applying them to any navigable water, be it lake or river, and there is the same necessity of applying them to vessels navigating the lake, as exists for their application to rivers, a portion of the former and the whole of the latter being

within our territorial jurisdiction. This, we think, is made quite apparent from the language of the eleventh section which we have quoted. The intent of that act was to afford a remedy and to embrace vessels other than steamboats not included in the original act of 1845, and it is no forced construction of the words used in the act of 1857 to embrace within them vessels and craft engaged in navigating, not only the rivers, but the waters within our jurisdiction.

The affidavit, we think, shows enough to give jurisdiction, and to bring the case within the act of 1857. On the general subject of jurisdiction, we have expressed our opinion fully in *Williamson* v. *Hogan*, 46 Ill. 504, and desire to add nothing thereto.

Another point made by appellant's counsel is, conceding the jurisdiction, the act does not cover the injury of which complaint is made; that while the act provides a remedy for injuries done to persons by the vessel or craft, the declaration alleges the injury was caused by the negligence of the owners of the vessel.

This point is not much elaborated. While the statute speaks of injuries done by the vessel or craft, the bearing and spirit of that provision most clearly is, as inanimate things have no will to direct them, but must be controlled by intellect, such vessel or craft assumes the personalty of the owners, who have control over all, vessel, crew and officers. It follows, therefore, that, for an injury done by a vessel, the owners must be responsible. Like a railroad corporation, they are constructively present at all times, in the persons of their agents, and are held liable, in all courts, for their negligence from which an injury results to another. It is well settled a master is responsible to his servant for injuries received by him from defects in the structures or machinery about which the services were rendered, which defects the master knew, or ought to have known. *Chicago and Northwestern Railroad Co.* v. *Swett, Adm.* 45 Ill. 197. Other cases to the same effect might be cited, but it is unnecessary.

The remaining point is, that there was a total failure of evidence to support the action.

We think the proof is ample on this point. That the rigging of the vessel was rotten, and had been so for some time, was known to the owners. The captain, representing them, was told so more than once, and that this particular rope was frayed and in a damaged condition, was also well known. Its condition could be seen, and the safety of the crew demanded attention to it. Catting an anchor requires force, and the mechanical means by which it is obtained should be sound and free from defects. That this pennant was not, is clearly shown. It is no hardship upon owners of a vessel to require them to have all mechanical as well as human agencies employed by them, trustworthy. If they fail in this, they cannot expect a favorable verdict in an action against them, founded upon their negligence.

The instructions, being substantially in accordance with the views herein expressed, were correct. There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

LEWIS KENYON

v.

PHILIP SHRECK *et al.*

1. APPEARANCE—*as to several defendants, generally.* In actions where there are several defendants, an appearance by an attorney for the defendants generally, must be construed as an appearance for all.

2. SAME — *denial of authority of attorney to enter an appearance.* Whatever the true rule may be in regard to the question, to what extent, for what purposes, and under what circumstances, a party for whom an appearance to a suit has been entered, can deny the authority of the attorney and ask relief from the court, the claim to do so is viewed with great

disfavor by courts whenever innocent third parties have acquired rights under the judgment or decree.

3. SAME—*to let a party in to redeem.* In this case, a party became the purchaser of a tract of land under an execution sale, subject to a mortgage. Fourteen months and a half after the purchase, a bill was filed to foreclose the mortgage. The purchaser was made one of the parties defendant to the bill, but was not served with process. The appearance, however, of the defendants, was entered, generally. A decree of foreclosure was pronounced and the property was sold, the mortgagee becoming the purchaser. The purchaser under the execution took no steps to redeem, or set aside the decree, not even procuring a sheriff's deed on his certificate of purchase, though the evidence showed he was aware of the foreclosure, but some six years afterward, sold his certificate of purchase to the complainant, who obtained a sheriff's deed and filed his bill for redemption. The land, in the meantime, was constantly occupied under the foreclosure title, and several times changed hands, and, at the time of the purchase of the certificate by the complainant, was occupied by the defendant: *Held*, for the purpose of allowing a redemption under such circumstances, evidence could not be received impeaching the authority of the attorneys in entering the appearance of the purchaser under the execution, in the foreclosure suit; that it was the duty of such purchaser, if he wished to redeem, to have come forward within a reasonable time, and asked the decree of foreclosure to be opened as to him, and that the complainant's equities were no stronger than those of the execution purchaser would be if he were complainant, being chargeable with notice of all the facts with which such purchaser would be chargeable.

4. RIGHT OF REDEMPTION—*its general character.* The right of a mortgagor, or his grantees, to redeem, after condition broken, is a purely equitable right, the creation of courts of chancery. It is a right which can be asserted only in a court of equity, and when its assertion would be plainly inequitable that court will withhold its aid.

5. SAME—*effect of foreclosure upon subsequent incumbrancers, not made parties.* In this State, when the foreclosure is by *scire facias*, subsequent incumbrancers are cut off, though not made direct parties to the proceeding.

6. When the foreclosure is by bill in chancery, they are not absolutely barred unless made parties, but they can not be permitted to assert their equity of redemption against an equity still stronger.

APPEAL from the Circuit Court of Mercer county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The facts in this case sufficiently appear in the opinion.

Messrs. J. R. & I. N. BASSETT, for the appellant.

Messrs. FROST & TUNNICLIFF and Mr. J. C. PEPPER, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

At the September term, 1859, of the circuit court of Mercer county, six different judgments were rendered against one Smiley S. Keiser, one of which was in favor of Samuel C. Donaldson. Executions were taken out on all the judgments, and several tracts of land were sold thereunder, on the fifth of November, among which was the tract in controversy in this case. It was struck off to Elias Willits, one of Donaldson's attorneys, who does not appear to have paid any money on the purchase, but undoubtedly bid it in as such attorney, and for the benefit of his client. The land was, at the date when these judgments were rendered, subject to a mortgage in favor of William McCartney, who, on the twenty-first of January, 1861, fourteen and a half months after the sale to Willits, filed a bill to foreclose, making Donaldson one of the defendants. There was no service on Donaldson, but the firm of attorneys to which Willits belonged appeared for the defendants generally, and moved to dismiss the bill. On the authority of *Kerr* v. *Swallow*, 33 Ill. 380; *Flake* v. *Carson*, ib. 518, and *Sullivan* v. *Sullivan*, 42 ib. 316, this must be construed as an appearance for all the defendants. A decree of foreclosure was pronounced at the April term, and, on the seventeenth of September, 1861, a sale was had, and the land was bid in by McCartney for the amount of his decree. Before the filing of the present bill, the land was several times sold, and considerable improvements were made thereon. Sometime in the year 1867, Kenyon, the appellant, bought from Donaldson his interest in the certificate of purchase held by his attorney, Willits, and the certificate having been assigned to him, the sheriff, on the thirty-first of October, 1867, made a deed to

said Kenyon, who, in the preceding month of September, had filed this bill to redeem.

It is urged by counsel for appellant, that there was no appearance by Donaldson to the foreclosure suit, and that, if there was, it was without authority. The first point has already been disposed of by the authorities cited. As to the second, admitting the attorneys had no authority to enter his appearance, the question remains, whether the complainant can urge such absence of authority as a foundation for his right to redeem in the present proceeding.

We do not propose to consider, in this case, the disputed question, to what extent, for what purposes, and under what circumstances, a party for whom an appearance to a suit has been entered, can deny the authority of the attorney, and ask relief from the court. It is sufficient to say that the claim to do this is viewed with great disfavor by courts, whenever innocent third parties have acquired rights under the judgment or decree, and that the facts disclosed by the present record are inconsistent with the assertion of this claim. *Am. Ins. Co.* v. *Oakley*, 9 Paige, 498; *Denton* v. *Noyes*, 6 Johns. 300.

As already stated, the sale under the decree of foreclosure was made in September, 1861. From that time to the filing of this bill, a period of six years, the land was constantly occupied under the foreclosure title, and several times changed hands. It was, of course, bought upon the faith of a public record of the circuit court, showing that Donaldson and all persons claiming under him were cut off from the privilege of redeeming. Donaldson himself was aware of the foreclosure, having been informed of it by his attorneys, as appears from the evidence, soon after the decree and sale. That he acquiesced in it is shown, not only by the fact that he took no steps for the purpose of setting it aside, or of redeeming, but he never even took out a sheriff's deed on his certificate of purchase at the sheriff's sale, and it was not until October, 1867, that the deed was made. When the complainant, Kenyon,

bought from Donaldson, the land was occupied by the defend ant, and Kenyon is chargeable with notice of all the facts we have stated. His equities are no stronger than those of Donaldson would be if he were complainant.

It is to be remembered that the right of a mortgagor, or his grantees, to redeem, after condition broken, is a purely equitable right, the creation of courts of chancery. It is a right which can be asserted only in a court of equity, and when its assertion would be plainly inequitable, that court will withhold its aid. In this State, when the foreclosure is by *scire facias*, subsequent incumbrancers are cut off, though not made direct parties to the proceeding. When the foreclosure is by bill in chancery, they are not absolutely barred, unless made parties, but they can not be permitted to assert their equity of redemption against an equity still stronger. In the present case, if Donaldson's appearance had not been entered in the foreclosure suit, he, or his assignee, would doubtless be entitled to redeem. But his appearance was entered, and a decree was pronounced, cutting off his rights, and on the faith of that decree, the defendant has bought and improved. The defendant's equities are therefore very strong, and, in our opinion, the equity of redemption sought to be asserted, under such circumstances and after such a lapse of time, is not of a character to require us to permit the effect of a judicial record to be destroyed by proof that Donaldson's appearance was entered without authority, and thereby destroy the title of the purchaser. It is not like a case where a fraudulent judgment is sought to be enforced against a party whose appearance has been entered without authority. Nothing is claimed from Donaldson under the decree, and we merely hold that if he desired to redeem, he should have come forward, within a reasonable time, and asked the decree of foreclosure to be opened as to him. But he does nothing for six years, when the complainant buys his claim, and commences this proceeding. We can not, for the purpose of allowing a redemption under such circumstances, receive evidence impeaching the

authority of Donaldson's attorneys in order to destroy the validity of the record of foreclosure.

The decree must be affirmed.

Decree affirmed.

ELIAS NIXON

v.

GORDIS R. COBLEIGH.

1. EVIDENCE—*certified copy of deed—proper foundation for the same—under the statute.* In an action of ejectment, the plaintiff swore "that he did not have the deed in his possession; that he did not know where it was and had not made search for it:" *Held*, that this proof established either alternative presented under the statute—loss, or want of power over the instrument—and was sufficient, as a foundation for reading in evidence a certified copy from the record.

2. SAME—*design of the statute—to modify the common law rule.* The express object of our statute, was to modify the strictness of the common law rule, as to the admission of certified copies of lost instruments, and to give it a rigid construction, would virtually defeat the design of the legislature.

3. SAME—*secondary—to prove contents of a lost deed.* And when, in such case, a party offered in evidence a certified copy of a deed, which appeared to have been signed by "James H. Turrill," instead of "Samuel H. Turrill," it was competent for him to show by extrinsic evidence, that the deed was in fact executed by Samuel H, and that the error occurring in the christian name in the copy, was the mistake of the recorder in transcribing the original upon the records.

4. The right of a party to prove the contents of a lost deed, can not be questioned; and had the original deed been produced, signed as this purports to have been, it would be proper to show by parol evidence, that he executed it by the name of "James" instead of "Samuel," his true name.

5. And in such case, an objection to the introduction in evidence of a trust deed, that there is not sufficient proof that notice of the sale had been given as required by the deed, is unavailing, it appearing from recitals in the deed, that the notice required had been given, and that the sale was made

at the time and place named in the notice, which was at the door of the court house in the city of Pekin. Although neither the date of the notice, nor the name of the newspaper is given in the deed, it recites that due notice was given, and that the trustee duly advertised the premises, and these recitals, as to strangers and third persons, are sufficient.

6. And the objection, that the sale was voidable because the deed declared that the property should be sold *on the premises*, and it was sold at the *court house door* is one, which can not be raised by a party who is a stranger to the deed and for whose benefit the mode of sale was not inserted.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

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

Mr. W. DON MAUS, and Messrs. COOPER & MOSS, for the appellant.

Mr. B. S. PRETTYMAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by appellee in the Tazewell circuit court, against appellant, to recover certain lots in the city of Pekin. Appellee derived title from the general government through a number of mesne conveyances.

On the trial in the court below, appellee read in evidence copies of several deeds in his chain of title, duly certified by the recorder.

It is first urged that the court erred in admitting these copies, for the reason that sufficient proof of the loss of the originals was not made. By section thirty-eight, of chapter entitled "Conveyances" (Gross' Comp.) it is enacted, that if any party, his agent or attorney, shall, in open court, swear that the original deed, conveyance or other writing required to be recorded, and has been properly acknowledged and recorded, is lost, or not in the power of the party wishing to use the same on

the trial, the record of such deed, or a transcript thereof, certified by the recorder, may be read in evidence. Appellee swore that he did not have the deed in his possession; that he did not know where it was, and had not made search for it. He made the same oath in reference to each copy before it was read in evidence. While this oath is not in the language of the statute, in failing to state the deeds were not in his power, it is substantially the same.

He swears that the deeds are not in his possession, and that he does not know where they are, and if that is true, we fail to perceive how they were in his power, and the statute presents either alternative—loss, or want of power over the instrument.

This statute was designed to modify the strictness of the common law rule, as to the admission of certified copies of such instruments. Before the passage of this statute, the party would have been required to make strict proof of diligent search, in all places where the instrument was likely to be found, before the copy could have been admitted. And the statute having been adopted to dispense with such strictness, it would be manifestly erroneous to give it so rigid a construction as to defeat the design of the legislature.

It is urged, that the court below erred, in permitting appellee to prove the contents of the deed, from Turrill and Haven to Charles Haven. On producing the certified copy of the deed it appears to have been signed by James H. Turrill, instead of Samuel H. Turrill. The clerk entitled the deed "Samuel H. Turrill and Aaron Haven to Charles Haven," and in the copy certified by the recorder, they are described as the parties of the first part, but it purports to be signed by James H. Turrill. These facts are sufficient to create a belief that it was signed by Samuel H, but not of themselves strong enough to overcome the legal presumption, that it was signed as it purports to have been. But Aaron Haven, who was a partner or joint owner of the property, and jointly executed the deed, swears that it was in fact signed by Charles H. Turrill and

not by James. This renders it morally certain that the recorder made a mistake in transcribing the original upon his records.

There can be no question of the right of a party to prove the contents of a lost deed. Nor is there any doubt that, had the original been produced, executed as this purports to have been, and acknowledged by Samuel as this from the copy purports to have been, it could be proved he executed the deed by the name of James instead of Samuel, his true name. We therefore can see no reason why it could not be proved by a person who knew how the deed was, in fact, signed, that it was by the name of Samuel H. Turrill.

It is again urged that the deed executed by Hooper to Turrill and Haven, should not have been introduced in evidence, for the want of proof that the notice of the sale had been given as required by the trust deed. The deed itself recites that the notice required had been given, and that the sale was made at the time and place named in the notice, which was at the door of the court house in the city of Pekin. The deed recites that due notice was given, and although the date of the notice is not given in the deed, nor is the name of the newspaper, although blanks were left for their insertion, the recital that the trustee duly advertised the premises, as to strangers, and third persons, must be held sufficient.

It is also urged that, as the trust deed declared that the property should be sold on the premises, and they were sold at the court house door, that the sale was void. When Egan executed and delivered the trust deed to Hooper, he thereby transferred the title in fee to him upon the trusts specified in the deed; and had Hooper conveyed without any notice, and on a private sale, the title would have passed to the grantee, although subject to be defeated by either Egan or Turrill and Haven. Such a conveyance would not have been void, but only voidable, by the grantor in the trust deed, or the persons to secure whose debt it was executed. Not being void, but only voidable, mere strangers can not be heard to impeach the transaction. The manner in which the sale was required to be

conducted, was inserted for the protection of Egan on the one part, and Turrill and Haven on the other. Had they filed a bill within a reasonable time to avoid this conveyance, then a very different question would have been presented.

We are aware, however, of no rule of law that permits mere strangers to the deed, and for whose benefit the mode of conducting the sale was not inserted, to raise the objection; and so far as this record discloses, appellants are strangers to the entire transaction, and hence they are not in a position to raise the question whether a proper notice was given or the sale made at the proper place. The previous decisions of this court in which the objections here urged were held valid, were where the debtor or creditor for whose security the directions as to the manner of conducting the sale were inserted, were the parties seeking to avoid the sale. Hence there is a distinction between them and the case at bar.

The judgment of the court below is affirmed.

Judgment affirmed.

AZARIAH F. HULS

v.

FRANCIS KIMBALL.

1. SECONDARY EVIDENCE—*of contents of instrument—preliminary proof.* Proof of the fact that a mortgagee surrendered to the mortgagor the mortgage given to secure the purchase money of the chattels embraced therein, under an agreement that the property should be returned, after proving that such a mortgage had been executed, is sufficient to let in parol evidence of the contents of the mortgage, on behalf of the mortgagee, in a suit between him and a third person concerning the title to the mortgaged property.

2. SAME—*by whom the contents may be proved.* When secondary evidence is admissible to prove the contents of a mortgage, such contents may

be proven by any one who can swear he knew them. The mortgagee is quite as competent as the mortgagor for that purpose.

3. And it is sufficient to enable a witness to testify to the contents of the instrument, where he states that he saw it signed, had it in his possession more than a year, and knew its contents, without stating that he had read it.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

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

Messrs. BARRY & BOTSFORD, for the appellant.

An original paper in the hands of a person who can not be reached by process of the court, so as to compel its production, may be proven by parol. *Ralph* v. *Brown*, 3 Watts & Serg. 395.

A party is not compelled to take a *dedimus* and travel out of the State for the best evidence, but may introduce the best within the State. *Ford* v. *Hale*, 1 Monr. 23; *Walker* v. *Crolle*, 8 B. Mon. 11.

Where the instrument is a note or a mortgage surrendered up, there is a very strong probability, if not an actual presumption of law, that it was destroyed, and this probability of destruction is so strong as to require but very slight cumulative evidence, to show that it could not be produced on the trial. *Snapp* v. *Pierce*, 24 Ill. 156; *Bond* v. *Root*, 18 Johns. R. 60.

Messrs. MAYBORNE & BROWN, for the appellee, on the question of the admissibility of secondary evidence to prove the contents of instruments, cited *Blade* v. *Noland*, 12 Wend. 173; 2 Johns. Cases, 488; 10 Johns. R. 374; 3 Cowen, 303; 3 Wend. 344.

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

This was an action of trover, for a clover-huller and horse-power, tried in the circuit court of Kane county, and a verdict and judgment for the plaintiff. To reverse this judgment, the defendant brings the record here, by appeal, and the only question of any importance made on the record is, as to the ruling of the court in refusing secondary evidence of the existence of a chattel mortgage upon the machine, under which defendant claimed, and subject to which, plaintiff purchased his interest.

Appellee insists that the preliminary proof, to let in secondary evidence of the contents of the mortgage, was not sufficient.

The execution of the mortgage was proved by competent testimony. It was given by one Hinch and Cary to appellant, of whom they purchased, to secure the payment of the purchase money, and the acknowledgment was duly entered on the docket of the proper magistrate. Cary sold his interest in the machine to one Button, and he to the plaintiff. Afterwards, the last payment being due, and unpaid, it was agreed between Hinch and appellant, that appellant should surrender to Hinch the notes and mortgage, and receive back the machine, it then being, it seems, in another county, and under the control of appellee. The note due and the mortgage were given up, and appellant went to Kendall county, where the machine was, and without the knowledge of plaintiff took it back to Kane county.

In order to get in evidence about the mortgage, appellant testified that Hinch had it the last time he saw it; that he gave it up with the last note due to him, and did not know where they were; that he did not have them in his possession or power to produce on the trial; had not seen Hinch since the suit was commenced; after it was commenced, he tried to find him; wrote to his wife's people in the east, but they did not know where he was; learned that he had left the State;

went to Batavia, and made inquiry there; then went to Cortland, at which place he learned he had shipped his goods to DeWitt, Iowa; wrote letters there, and found he was there; sued out a *dedimus potestatem*, which was returned by the commissioner, not executed; then wrote to a friend there, from whom he found out that Hinch's wife had died there, and he had left the place and gone to parts unknown; had written letters without results; don't know where he now lives; has no copy of the mortgage; had the mortgage in his possession over one year; knew what conditions were in it; was present when it was signed; the mortgage and note were given up to Hinch on condition that he, appellant, should take Hinch's interest in the machine, and relieve him and Cary from the note and mortgage, which was done, and he had seen neither since.

The court held this preliminary proof insufficient.

Appellee's counsel liken it to the case of *Mariner* v. *Saunders*, 5 Gilm. 113, and *Rankin* v. *Crow*, 19 Ill. 626. In Mariner's case, the question was on lost deeds conveying land; one of the deeds was made to one Walters, who was dead. The court said, the executor of Walters, or other person having the custody of his papers since his death, should have been examined, which had not been done. The court also say, that a court is vested with a certain discretion, depending upon the peculiar circumstances of each case; and if the least suspicion of fraud or design can be gathered from any part of the testimony, the court can not be too strict.

In Rankin's case, the controversy was also about a lost deed conveying land, and the rule in Mariner's case approved, that every reasonable effort must be made by the party claiming the benefit of a lost deed, to produce the original.

In the case of *Snapp et al.* v. *Peirce et al.* 24 Ill. 156, it was said by this court, the fact that a bond for the conveyance of land has been given up to the obligor may be proved by parol, and when that is shown, there is a very strong probability, if not an actual presumption of law, that the bond was destroyed by the obligor.

We are disposed to liken this case to that of a bond so delivered up to the obligor. As in that case, the bond was of no further use; so in this, the mortgage could have no value, and the presumption would be very strong the mortgagor, on its delivery to him, had destroyed it. Proof of the fact that it was delivered to him, was sufficient, after proving such a mortgage had been executed, to let in evidence of its contents, and that by any one who could swear he knew the contents of it. It was not at all important Hinch should testify to that. The mortgagee was quite as competent. It is said appellant did not testify he had read the mortgage, but he did testify that he saw it signed; had it in his possession more than one year, and knew its contents.

But appellee contends that appellant, when he took the property, did not claim under the mortgage, but under a purchase from Hinch. The parties state this matter differently. There is a conflict of evidence upon this point. On the point of sufficient preliminary proof, we are satisfied it was ample to let in the secondary evidence.

The circuit court having taken a different view of the matter, its judgment must be reversed and the cause remanded, for further proceedings consistent with this opinion.

Judgment reversed.

SAMUEL FLETCHER *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. PARENT AND CHILD—*of the inhuman treatment of a child by a parent.* While the law gives parents a large discretion in the exercise of authority over their children, yet this authority must be exercised within the bounds of reason and humanity; and if the parent commits wanton and needless cruelty upon his child, the law will punish him.

2. So, upon an indictment of a parent for false imprisonment of his child, a blind and helpless boy, in a cold and damp cellar, without fire, during several days in mid-winter, he giving as an excuse therefor, that the boy was covered with vermin, it was *held* that such treatment of a child by his parent was wanton, inhuman and needless cruelty, and rendered him subject to indictment and punishment.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. SYLVANUS WILCOX, Judge, presiding.

The opinion states the case.

Messrs. MAYBORNE & BROWN, for the plaintiffs in error.

Mr. WASHINGTON BUSHNELL, Attorney General, and Mr. CHARLES J. METZNER, State's Attorney, for the people.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an indictment against Samuel Fletcher and his wife, Ledicia, for false imprisonment of Samuel Fletcher, junior, the son of Samuel, senior, and step son of Ledicia. The defendants were found guilty, and sentenced to pay a fine of $300 each.

The instructions gave the law correctly to the jury, and so far as relates to Samuel Fletcher, we are of opinion the evidence sustains the verdict. It shows the wanton imprisonment, without a pretense of reasonable cause, of a blind and helpless boy, in a cold and damp cellar without fire, during several days of mid-winter. The boy finally escaped and seems to have been taken in charge by the town authorities. The only excuse given by the father to one of the witnesses who remonstrated with him was, that the boy was covered with vermin, and for this the father annointed his body with kerosene. If the boy was in this wretched state, it must have been because he had received no care from those who should

have given it. In view of his blind and helpless condition, the case altogether is one of shocking inhumanity.

Counsel urge, that the law gives parents a large discretion in the exercise of authority over their children. This is true, but this authority must be exercised within the bounds of reason and humanity. If the parent commits wanton and needless cruelty upon his child, either by imprisonment of this character or by inhuman beating, the law will punish him. Thus, in *Johnson* v. *The State*, 2 Humphrey, 283, the court held the parents subject to indictment, because, in chastising their child, they had exceeded the bounds of reason, and inflicted a barbarous punishment. It would be monstrous to hold that under the pretense of sustaining parental authority, children must be left, without the protection of the law, at the mercy of depraved men or women, with liberty to inflict any species of barbarity short of the actual taking of life.

In this case, however, the verdict against Ledicia Fletcher was wrong. There is absolutely no evidence whatever against her. As to her, the judgment must be reversed. As to Samuel Fletcher, it is affirmed.

A similar order of partial reversal, in a criminal case was entered by this court in *Vandermark* v. *The People*, 47 Ills. 124.

Reversed in part.

LESTER UNDERWOOD

v.

GEORGE H. WEST.

1. RESCISSION OF CONTRACTS—*placing the parties in statu quo.* Where parties have exchanged lands, and one of them seeks to rescind the contract, on the ground of fraud, he must restore, or offer to restore, to the other

party the property received, before he can properly demand a return of that which he gave in exchange.

2. And so, where the party seeking to rescind, has retained the possession of a portion of the lands received by him in the exchange, he will not be permitted to rescind without accounting for the rents and profits.

3. SAME—*and herein of a purchaser buying in an outstanding title.* A party who has exchanged lands with another, and agreed to pay off a mortgage to a third person, upon the lands he was to receive, and is seeking a rescission in a court of equity, upon the ground of fraud, he can not avoid the rule that he must restore to the other party that which he received from him, by permitting a foreclosure of such mortgage, and buying in the title under the foreclosure, for his own benefit. Whatever might have been his right to purchase in the outstanding title under the foreclosure, had he restored the property to the other party, he could not do so while in under his purchase, and still recover back the property he gave for it.

4. SAME—*and herein of giving compensation instead of rescinding—rights of purchasers pendente lite.* In this case, the bill filed for a rescission was dismissed upon a hearing, and the complainant appealed. He had not restored the lands he had received in the exchange, but continued in the possession and use of them. Pending the appeal a third person purchased from the defendant one of the tracts conveyed to him by the complainant, for a valuable consideration. The original decree of dismissal was reversed on the appeal, and upon a second hearing below the defendant brought into court the amount paid by the complainant to secure the title to a portion of the property he was to receive in the exchange, but which the defendant did not own, and, in reference to the title to which the latter had made fraudulent representations, for which the rescission was sought: *Held*, the court properly refused to decree a rescission of the contract, but requiring the complainant to receive the money tendered, as a settlement of all the equities between the parties. While the purchaser *pendente lite* could not claim protection as such, yet his position gave force to the fact that the complainant had not offered to place the defendant in *statu quo*, and equity favors compensation, when the law permits it to be made.

APPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

This case was before this court at the April term, 1867, and will be found reported in 43 Ill. 403, where a full statement of the case, as presented at that time, will be found. The additional facts appearing on the second hearing below will be found in the opinion of the court.

Mr. D. P. JONES, for the appellant.

Mr. B. C. COOK, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This cause was previously before this court, and is reported in 43 Ill. 403. The decree was then reversed and the cause remanded. Before another hearing in the court below, one Lewis McEwen interpleaded, and it appears that, after the dismissal of appellant's bill on the first trial, and before the case was previously removed to this court, he had purchased the eighty acres of land conveyed by appellant to appellee; that appellee had tendered and brought into court two hundred and fifty dollars, the price appellant had paid for lots six and ten on a purchase thereof from another person. On the hearing in the court below, a decree was rendered, refusing the relief sought, except that appellant should receive the money tendered, and recover his costs.

It also appears that appellant went into the possession of the city property received in exchange by him, and that he has been in the actual occupancy of it ever since; that he had not offered to restore the possession, or to account for the rents or profits. The rule of law applicable to such cases is, that the party wishing to rescind should restore, or offer to restore, to the other party the property received in exchange before he can demand a return of what he has given in exchange.

A court of equity would not permit appellant to retain the property he has purchased, for a period of years, to use and occupy it, without accounting for the rents or profits, and still recover back the property given in exchange.

He should, as he refused to accept the deed from West, have surrendered possession of the Fox River House, or at least offered to surrender the possession, and account for the rents and profits, or recoup the damages he had sustained by the failure of West to convey all the lots he had sold,

when he filed his bill. He, it is true, refused to receive the deed from West, because it failed to convey all of the lots embraced in the agreement, but he should, in addition, have restored the possession of not only those, but the others. This was necessary to render the rescission complete. He had agreed to remove the mortgage on the property in favor of Delano. Having refused to receive the deed of West, he bought the property of the purchaser under a foreclosure of that mortgage.

Thus it appears that he repudiated the exchange of the property, retained possession, and purchased in a title acquired by the foreclosure of a mortgage he had agreed to pay, and attempted to get back the title to the land he had conveyed to West. This is not fair or just. Had he restored the property to West, and the foreclosure had occurred, it may be that he could then have purchased in the outstanding title, but not while he was in under his purchase, notwithstanding he had filed a bill to rescind the contract.

Again, McEwen shows that he was a purchaser for a valuable consideration paid to West for the land. It is true, it was while the appeal was pending, but he seems to have had no actual notice, and while this fact would not, of itself, be sufficient ground to refuse the relief sought, as he purchased *pendente lite*, still it lends force to the fact that appellant failed to surrender the possession of the property received in exchange. Appellant had not fully rescinded, and hence McEwen may have been mislead, seeing him still retaining possession. At any rate, appellant is not in the same position to insist upon McEwen restoring the property to him, as though he had abandoned the property.

When relief can be afforded in either of two modes, the court may choose either that effects complete justice. In this case, the decree of the court below has chosen that by which compensation is made instead of a rescission, and by the decree complete justice has been done. Appellant has acquired all the property for which he contracted, has had its continuous

use, and it has cost him no more than he agreed to pay. By it West has received the land in exchange for the property he conveyed, and McEwen has suffered no loss. Had appellant fully rescinded, it might have been that he could have enforced a re-conveyance under the law, notwithstanding courts of equity favor compensation, when the law permits it to be made.

As to the question of costs, that is, under our statute, a matter of discretion with the chancellor trying the cause. See section 15 of the chapter entitled "Costs" (Gross' comp.). This decree for costs was rendered on a hearing, and brings it within the discretion of the chancellor, and with the exercise of that discretion we are not inclined to interfere. The decree of the court below is affirmed.

Decree affirmed.

BRIDGET LALOR, Administratrix, etc.

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

1. MASTER AND SERVANT—*when the former is liable for injuries to the latter, occasioned by the negligence of his fellow servants.* Where a person in the employment of another, in the performance of a specific line of duty only ordinarily hazardous, is commanded by a fellow servant, but to whom he is so subordinate that he is compelled to obey his direction, to do an act in the same general service, but different from the sphere of employment in which he had engaged to serve, and extra hazardous in its character, and in respect to which the servant making the requirement knew he was unskilled and inexperienced, and in doing the same, the servant so directed receives injuries, occasioned by the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured.

2. In an action against a railroad company, to recover, under the statute, for the death of a person, occasioned by the alleged negligence of the company, it was averred that the deceased was employed about the depot grounds

and freight house of the defendants, as a common laborer, specially for the purpose of loading and unloading the freight cars, at monthly wages, and for no other or different purpose; that while he was engaged in loading a freight car with pig iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business and affairs of the company about the depot, to couple and connect a freight car with other cars attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, which fact was well known to the superintendent, and while so engaged, having to go between the cars for the purpose, the engine was so carelessly handled as to bring the cars together with great force, and while he was so between them, by means of which he was crushed to death: *Held*, the deceased using due care and caution while coupling the cars, the company was liable.

3. PLEADING—*of the proper averments in the declaration in such case.* In such case, the declaration should contain an averment that deceased, while coupling the cars, used due care and caution.

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

This was an action on the case under the statute, brought by the appellant, Bridget Lalor, as widow and administratrix, against the appellees, the Chicago, Burlington and Quincy Railroad Company, for the killing of her husband, Joseph Lalor. A general demurrer was interposed to the declaration, and sustained by the court.

Mr. JNO. J. MCKINNON, for the appellant

Messrs. WALKER & DEXTER, for the appellees.

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

Appellant's counsel is perfectly right in contending, that the principle involved in this case has never before been discussed, or decided by this court.

In our judgment, the cases on which appellees rely, *Honner* v. *Ill. Cent. R. R. Co.* 15 Ill. 550, and *Ill. Cent. R. R.*

Co. v. *Cox*, 21 ib. 20, are not analogous. In the first case cited, the plaintiff was engaged with his fellow servants in the same grade of employment, in working at a turn-table with iron bars, one of which broke and injured him.

In the other case, the deceased was an employee on the car, engaged in a common business with the other servants.

The declaration in this case alleges that the deceased was employed about the depot grounds and freight house as a common laborer, specially for the purpose of loading and unloading the freight cars, at monthly wages, and for no other or different purpose whatever; that while he was engaged in loading a freight car with pig iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business and affairs of the company about the depot, to couple and connect a freight car with other cars attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, and which fact was well known to the superintendent, and while so engaged, having to go between the cars for the purpose, the engine was so carelessly managed as to bring the cars together with great force, and while he was so between them, by means of which he was crushed to death.

The demurrer admits these facts, and they make a strong case for the appellant; not like the cases cited by appellee, *supra*, they show a case of a person injured while engaged in a sphere of employment, and under the command of his superior, different from the one in which he had engaged to serve. In entering upon his engagement, the deceased may be presumed to have known the perils, usually and necessarily incident to such service, and made his contract accordingly. So, in this case, the deceased engaged to perform work only ordinarily hazardous; he was compelled to do other work extra-hazardous, by which he lost his life, the superintendent knowing he was unskilled and unacquainted with the manner of doing such work, when he ordered deceased to perform it. Admitting

the deceased was in the same general service as the superintendent, his sphere, however, was a special one, and so subordinate as to compel him to yield implicit obedience to the command of the superintendent. The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company, the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive, while thus exposed. The law would be lamentably deficient, did it furnish no remedy in such a case. None of the cases cited come up to the facts admitted by the pleadings in this case. Those cases, for the most part, proceed upon the ground, that, being fellow servants, engaged in the same service, a recovery can not be had for an injury to one so situated, against the common employer; that the doctrine of *respondeat superior* does not apply.

We place this case on the ground of misconduct of the company in exposing the deceased to this peril, and when so exposed, in so carelessly mismanaging the engine as to cause his death. It is needless, in this view, to consider or comment upon the numerous cases cited. None of them meet this case.

It may not be improper to remark there is a defect in the declaration, on which, however, no point has been made, and that is, the absence of an averment that deceased, while coupling the cars, used due care and caution. As the judgment must be reversed, and the cause remanded, the plaintiff can amend in this particular, should her counsel deem it necessary.

For the reasons we have given, the judgment is reversed and the cause remanded.

Judgment reversed.

ISAAC WILSON

v.

JAMES McDOWELL.

BILL OF EXCEPTIONS—*its requisites.* Where the bill of exceptions does not purport to contain all the evidence, the appellate court will not review the finding below on the facts.

APPEAL from the Circuit Court of Livingston county; the Hon CHARLES H. WOOD, Judge, presiding.

Messrs. PAYSON & PERRY, for the appellant.

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

Per CURIAM: This case was tried by the court without a jury. The bill of exceptions does not purport to contain all the evidence. We can not, therefore, review the finding.

Judgment affirmed.

BERNARD FOWLER

v.

JAMES REDICAN.

1. PAROL EVIDENCE—*to explain a written contract.* A vendor of certain lots of land signed a memorandum, in writing, as follows: "Chicago, June 20th, 1868, received of James Redican, to apply on the purchase of lots 14 and 15, block 15; 12 and 13, block 16, bought of B. F. Fowler, one hundred dollars. Price of four lots, $1170.33. If lots are not in location as represented, money to be returned to J. Redican at his option." The purchaser went into possession under the agreement, and made valuable improvements: *Held*, in a suit by the vendee to enforce the specific performance

of the contract, that from the incompleteness of the memorandum in itself, in expressing all the conditions of the contract, and the location of the lots, it was evidently the intention of the parties to reserve the right to supply its deficiencies by parol proof, and it was, therefore, competent for the vendee to show by parol the character of deed to be made, when the contract was to be executed, and the description and location of the lots, without asking a reformation of the instrument.

2. Moreover, as the partial execution of the contract by the purchaser, through his possession and improvements, and payment of part of the purchase money, would have enabled him to enforce its specific execution had it rested entirely in parol, so, this instrument not purporting to express the entire agreement of the parties, could be made complete by parol evidence of those matters which were omitted.

3. But it seems, where the contract on its face appears to be complete in itself, but misdescribes the property sold, parol evidence would not be admissible to correct such misdescription, except in a proceeding in equity to reform the instrument.

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

The opinion states the case.

Messrs. DENT & BLACK, for the appellant.

Mr. ARTHUR W. WINDETT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The bill, in this case, was filed by appellee in the superior court, against appellant, to compel a specific performance of a contract for the sale of several lots in the city of Chicago. It alleges, that on or about the first of June, 1868, appellant, claiming to be owner of lots 14 and 16, in block 15, and lots 12 and 13, in block 16, in Stinston's subdivision of blocks 15, 16, 17 and 18, in the south 60 acres of the E $\frac{1}{2}$ of N E $\frac{1}{4}$ sec. 19, T. 39 N. R. 14 E. in Chicago, and being desirous of selling the lots, employed Thomas A. Hill & Co. as his agents and brokers to sell them. The bill, as first filed, described

the property as being in Sampson & Green's addition to Chicago, but, on leave of the court, the description was amended, after the proofs were taken, and leave was given to appellant to cross-examine the witnesses whose evidence had been taken.

The bill alleges, that about the twentieth of June, 1868, Hill & Co., as appellant's agents, offered to sell the lots to appellee for the sum of $1170.33; that appellee purchased them for that sum, and paid $100 on the price; that Hill & Co. gave to appellee a memorandum of the sale, by which the receipt of the $100 was acknowledged, to be applied on the purchase; that they agreed to furnish appellee an abstract, showing title in appellant, and clear and free from incumbrances at the time of the purchase, and thereupon appellee would, within a reasonable time, pay the balance of the purchase money, and, upon its being paid, appellant was to give appellee a warranty deed for the lots, duly executed and acknowledged; that, relying upon the contract, appellee, on or about the twenty-fourth of June, 1868, entered into and took possession of the lots, and has made large and valuable improvements thereon, by enclosing them with a fence, and by erecting two houses of the value of $500; that appellee has the sole and exclusive possession of the lots under the contract of purchase; that, on the first of July, 1868, appellee tendered to appellant the balance of the purchase money, but he refused to receive the same and to complete the contract by executing a deed for the lots. The bill prays that appellant be compelled to execute a deed, and appellee be allowed to pay the balance of the purchase money.

Appellant answered, and denies that, at the time mentioned in the bill, he claimed to own the lots, or that he employed Hill & Co., or any one else, as agents to sell them; denies that he ever received the $100, or any other sum, as a part of the purchase money on the lots; denies that he agreed to furnish an abstract of the title, or that he ever agreed to give appellee a warranty or any other deed; denies that appellee took possession under any contract made with appellant; that

if appellee has taken possession or made improvements on the lots, it was without appellant's knowledge or consent; denies a tender at the time alleged, or at any other time. He sets up and relies upon the statute of frauds; denies that he, or any one duly authorized, gave to appellee a memorandum, in writing, containing any agreement to convey to appellee the lots in controversy.

On leave, the bill was amended, and alleges that Hill & Co. were authorized by appellant to sell the premises, and that they made, signed and delivered to appellee this memorandum:

"CHICAGO, June 20, 1868.

"Received of James Redican, to apply on the purchase of lots 14 and 15, block 15; 12 and 13, block 16, bought of B. F. Fowler, one hundred dollars. $100.

"THOS. A. HILL & CO.

"Price of four lots $1170.33. If lots are not in location as represented, money to be refunded to J. Redican at his option.

"T. A. H. & CO."

It further alleges that appellant, at the time of the sale, was the owner, and if not the owner of the legal title, he was the owner of and held the equitable title to the lots, and had the right to sell and convey the same, or have them conveyed to appellee; that, if anything has been done by appellant to affect the legal title to the lots, it has been in bad faith, and through fraud and covin, and to hinder appellee in the assertion of his rights, under the contract. Appellant answered, substantially, as he had done to the original bill, and a replication was filed to the answers.

A hearing was had on the original and amended bills, answers, replications, exhibits and proofs, when the court below granted the relief prayed, and decreed that appellant execute and deliver to appellee a warranty deed for the lots within five

days, and within the same time appellee should pay the balance of the purchase money. The record is brought to this court, on appeal, for a reversal.

It is urged, that the memorandum given by Hill & Co. is so wholly wanting in a description of the premises sold, that the contract can not be enforced. It fails to locate the lots by reference to any city, town, plat or addition. It simply describes them by lots and blocks. And it is urged that, inasmuch as the statute of frauds was interposed, a resort to parol evidence can not be had to locate, or complete the description of the lots. As a general rule, a contract, or agreement in writing, can not be explained, contradicted or altered by parol evidence. But equity entertains jurisdiction to reform contracts when, from inadvertence or mistake, the written instrument fails to contain the entire agreement of the parties, and when thus reformed, the court, when it is necessary to the attainment of justice, will decree that it be specifically performed. But the bill, in this case, is not framed with a view to a reformation of this agreement.

It is, however, claimed that, as appellee went into possession of the property, and expended money in making lasting and valuable improvements, and paid a portion of the purchase money, the case is taken out of the statute of frauds, even if the entire agreement had been verbal, and much more so when parol evidence is only required to locate the lots named in the written memorandum, and to point out the city, and the addition in which they are situated. That the first part of this proposition is true, is abundantly sustained by adjudged cases, both in this country and Great Britain. But inasmuch as numbers of the lots and blocks are alone given in the writing, does that fact preclude appellee from proving by parol that they are in a certain addition to Chicago? Will the statute of frauds and perjuries, as construed, permit a purchaser to enforce a contract which rests entirely in parol, and prohibit another from proving that the property, not fully described in the memorandum, is situated at a particular place?

That the sale was made with the approbation of appellant, the evidence clearly establishes. Appellee, as soon as he learned the condition of the title, and it does not appear there was any unreasonable delay, offered to go on and complete the contract, but appellant declined, alleging he came too late, but he had done nothing to place appellee in default. He did not facilitate the matter by furnishing an abstract, but only referred him to that upon which he had purchased, and appellee seems not to have had the full benefit of it before it was taken from him. Nor did appellant furnish such a deed as appellee was bound to receive. Under such circumstances, a delay of two or three weeks was not unreasonable.

We have seen that, had the agreement been in parol, equity would have given the relief, notwithstanding the statute of frauds, and, as this was merely a memorandum, not intended to embrace all of the terms and conditions of the contract, is manifest from its mere inspection, as well as the testimony in the case. No time is designated for it to be carried into effect; no time for the payment of the remainder of the purchase money, nor for the conveyance to be executed, nor was the character of the deed specified in the memorandum. But it is positively asserted that one hundred dollars had been paid by appellee on the purchase of four lots, the numbers of which are given, the amount of purchase money is specified, and it states the purchase was made of appellant. In this state of the case, it seems that there can be no reason why parol evidence may not be resorted to for the purpose of locating the lots, and to show when the contract was to be executed and the character of the deed to be given proved, in connection with the possession and improvement of the lots. If to decree a performance when the entire agreement is in parol, and in part executed by the purchaser, is not within the statute of frauds, we are at a loss to perceive how a case of this character can be within its provisions. Had the contract appeared to be full and complete when inspected, but misdescribed the lots, then the parties would have been compelled to proceed for its reformation before it could have been enforced.

The memorandum refers to representations not embodied in it, and it is manifest that the parties intended to, and understood they could, resort to parol to explain other terms and conditions. When the parties agree, by the writing itself, that parol evidence may establish terms and conditions not specified in the agreement, no one would question that such proof could be made, because such an agreement is made by the parties, and would not be in violation of the law. And in this case, it is manifest that such was the intention as to the representations as to location, and that is the turning point in this case. It refers to the representations as to location, and gives appellee the option to have his money refunded if they were not truly made. Had he refused to proceed with the agreement, and appellant had attempted to compel a specific performance, would any one, for a moment, doubt that he could, under the terms of the memorandum, have shown that the property was not located as represented, without showing fraud, and thus have exonerated himself from the contract? If this be so, it is by reason of the right being reserved in the memorandum to prove that fact by parol, and it seems equally manifest that if, by the writing itself, he can prove the location for one purpose, he may for another.

It is urged, that the proof fails to sustain the allegations of the bill. It is there alleged that the conveyance was to be by a good warranty deed, while the evidence does not show that, in all the negotiations, any reference was made to the character of the deed that was to be executed. But it may be inferred that such was the understanding of the parties, as appellant only required the amount of the purchase money above the incumbrances to be paid in hand, and the balance to be paid on time, and the offer of appellee to take a deed and assume the payment of the incumbrances, all tend to show that a warranty deed was intended. If a quit claim deed was to have been given, then there would have been an arrangement and an understanding that appellee was to pay the incumbrances, beyond the price he was to pay, but we

find no such agreement, or anything from which it could be inferred. We think the proof sustains the allegation that appellee was to have a warranty deed, and failing to find any error in this record, the decree of the court below must be affirmed.

Decree affirmed.

JAMES M. ADSIT *et al.*

v.

WILLIAM SMITH.

TRUST—*whether it exists.* The mere fact that a person who obtained the discharge from a soldier, and procured a land warrant to be issued thereon, purchased the warrant before it was issued, contrary to the act of congress on that subject, will not constitute such purchaser a trustee of the soldier as respects the land entered under such warrant.

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

This case was before this court at the September term, 1868, and is reported in 49 Ill. 403, where a statement of the case will be found, as presented on the first trial. On the remand of the cause a new hearing was had, and additional testimony introduced, whereupon the court below found a trust existed in favor of Smith, and decreed accordingly. Adsit appealed.

Messrs. KING, SCOTT & PAYSON, for the appellant, Adsit, and Mr. THOMAS CLOWRY, for the purchasers, Wright and Rourk.

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

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

This case was before us at a former term, and is reported in 49 Ill. 403. It was then decided on the testimony of Holmes alone, the party from whom Adsit obtained the discharge, and on which a land warrant was issued as a bounty for military services in the war with Mexico. On his testimony, it was held, Adsit was the trustee of Holmes, and bound to account for the land in that capacity.

On a rehearing of the cause in the superior court, Adsit was a witness, and his testimony puts a different phase upon the transaction, and so balances the testimony of Holmes as to render it impossible to base a decree upon it.

There being no evidence of a trust, or of fraud on the part of Adsit, his testimony balancing that of Holmes on that point, nothing is left of the case, but the fact of obtaining by Adsit Holmes' discharge, and procuring thereon a warrant to be issued for the land in controversy. The most that can be said of this, is, that the transaction was in violation of an act of congress, but that would not give a court of chancery jurisdiction to hold Adsit as a trustee, and make him accountable as such. All the matter alleged, of trust and of fraud, has no support in the testimony. Nothing appearing to corroborate Holmes' statements, and they being denied by Adsit, the one is as much entitled to belief as the other.

There is nothing, then, in the record sufficient to give a court of chancery jurisdiction of the subject matter, there being no fraud and no trust established; consequently, the decree finding a trust existed, must be reversed, and the bill must be dismissed.

If Holmes has any right to the money Adsit received for the land, he can prosecute that right in a court of law, and recover according to the justice of his case.

The decree is reversed for want of jurisdiction.

Decree reversed.

CITY OF CHICAGO
v.
LUNT, PRESTON & KEAN.

TAXATION—*of government securities held by private bankers.* Several persons associated together as partners, and doing business as private bankers, may invest their capital in bonds and negotiable securities of the United States, for the sole purpose of re-selling the same, and thus making a profit, and re-purchasing like securities to be sold in like manner, such capital being kept constantly absorbed in some form of such securities, and still be entitled to that immunity from State and municipal taxation which would be accorded to an individual holding the same securities.

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

The opinion states the case.

Mr. S. A. IRVIN, for the appellant.

Messrs. SLEEPER, WHITON & DURHAM, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This case comes before the court upon the following stipulation as to the facts:

"The complainants formed a co-partnership on the 1st December, 1866, with a capital stock of $50,000, for the purpose of doing business as private bankers in the city of Chicago, making the purchase and sale of the various securities of the United States a principal feature of their business.

"Immediately after the formation of the partnership, the complainants invested their said capital in various bonds and negotiable securities of the United States, but only for the purpose of re-selling the same, and thus making a profit.

"From the formation of the partnership down to the present time, the complainants have constantly owned and held $50,000 and upwards of the bonds and negotiable securities of the United States, although the identity of the same was constantly changing by daily sales and new purchases by said complainants.

"The complainants, in the conduct of their business, receive deposits, which, since the 1st day of January, 1867, have constantly exceeded $100,000, and have made loans to their customers since that date which have at all times exceeded $100,000. July 27th, 1869."

The question for decision upon these facts is, whether the complainants are liable to the city of Chicago for taxes upon their stock invested in United States securities.

We held, in *The People* v. *Bradley*, 39 Ill. 130, and in *McVeagh* v. *The City of Chicago*, 49 Ill. 318, that bank stock invested in government bonds was liable to taxation. It need hardly be said that the question now presented is totally different. In this case, there has been no creation of an artificial person with special privileges which it accepts with the condition that its capital stock, no matter how invested, shall be subject to taxation. Here is simply a private partnership, which has invested its funds in government securities, and it occupies precisely the same position that an individual would do who had invested his funds in like manner. The capital of the partnership bears no resemblance to bank stock. Its owners enjoy no special privileges, and there is no more reason why their capital, invested in government bonds, should be subjected to local taxation, than there would be if the same capital belonged to individuals. When the owners of government bonds make them the basis of banking, they consent, by the terms of the act of congress, to the taxation of the stock into which the bonds are substantially converted. But in this case there has been no such conversion. The bonds in question are simply bonds, and not bank stock, or the basis of bank

stock, and are owned by a private partnership, and not by a corporation. We can see no grounds for denying them that immunity from taxation to which they are entitled by the act of congress.

The decree enjoining the city from the collection of the tax must be affirmed.

Decree affirmed.

Chicago, Rock Island & Pacific Railroad Company

v.

William Otto.

1. Instructions—*should be based upon the evidence.* An instruction, in an action of trespass on the case for injuries to the person, which directs the jury that in fixing the damages the plaintiff ought to recover, if they believe from the evidence he is entitled to recover, they should consider all the circumstances surrounding the case, and then specifically points out the circumstances, is not obnoxious to the objection, that instructions should be based upon the evidence.

2. Where an instruction was asked by the defendant, directing the jury that they are to judge of the credibility of the plaintiff as a witness, whether, taking his interest into consideration, he is entitled to belief as against other disinterested testimony which contradicts him: *Held*, there being no disinterested testimony contradicting him, it was properly modified by striking out the words "as against other disinterested testimony which contradicts him."

3. New Trials—*excessive damages.* In a case sounding in damages, unless the verdict is manifestly so high as to produce the conviction that the jury were actuated by improper motives, it will not be disturbed on the ground of being excessive.

Appeal from the Circuit Court of Rock Island county; the Hon. Geo. W. Pleasants, Judge, presiding.

The opinion states the case.

Mr. George C. Campbell, for the appellant.

Messrs. Hawley & Gest, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

This was an action of trespass on the case, to recover damages for an injury sustained by appellee while he was a passenger on appellants' train of cars. The declaration contained two counts, alleging that appellee was a passenger from Rock Island to Moline; that he had paid his fare; that the conductor refused to stop the train at Moline, and forcibly ejected him from the cars, whereby he was thrown on the ground, and his shoulder was dislocated, whereby he sustained damage.

On the trial in the court below, the jury found for plaintiff, and defendant entered a motion for a new trial, which was overruled, and judgment rendered on the verdict, from which the defendants prayed on appeal, and bring the record to this court, and ask a reversal on the grounds, that an improper instruction was given for appellee, and a proper instruction asked by appellants was modified before it was given, and in overruling the motion for a new trial.

On behalf of appellee, the court gave this instruction:

"If the jury believe from the evidence that the plaintiff is entitled to recover, and that he has substantially proved his declaration, then, in fixing the damages he ought to recover, they ought to take into consideration all the circumstances surrounding the case, such as the circumstances attending the injury; the loss of time of the plaintiff, if any, occasioned by the injury; the pain he has suffered, if any; the money he has expended, if any, to be cured of such injury, and the business he was engaged in, if any, at the time he was injured, and the extent and duration of the injury, and give him such damages as, in their opinion, he ought to recover."

It is urged that this instruction is erroneous. It lays down the true measure of damages, and confines the jury to the evidence in the case.

The jury were told that they were to consider all the circumstances surrounding the case, and then the circumstances were specifically pointed out; nor does the instruction refer to or authorize the jury to consider any other than the circumstances appearing in evidence. We perceive no objection to this instruction, and it was properly given.

Appellants asked, with others, this instruction:

"3. Under the laws of this State, the plaintiff is a competent witness, but his credibility is left to the jury, that is, they are to determine whether, taking his interest into consideration, he is entitled to belief, as against other disinterested testimony which contradicts him."

But, before giving it, the court modified it by striking out the words "as against other disinterested testimony which contradicts him." The instruction was properly qualified, as the only evidence which tended to contradict his evidence was that of the conductor who ran out trains on the morning appellee was injured; and he would be liable over to the company for negligence which occasioned the injury to appellee. Hence, if either of them occasioned the injury, he was as directly interested as appellee; and the others who did not occasion it, not being present, their evidence did not conflict with it. Their mere statement that they did not eject appellee from the car, in no wise contradicted or conflicted with his statements. Only one of the conductors did contradict his evidence. This instruction was properly modified before it was given.

The evidence was conflicting, and it was for the jury to reconcile it, and to give weight to such portions as they thought worthy of belief. They saw the witnesses while testifying, and were enabled to determine to what portion they should give

credit, and what they should reject. We are unable to say the evidence fails to sustain the verdict.

While the damages seem to us too large, yet we are not prepared to hold that they are so high as to require a reversal for that reason. They do not strike us as being the result of passion, prejudice, or a misapprehension of the evidence, or a disregard of their duty as jurors. Unless the verdict is clearly and manifestly so high as to produce the conviction that the jury were actuated by improper motives, it will not be disturbed, in a case sounding in damages.

We perceive no error in this record for which the judgment should be reversed, and it is therefore affirmed.

Judgment affirmed.

JOHN PARKER

v.

GEORGE H. FERGUS.

INSTRUCTION—*abstract principles.* It is not erroneous to refuse to instruct a jury that a conversation not reduced to writing, when detailed by a witness after the lapse of six years, is to be received with caution, for the reason, if such an instruction amounts to anything, it is a mere abstraction, which the court has the discretion to give or refuse.

APPEAL from the Superior Court of Chicago; the Hon WILLIAM A. PORTER, Judge, presiding.

This was an action of assumpsit, brought in the court below by George H. Fergus against Parker and Fagan, for the recovery of a bill for printing, claimed to have been done for the defendants as partners. Parker denies the partnership, and on a former hearing of this case, at the April term, 1867, reported in 43 Ill. 437, it was held, under the evidence then

appearing in the record, that Parker was not liable as a partner, and the judgment was reversed. On another trial below additional evidence was introduced, on the subject of the partnership, which is quite voluminous, and would serve no valuable purpose to be repeated here.

The plaintiff again recovered a judgment, from which Parker appeals.

Mr. A. D. RICH, for the appellant.

Mr. JOHN LYLE KING, for the appellee.

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

This case was before us at a previous term, and is reported in 43 Ill. 437, and a new trial has been had. On this second trial there was proof supplying the defect found to exist on the first trial, and a verdict again rendered for the plaintiff. That the jury were justified, by the evidence, in finding that Parker was a partner of Fagan, we have no doubt. The arrangement between them, though in the form of a lease, was, as between them, to certain intents and purposes a partnership. The evidence in this record satisfactorily establishes this, and fixes the liability of appellant, as such.

We see no error in refusing to instruct the jury, on behalf of appellant, that a conversation not reduced to writing, when detailed by a witness after the lapse of six years, is to be received with caution, for the reason, if the instruction amounts to anything, it is a mere abstraction, which the court might properly refuse. The court had a discretion to give or refuse the instruction.

Perceiving no error in the record the judgment is affirmed.

Judgment affirmed.

ELIZA HALL
v.
GEORGE W. SROUFE.

1. ERRONEOUS INSTRUCTIONS—*will not always reverse.* The giving of erroneous instructions will not be ground for reversal where the evidence clearly shows the verdict was right.

2. HUSBAND AND WIFE—*of the ownership of property.* A married woman held the legal title to land to place it beyond the reach of her husband's creditors, it not having been bought with her money, and she borrowed money in her own name, giving her own notes therefor, and giving the land as security. It was *held*, that personal property purchased by the wife with a portion of the money so borrowed, would be subject to execution in favor of a creditor of the husband. The property would be regarded as having been purchased with the husband's money.

APPEAL from the Circuit Court of Henry county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

The opinion states the case.

Messrs. BENNETT & VEEDER, for the appellant.

Mr. M. SHALLENBERGER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of replevin, brought by Eliza Hall, against the appellee, who was sheriff of Henry county, to recover possession of two horses which he had levied upon, under an execution against the husband of the plaintiff. The only question is, whether the property belonged to the plaintiff or her husband.

It is urged by appellant, that the circuit court erred in the instructions, and in the admission of evidence. But that portion of the testimony about which there is no controversy,

shows such a state of facts as to render a discussion of these questions unnecessary, for even if the instructions were erroneous, the facts proven by the husband of the plaintiff place the correctness of this verdict beyond all question. If it had been for the plaintiff, the court should have set it aside.

The plaintiff claims the horses were bought with her money. The money was a part of eight thousand dollars which was borrowed in January, 1867, from one Libby, in the State of New York, through his agent in Chicago. She gave her individual notes for the money, and a deed of trust on 720 acres of land. This land was the farm which Hall and his family had occupied, by themselves or tenants, for some years, but the legal title of which had been kept in the wife. But Hall himself was put on the stand as a witness, and testified as follows. We quote from the record:

"I don't know as I can say where she got the money to pay for the lands. Somebody might have given it to her. I don't know of her having any money when I married her. Don't know of her getting any legacy or any thing of that kind. Some four quarter sections were paid for by my wife. She never received the money from me. She bought the land from different persons. I don't remember all their names. I was living with her when she bought the lands. She got some of the money that paid for the lands from Libby. Got the money from Libby inside of two years. She probably claimed to own some of the lands before that time. I was her agent before that. I rented the lands out before that time. She might have saved money out of the rent to pay for some of the land."

There is a degree of candor in this testimony, that is both refreshing and convincing. It leaves no room for hesitation in saying, that, as she had no money when he married her, and as he does not know of her having received any since, the money which bought this farm did not belong to her, and

the title was held in her name to place it beyond the reach of his creditors. The above extract from the evidence needs no confirmation, but it is confirmed by the rest of the testimony. It follows that the money which bought these horses and which was borrowed upon the security of this farm, although in her name, must be considered as really his money, as against the creditor who had levied his execution on the horses.

Judgment affirmed.

SAMUEL S. HAYES

v.

JOHANNA MOYNIHAN.

MEASURE OF DAMAGES—*in actions ex contractu.* In actions on contracts, actual or compensatory damages only are recoverable.

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

The opinion sufficiently states the case.

Mr. FRANCIS ADAMS and Mr. M. F. TULEY, for the appellant.

Mr. E. VAN BUREN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the superior court of Chicago, against appellant. The declaration contains but a special count, which avers that, in April, 1868,

appellee was the owner of a lot in the city of Chicago, describing it, on which there was a brick dwelling house, owned and occupied by appellee, which rested on a foundation built six feet below the surface of the ground; that appellant, being desirous of erecting store houses on adjoining lots and abutting appellee's house, and it being necessary to make excavations for the purpose, and being desirous of sinking such excavations below and under appellee's foundation wall, appellant, in consideration that appellee would consent thereto, and would not institute legal proceedings to prevent his making such excavations, and would permit him to place dimension stone under the foundation wall of appellee's house, agreed that he would settle with her, and pay all damages she had or might sustain thereby, and by reason of building his foundation walls great injury had ensued. To the declaration the general issue was filed.

At the January term, 1869, a trial was had before the court and a jury, resulting in a verdict in favor of appellee, for $2230. A motion for a new trial was entered, but overruled by the court, and judgment rendered on the verdict. To reverse that judgment, the record is brought to this court by appeal, and errors are assigned.

It is urged that there is a variance between the declaration and the evidence; that it is averred appellant promised to pay whatever damages appellee might sustain by the construction of his foundation, while it is contended he only promised to pay whatever damages should be sustained, and for which he would be legally liable. The testimony given by appellee fully sustains the declaration, but that of appellant is, that he was only to pay for such damages as he might cause, and for which he would be legally liable. The evidence of Asay is not definite, and when considered by itself, leaves it doubtful; but he says appellee would be more apt to remember it correctly than he would, as she had an immediate interest, and had gone to his office to procure an injunction to stop appellant from proceeding with the excavation for the cellar.

As the result of that interview, appellee did not proceed with legal proceedings, and soon after gave her consent that the work might proceed. We infer, whatever may have been appellant's understanding, that appellee understood the agreement as she details it. She is more positive in giving her evidence than appellant. She seems to be more clear, and enters more into details than he does, as to what was said and done. That there is a conflict, is manifest, but it is of that character that both seem to be convinced of the truth of their own version of the arrangement. When it is remembered that appellant and Asay had discussed the legal questions involved in the case, it is not unreasonable to suppose that he and Asay both would be liable to be less certain in their recollection of the agreement. According to appellant's own testimony, he suspended operations for a short time after this interview, and until appellee gave her assent; and if he had been clear that, by the agreement, he was only to pay to the extent the law imposed a liability, why suspend work?

It appears appellant and appellee had a subsequent interview, at the end of which, he says he wrote a note, and sent it by her, to his workmen, to proceed. It may be that appellee had confused what was said at the two interviews, in giving her testimony. But be that as it may, the jury, in the conflict, have decided in favor of her evidence, and we are not prepared to hold that they did wrong. It is true, the testimony is not of that clear and positive character that is desirable, but the jury have found that it sustains the contract set out in the declaration.

It is also objected that the damages are excessive. The evidence on behalf of appellee, if taken at the highest estimate, would only make the cost of repairing the house $1600 or $1800. The witnesses who place it at that sum, when they come to give the items and their cost, do not make it so much. Garnsey makes it $901, and Barrows $1044, taking the highest estimate they place on the labor and materials. They both say the house, when thus repaired, would, perhaps, sell for

$500 less than before it was injured—in the one case, the aggregate of $1401, and the other, $1544. And should the item for risk be added in the first, it would amount to $1901, and in the other, $2044. On Garnsey's evidence, the verdict is $186, and on Barrow's, $229, too high.

But the evidence of appellant's witnesses, Fitzgerald and Agnew, estimate the cost at $557, and if the depreciation in value and amount appellee's witnesses name for risk were added, it would make but $1557 for the cost. Again, the witnesses who fix the depreciation in value at $500, do not speak with any great degree of certainty as to the fact, while Harris, one of appellee's witnesses, thinks it would not exceed $300. Again, appellant's witnesses say it is not customary to charge for the risk, but suppose it is meant for profits of the contractor; still it would seem to be high on the amount of work to be done. It would not look reasonable to suppose the contractor ever expects to make a profit of fifty per cent on the cost of erecting a building, or even for repairing this one. One of appellant's witnesses swore he would undertake to do the work at his estimate, with ten per cent added. It is true, these witnesses do not think it is necessary to plaster the entire house, or to expend so much on the roof as do the witnesses for appellee; but if these items, at $240, were added, it would still be under $1800. And allowing rent during the time the repairs are being made, still the verdict on either estimate is too large.

This is an action on contract, and there can be no claim for punitive damages. They can only be allowed in actions for torts. In recoveries of this character, only the actual or compensatory damages are recoverable. And in any view of the evidence we fail to see that it warrants the sum found by the jury. Being excessive and unauthorized, the court below should have granted a new trial. The judgment of the court below must, therefore, be reversed and the cause remanded.

Judgment reversed.

Syllabus.

JOHN CLARK *et al.*

v.

MICHAEL HOGLE, Administrator *et al.*

1. ARBITRATION—*power of an executor or administrator in reference thereto.* An executor or administrator has no power to submit a claim against an estate to arbitration so as to bind the estate, and if he undertakes to do so, a judgment rendered on the award will be void.

2. SAME—*effect of such submission upon a prior valid judgment.* But where such submission was upon an appeal to a circuit court from a judgment in a probate court, allowing a claim against the estate, the void judgment entered upon the award in the circuit court will not affect in any manner, or invalidate the judgment appealed from.

3. WANT OF SERVICE—*default.* A decree rendered upon the default of a party who had no notice of the suit, either actual or constructive, is void as to such party.

4. JURISDICTION IN CHANCERY—*administration of estates.* A creditor of an estate presented his claim to the probate court, at the term appointed by the executor for that purpose, and a portion of it was allowed. The creditor thereupon appealed to the circuit court, when the matter was improperly referred to arbitration, and a judgment was entered on the award for the full amount of the claim. The distributees of the estate filed their bill in chancery to vacate that judgment, which was done, except to the amount allowed in the probate court. After a time, the assignee of the judgment filed his bill in chancery, asking to have that decree annulled, and for an account from the personal representative of the estate of the personal assets, and in default of any, that he be decreed to sell the realty to pay the debt. The estate had not been settled, and soon after the allowance of the claim in the probate court all the papers and records of that court were destroyed by fire: *Held*, that this bill of the creditor should be entertained, under the circumstances of the loss of the records and papers by fire; he had a right to ask an account from the personal representative, and a discovery of assets, and a decree for a sale of realty in default of other assets.

5. ADMINISTRATION OF ESTATES—*within what time the realty may be sold to pay debts.* A little more than eight years had elapsed, after the decree mentioned, before the creditor filed his bill, but it was held, such delay ought not to bar the relief sought, under the circumstances, as he had no means of showing the condition of the estate after the destruction of the probate office, and the estate still remained unsettled.

6. PARTIES—*who may file such a bill.* One creditor alone may file such a bill.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion states the case.

Mr. JOHN CLARK, for the plaintiffs in error, upon the question of the jurisdiction of a court of chancery to entertain a bill in behalf of a creditor of an estate, insisted that under the circumstances of this case, the relief sought should be granted, citing 1 Story's Eq. Juris. secs. 538, 543, 546, 547, 548, 551, 552, 554 and 555; also, *Propst* v. *Meadows*, 13 Ill. 169; *Vansycle* v. *Richardson*, ib. 174; *Martin* v. *Dryden et al.* 1 Gilm. 210; *Mahar* v. *O'Hara*, 4 Gilm. 427; *Strong et al.* v. *Clawson*, 5 Gilm. 347; *Grattan* v. *Grattan*, 18 Ill. 171.

Messrs. ROFF & DOYLE, for the defendants in error, contended there was no jurisdiction; first, because it did not appear that the personal assets were exhausted, that being the primary fund for the payment of debts. Second, there is a remedy at law, provided by the statute. Third, there being several creditors, one alone can not maintain a bill.

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

This is a writ of error to the circuit court of Iroquois county, to set aside a decree rendered by that court, in a suit in chancery, in which Benjamin F. Smith, by his guardian, and Dinah Smith were complainants, and Benjamin F. Wright, Jacob A. Whiteman and others were defendants, at the December term of 1859, of that court.

The bill was filed by John Clark as assignee of Benjamin F. Wright, and against Michael Hogle, administrator of James M. Smith, deceased, William A. Boswell, executor of Dinah Smith, deceased, and Kate Atkins and others, claiming interests under the will of Dinah Smith.

A demurrer to the bill was sustained by the circuit court, to reverse which, the record is brought here by writ of error.

To understand the case, a brief statement of the leading facts is necessary.

It appears that James M. Smith died in 1854, in Iroquois county, having made his last will and testament, by which he devised his estate, real and personal, after the payment of his debts, to his mother, Mary Mandeville, and to his brother, Benjamin F. and sister, Dinah Smith, he being unmarried and having no child. By the death of Mary and Benjamin, Dinah became entitled to the whole estate, subject to the debts. The will was proved in the proper court in August, 1854, and letters testamentary were duly granted to Whiteman, who qualified, and thereupon gave notice to all persons holding claims against the estate to present them at the December term, 1854, of the probate court, at which term Benjamin F. Wright presented his claim against the estate, amounting to three thousand and sixty-seven dollars, which was allowed by the court to the amount of five hundred and sixty-seven dollars fifty-seven cents, from which Wright appealed to the circuit court.

The judge of that court, having been of counsel in the cause, declined trying the appeal, and, by whose motion is not stated, the court made an order of reference to three persons, who proceeded, after notice to the parties, to hear the case, and they awarded to Wright the full amount of his claim, a copy of which award was duly served upon the parties. A judgment on the award was entered in favor of Wright against the executor, to be paid in due course of administration. Subsequent to this, but at what time is not stated, it is alleged that Wright assigned this claim to the complainant in this bill, nor is it shown what consideration, if any, was paid for the assignment, or that it was of record.

On the twenty-seventh of March, 1855, Benjamin F. Smith, one of the devisees under the will of James M., by his guardian, and Dinah Smith, the other surviving devisee, filed their bill in chancery in the same court, making Michael Hogle,

administrator with the will annexed, of James M. Smith, deceased, Wright, Mary Mandeville, and Andrew Mandeville defendants, alleging fraud in procuring the judgment in the probate court, and that the finding of the circuit court on the award of the arbitrators was a nullity, and praying that the judgment rendered thereon by the circuit court should be set aside and for nothing esteemed, and that Hogle, the administrator, be enjoined from paying the same.

Without any service of process upon Wright or the other defendants, without any publication against them if they were non-residents, which is nowhere shown, their default was entered and the cause set for hearing.

The court decreed that the judgment of the circuit court on the award should be vacated as to all except the sum of five hundred and sixty-seven dollars fifty-seven cents, allowed by the probate court, with interest thereon from the day of December 1854, and enjoining the administrator from paying over any part of that judgment except the sum of five hundred and sixty-seven dollars fifty-seven cents, with the interest thereon.

It is to annul this decree the bill before us was filed. The file mark is to November term, 1868, more than eight years after the decree complained of was passed.

It is alleged in the bill, that soon after the will was proved, and letters testamentary granted, and the claim of Wright allowed, all the papers of the probate court were destroyed by fire.

The first question presented is, had the circuit court such jurisdiction of the person of Wright as to justify the decree against him? The answer to this is plain. The court had no jurisdiction over him, there having been no notice of the suit, constructive or otherwise, and the decree was by his default. As to him, the decree was a nullity, and is not in the way of the previous judgment on the appeal, from the probate court, which the bill attacked. That was left in full force as a judgment of a court of competent jurisdiction, for the sum

three thousand and sixty-seven dollars, against the executor of James M. Smith, to be paid in due course of administration.

It is said, however, by defendant in error, that this judgment was rendered upon an award of arbitrators, and that it is therefore of no binding force upon the estate. It is held by this court, that an executor or administrator has no power to submit a claim against an estate to arbitration so as to bind the estate. *Reitzell et al. Adm.* v. *Miller*, 25 Ill. 67. This is undoubtedly the true doctrine, and rendered the judgment on the award void and of no effect, but it did not affect in any manner, or invalidate the judgment for the amount found by the court of probate, namely: five hundred and sixty-seven dollars fifty-seven cents, and this amount is saved to Wright, by the decree sought to be set aside.

We were, on the first examination of this case, inclined to hold, under the circumstances attending it, the loss and destruction of the records of the probate court by fire, that there was an equitable claim by Wright, or his assignee, the complainant here, that the administrator should be decreed to account and to sell the lands of the testator sufficient to pay the original judgment obtained before the court of probate, and mature reflection has satisfied us that so to decree would not be at variance with principle, or contrary to the views expressed by this court in the case of *McCoy* v. *Morrow*, 18 Ill. 519, and approved in *Rucker* v. *Dooley et al.* 49 Ill. 377.

Here there were no means accessible to complainant, to show the condition of the estate of Smith, and no pretense of any settlement of it by the executor, before he resigned, or by Hogle, the administrator, who succeeded him, and only a little more than eight years had elapsed, before this bill was filed to require the administrator to sell the land, or enough of it to pay complainant's debt. We do not think, under the circumstances, there was such delay, as to bar the relief sought.

This bill is, in effect, a bill for discovery, and an account of assets, and shows upon its face it would be impossible to do either, by reason of the papers and records being destroyed.

That one creditor may alone file such a bill is well settled. 1 Story Eq. Jur. 603 sec. 546.

We are of opinion, sufficient equities are shown upon the face of the bill to sustain it. The complainant, under the circumstances stated, is entitled to call upon the administrator to show what he has done with this estate; what assets, if any, there be, subject to the payment of this debt, and in default thereof, compel payment out of the realty. The bill is at least entitled to an answer. What the final decree shall be, must depend upon the issues and proofs made at the hearing.

The decree sustaining the demurrer and dismissing the bill is reversed, and the cause remanded for further proceedings consistent with this opinion

Decree reversed.

GEORGE H. LAFLIN *et al.*

v.

THE CENTRAL PUBLISHING HOUSE *et al.*

1. ATTACHMENT—*when it will lie.* Should a mortgagor and mortgagee of chattels collude to make use of the mortgage for the purpose, by an unfair sale, of hindering, delaying and defrauding creditors of the former, by preventing any thing being saved at the sale after payment of the mortgage, it might be plausibly argued that the property would be liable to attachment under the amendatory attachment act of 1865.

2. But a fraud in the sale under the mortgage, merely, by the mortgagee upon the mortgagor, would not, of itself, bring the case within the statute, and enable creditors to attach.

3. Or, if the mortgagee should sell the property *en masse*, and for less than its value, whatever might be the right of the mortgagor to avoid the sale, that fact would not, of itself, authorize an attachment by creditors.

4. It would be difficult to imagine a case where a creditor would have a right to attach the mortgaged property, under the statute, in the absence of a corrupt intent to defraud creditors, by collusion between the mortgagor and mortgagee.

THIS CASE comes from the Superior Court of Chicago, the Hon. WM. A. PORTER, Judge, presiding, upon a certificate of questions of law, which is set forth in the opinion.

Messrs. BONNEY, FAY & GRIGGS, for the plaintiffs in error.

Mr. MILTON T. PETERS, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This case comes before us without any statement of facts, but upon the following certificate of the court:

I, William A. Porter, one of the Justices of the said Superior Court of Chicago, within and for the county of Cook, in said State of Illinois, do hereby certify to the Supreme Court of said State, that the above entitled cause was tried before me, at the June Term of said Superior Court, A. D. 1868; and that, upon that trial, the plaintiffs contended that a certain chattel mortgage, which was admitted to have been made without fraud, from the Central Publishing House to John W. Smith, one of the defendants, had been fraudulently foreclosed by a sale out of court, under which sale Smith claimed to hold the property in question in this suit.

The plaintiffs alleged that said property might have been sold fairly for sufficient to pay the demand of said Smith and the demand of the plaintiffs, and that by the sale to Smith, the plaintiffs were deprived of all means of making their demand. And upon said trial the following questions of law arose, and were decided be me as below stated, that is to say:

Question I.—Whether the act entitled "An act to amend Chapter IX of the Revised Statutes, entitled Attachments in Circuit Courts," warrants an attachment on the ground of fraud in a sale under a chattel mortgage without fraud in the making of the mortgage?

Which question I decided in the negative, against said plaintiffs, and in favor of said defendants, whereto the said plaintiffs then and there excepted.

Question II.—Whether a sale under a chattel mortgage, which, in matter of fact, hinders and delays creditors, warrants an attachment under said act, on the ground that such sale is fraudulent in law, without a corrupt intent in the making of the sale?

Which question I decided in the negative, against the plaintiffs, and in favor of said defendants, whereto the said plaintiffs then and there excepted.

And thereupon I instructed the jury in said case that the plaintiffs had failed to sustain their said action, whereupon the jury returned a verdict for the defendants, whereto the plaintiffs then and there excepted.

And thereupon the said plaintiffs entered their motion to set aside said verdict, and for a new trial of said cause; which motion, afterwards, to-wit: at the October Term, A. D. 1868, of said Court, was argued by counsel and overruled by the Court, and thereupon final judgment was rendered on said verdict, in favor of said defendants, and against said plaintiffs, whereto the said plaintiffs then and there excepted.

And I do further certify that thereupon the parties litigant aforesaid, respectively, did then and there, in open Court, assent that the questions of law aforesaid, together with my decision thereupon, should be certified by me to the Supreme Court, pursuant to the statute in such case made and provided, which, on the motion of the said plaintiffs, is accordingly done.

WM. A. PORTER. [SEAL.]

In the absence of all statement of facts, we are unable to give a satisfactory answer to the first of the foregoing questions. It is too vague and general. What was the character of the supposed fraud? Was it a fraud by the mortgagee upon the mortgagor? Or was it a combination between the mortgagor and the mortgagee to have the property sold for

less than its value, with a view of defrauding creditors by preventing anything being saved at the sale, after payment of the mortgage? In other words, had the mortgagor and mortgagee colluded to make use of the mortgage for the purpose, by an unfair sale, of hindering, delaying and defrauding creditors? In such a case, it might be argued, with considerable plausibility, that the property would be liable to attachment under the amended attachment law of 1865. If, on the other hand, the supposed fraud is merely a fraud by the mortgagee upon the mortgagor, we see no ground on which it could be held that this alone would bring the case within the statute, and enable creditors to attach. If, for example, the objection to the sale is, what we imagine from the argument it really was in the present case, that the property was sold *en masse*, and for less than its value, whatever might be the right of the mortgagor to avoid the sale, we could not recognize this fact as sufficient of itself to authorize an attachment by creditors.

As to the second question, we suppose it to refer to such a case as that just supposed, where the law authorizes the mortgagor to have the sale, but not the mortgage, set aside. This would give a creditor no right of attachment, nor can we imagine any case where he would have that right, under the statute, in the absence of a corrupt intent to defraud creditors, by collusion between the mortgagor and mortgagee.

As this record is made up, we can not say there is any error in it which would justify a reversal of the judgment.

Judgment affirmed.

LEONARD ROTHGERBER *et al.*

v.

THOMAS GOUGH.

FRAUDULENT SALES—*employment of vendor by vendee as agent.* Where a party sells out his business to another, while it is not a fraud *per se* for the vendor to be employed by the vendee as a clerk to carry on the business, it is a circumstance creating a strong presumption of fraud, and especially so when the former uses and controls the property as he did before the sale. In such a case, it requires clear and satisfactory proof, and the circumstances surrounding the transaction should clearly indicate honesty and good faith, to rebut the presumption.

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

The opinion states the case.

Mr. JOHN LYLE KING, for the appellants.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of trespass *de bonis asportatis*, brought by appellee in the superior court of Chicago, against appellants, for levying a writ of attachment on property claimed by appellee. Appellants claimed that the goods were the property of one Bolshaw, who was indebted to Livingston, for whom Rothgerber was acting as agent, in a considerable sum of money; that he caused a writ of attachment to be issued and levied upon the goods as the property of Bolshaw. Appellee, on the other hand, claimed to have purchased the goods of Bolshaw before the writ issued against Bolshaw, and before the levy was made, and to have been in possession of

the property. Appellants insisted, that the sale was fraudulent, and made to hinder and delay creditors. The case was tried before a jury, who found a verdict in favor of plaintiff, and defendants entered a motion for a new trial, which the court overruled, and rendered judgment on the verdict, and defendants bring the case to this court on appeal, and seek a reversal.

It is first insisted, that the verdict is unsupported by the evidence. The main facts in the case are, that Bolshaw owned a saloon and was engaged in the sale of liquors; that he was, at the time of the sale, indebted to different persons in the sum of about ten thousand dollars; that the indebtedness to Livingston was a balance of an account for liquors purchased of him. There seems to have been no inventory of the stock at or prior to the sale, and Bolshaw continued to sell liquors and managed the business after as before the sale. The articles of agreement that were executed at the time, provided that Bolshaw should have power to purchase all necessary articles, to employ, pay and discharge employees, and this was to continue for one year from the time of sale.

It seems the property sold was claimed to be worth one or two thousand dollars more than he received, and he at first asked $9000 for the stock. He does not pretend that he ever offered to sell it to any other but one person, and says he does not remember his name. He, too, only claims to have received two thousand dollars in hand. He took notes running from six to eighteen months, and without security.

If this transaction was not conceived and executed in fraud of creditors, it has many strong marks of such a purpose. In the first place, Bolshaw was largely in debt, even beyond his ability to pay. His creditors were pressing him, and he was not able to meet their urgent demands for payment. He sells property, perhaps, for two thousand dollars less than its value—at any rate, less than he at first asked; receives but two thousand dollars in hand; the balance he agrees to receive in payments at periods of six, twelve and eighteen months; takes

notes of a man of whose means or ability to pay he testifies he had no knowledge, and without security. He does all this without taking an inventory, but only pretends that they looked over the stock and examined it casually, taking down the items on a piece of paper. He paid no portion of the money he received to his creditors, unless it were some small bills for family expenses, etc. Nor did he make any arrangement for the appropriation of the money that was to be subsequently received, to their payment. These circumstances leave scarcely a doubt on our minds that it was the intention of Bolshaw to defraud his creditors by making this sale.

It being necessary, however, that the purchaser should also have been aware of the fraudulent intention of the vendor, and to participate in that design, to render the sale void, it is necessary to examine the evidence to learn whether appellee is chargeable with the fraud intended by Bolshaw. That he, without experience in the business, should be willing in good faith to make so large a purchase on such a hazard, seems almost incredible. He could have formed no correct judgment as to the value of the property by the very superficial examination he made. He took no inventory to learn its value, nor do we see that he even called in an experienced friend to obtain his judgment as to its value. He did not, nor could he know from the means he employed, whether there were three or ten thousand dollars' worth of liquors. Business men, acting in good faith, rarely transact business in this manner.

Again, if the transaction was a fair one, why did he remove a portion of the goods from the building by the way of a back window and through an alley, and why was it that he retained Bolshaw in the full and entire management of the property, fully empowered to do any and all things he might have done before the sale? These things are not in the usual course of business, and, to say the least, create a very strong presumption of a fraudulent intention. While it is not a fraud *per se* for the vendor to be employed by the vendee as a clerk

to carry on the business, it is a circumstance creating a strong presumption of fraud, and especially so when he uses and controls the property as he did before the sale. In such a case, it requires clear and satisfactory proof to rebut the presumption. The circumstances surrounding the transaction in such a case should clearly indicate honesty and good faith to change the presumption. The circumstances and proof in this case we think are not of that character.

The reason assigned by Bolshaw, why the goods were removed through a back window and through an alley, would seem to clearly indicate that the object was to avoid observation, and not to call attention to the fact that they were being removed. It is true, Bolshaw says they did so because the floor at the front entrance was defective, but it seems to us that this was but a pretext, as any such defect could have readily been remedied if it existed; but other heavy packages seem to have been removed that way. Men situated as they were, if their purposes had been honest, would naturally have desired to prevent suspicion by avoiding such a clandestine course. When fully considered, the proofs in this case impress us with the conviction that the verdict is not sustained by the evidence, and that the case should be passed upon by another jury. Taking all the testimony in the case, it, we think, fails to show that the transaction was *bona fide*. We are, therefore, of the opinion that the court below erred in overruling the motion for a new trial, and the judgment must be reversed and the cause remanded.

Judgment reversed.

WILLIAM H. WENTZ *et al.*

v.

LOUIS WILSON *et al.*

NEW TRIAL—*verdict against the evidence.* The judgment of the court below is reversed in this case on the ground that the evidence fails to sustain the verdict.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Messrs. STEWART & PHELPS, for the appellants.

Mr. J. W. DAVIDSON and Mr. JOHN PORTER, for the appellees.

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

This is an appeal from the Warren circuit court. The suit was assumpsit, on a promissory note, and the pleas were, a total failure of consideration, a set-off, and partial failure of consideration.

The jury found for the defendants. The note, it appears, was given for a threshing machine, described as a number 2 machine, by the agent of plaintiffs, who sold it.

It further appears, defendant, Lewis Wilson, had, at first, ordered a number 1 machine, on which there was a warranty by plaintiffs. He afterwards changed his mind, and ordered a cheaper kind, a number 2 machine, and now seeks to apply the warranty given on number 1, to number 2. His complaint is, that the machine does not clean the grain well; that a large per centage is left in the straw.

We are not satisfied the evidence justifies this, nor are we satisfied, if the warranty did attach to this machine, that it has been broken. The weight of evidence, we are inclined to think, is decidedly in favor of the machine. The purchaser has it in his possession, never having offered to return it, and has operated it repeatedly with success. He never complained of any defect until the note became due, but, on the contrary, said it was one of the best machines he ever saw.

There is no question of law mooted, and we dispose of the case by reversing the judgment on the ground the evidence does not sustain the verdict, and a new trial should be had.

The judgment is reversed.

Judgment reversed.

Chicago & Northwestern Railway Company

v.

Daniel Diehl.

Negligence in railroads—*requisites of instructions.* In an action against a railroad company for killing stock, if an instruction for the plaintiff which undertakes to enumerate the facts upon which a recovery may be had, omits the essential fact that the road had been opened six months, a judgment for the plaintiff will be reversed, unless such omitted fact is shown by the evidence.

Appeal from the Circuit Court of Whiteside county; the Hon. William W. Heaton, Judge, presiding.

The opinion states the case.

Mr. James McCoy, for the appellants.

Messrs. DINSMORE & STAGER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action for the recovery of the value of two colts killed by the railway company. The court told the jury to find for the plaintiff in case the evidence showed certain facts, among which it did not enumerate the essential fact that the road had been opened six months. We should not reverse for this if the evidence showed such fact, but it does not, nor does it show any other fact from which this might be inferred. We must, therefore, reverse the judgment and remand the cause.

Judgment reversed.

THE NORWICH FIRE INSURANCE COMPANY
v.
GEORGE BOOMER.

1. INSURANCE—*of omission of assured to disclose his interest.* Upon an application for insurance, the party applying is bound to disclose all facts material to the risk, but, in the absence of a requirement on the subject in the policy, or of any inquiry in respect thereto, it is not essential that he should disclose the nature of his interest in the property sought to be insured. It is sufficient, if he have an insurable interest.

2. So, where a policy issued to a mortgagee of the property insured, contained no provision in respect to the disclosure of the nature of the interest in the property, except that the company would not be liable "for loss for property owned by any other party, unless the interest of such party be stated in this policy": *Held*, that this condition did not require the assured to disclose his interest when he made the application; on the contrary, by implication, it excused him from so doing.

3. INSURANCE—*by a mortgagor in the name of his mortgagee.* Where a mortgagor, in pursuance of an agreement for further security, pays the

premium on a policy of insurance effected on the mortgaged property in the name of the mortgagee, the property being afterward destroyed, the fact of the mortgagor having paid the debt secured by the mortgage, will not prevent a recovery of the insurance against the company. In such case, the mortgagor is the beneficial party, and has the right to recover the same in the name of the mortgagee.

4. Same—*insurance by the mortgagee in his own name.* But, it seems, where a mortgagee applies for a policy, pays the premium, and effects the insurance in his own name, the company, on the occurrence of loss and payment by them of the insurance to the mortgagee, would be entitled to subrogation, and to an assignment of the mortgage. In such a case the insurance would be considered as a further security of the debt, and on the principle, that a surety who pays the debt, may resort to the principal debtor for payment, the insurer could recover from the mortgagor.

Appeal from the Superior Court of Chicago; the Hon. William A. Porter, Judge, presiding.

The opinion states the case.

Mr. O. B. Sansum, for the appellants, insisted that when a mortgagee applies for insurance, he must disclose the nature and extent of his interest, citing *Columbia Insurance Co.* v. *Lawrence*, 2 Peters, 49; Marshall on Ins. p. 789, b. 4. ch. 2; 10 Peters, 507; *Carpenter* v. *Providence Washington Insurance Co.* 16 Peters, 495.

Messrs. Waite & Clarke, for the appellee.

The nature or amount of the interest held by the assured on the property insured, *in the absence of specific inquiries as to the nature of such interest, and of conditions in the policy requiring it to be stated or disclosed*, need not be communicated to the insurer, or stated in the policy itself, and the assured, in case of loss, can recover to the extent of any interest he may have in the subject matter insured, however indirect; and it is in general sufficient, if the subject matter of the insurance and the nature of the risk are set forth in the policy, without

any mention of the nature or character of the interest for which the insurance is intended as a protection. Angell on Ins. sec. 182; Phillips on Ins. 3d ed. vol. 1, page 223; *Strong* v. *Manufacturers' Ins. Co.* 10 Pick. 40; *Protection Ins. Co.* v. *Harmer*, 22 Ohio, 2 vol. N. S. 474; *Franklin Fire Ins. Co.* v. *Coutes*, 14 Md. 285; *Fletcher* v. *Com. Ins. Co.* 18 Pick. 419; *Tyler* v. *Ætna Ins. Co.* 12 Wend. 507; *Turner* v. *Burrows*, 5 Wend. 546; *Lock* v. *North American Ins. Co.* 13 Mass. 61; *Phelps* v. *The Gebhard Fire Ins. Co.* 9 Bosw. N. Y. 404; *Mutual Ins. Co.* v. *Deale*, 18 Maryland, 26; *Carter* v. *Humboldt Fire Ins. Co.* 12 Iowa, 287; *Caruthers* v. *Sheddon*, 6 Taunton, 16; *Traders' Ins. Co.* v. *Robert*, 9 Wend. 408, 409; Angell on Fire and Life Ins. ch. 8, secs. 182, 183, 184, 185 and 186.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the superior court of Chicago, against appellants, on a policy of insurance. The policy was issued and bears date on the third of April, 1867, and covers a frame packing and slaughter house, with the alley or pens attached, known as Boyington, Cash & Wilder's Slaughter and Packing House, in Chicago; also the engine and boiler, machinery and pipes, hoisting machine and belts, and lard rendering tanks, water tanks and cooling vats, all contained in the building, for one year from that date, and insuring appellee against all immediate loss by fire, not exceeding $4000.

The policy contained several conditions, among which are, first, that the company shall not be liable if the applicant has made any erroneous representations materially affecting the risk; nor for loss if there was any prior or subsequent insurance without the written consent of the company; nor for loss of property owned by any other party, unless such interest is stated in the policy; second, the policy to become vitiated if the insured premises should become vacated by the removal of the owner or occupant for more than twenty days; third,

the assured not to recover of the company any greater portion of the loss or damage than the amount insured bears to the whole sum insured on the property. Within the year the property was partly destroyed by fire, and this action was brought to recover for the loss. After the fire, appellee took possession of the portion not destroyed, and sold it, and after deducting expenses, it yielded the sum of $1070. A trial was had, resulting in a verdict in favor of appellee, for $2757.56, upon which judgment was rendered by the court.

It appears that appellee, at the time the application was made, by the broker, only held a chattel mortgage on the property insured, and it is urged by appellants that, by failing to disclose the nature of his interest, the policy became void; that he was bound to disclose this as a material fact, and its suppression vitiated the policy. That he was bound to disclose all facts material to the risk, is no doubt true; but, in what respect it could be material that the company should know whether the interest was that of mortgagor or mortgagee, we are at a loss to perceive. It was, no doubt, material that he should have had an insurable interest, but it has, so far as we can find, never been held that the interest of a mortgagee was not of that character. All that he was bound to disclose, unless interrogated, was, that he had an insurable interest, and this he did, and in that the representations of his application are true. He was not asked by the company to state the nature of his title, nor did the terms of the policy require that he should. If the company had deemed it material, they would have propounded the necessary question to learn the fact, and inserted a clause that the policy should be void if the nature of his interest had not been fairly disclosed. Had the question been asked, and appellee had given a false statement in answer, then, it may be, a different question would have been presented.

That the company did not regard it material is clearly shown by the policy itself. We find, in limiting their liability, they say they will not be liable "for loss for property owned

by any other party, unless the interest of such party be stated in this policy." From this condition it is apparent they deemed it unnecessary appellee should disclose his own interest. It, by implication, says he need not, and no other inference can be drawn from the language. It, however, discloses the fact that the company did regard it material, where one person insures the property of another, that the assured should state the nature of the interest of the owner in the property. Neither reason, authority, nor the contract of assurance, so far as we can see, required appellee, unless interrogated, to state the nature of his interest in the property insured.

It is again urged that, inasmuch as the mortgagors paid the debt to appellee before the recovery in the court below, and the mortgagee has sustained no loss, he is not entitled to recover. Had appellants paid this loss before the mortgagors paid the debt to appellee, then the question of their right to subrogation would have been presented for consideration; but, inasmuch as appellants had not done so, the questions presented are of a different character. Had appellee applied for the policy, paid the premium, and effected the insurance, and on the occurrence of this fire appellants had paid the loss, they would no doubt have been entitled to subrogation, by an assignment of the mortgage. In such a case, the insurance would be considered as a further security of the debt, and on the familiar principle that a surety who pays the debt may resort to the principal debtor for payment; in such a case the insurer might, no doubt, resort to the mortgagor for payment.

But in this case the mortgagors paid the premium, and obtained the policy, in pursuance to an agreement with the mortgagee before it was effected. The mortgagors procured it as a part of the security they agreed to give appellee for the debt they owed him. It was, then, in equity, their policy, and not appellee's, although in his name. Had the mortgagors paid the premium, and obtained the policy in their names, the question could not have arisen. Then why, when they, in pursuance of their agreement, pay the premium, should they

not be regarded as the beneficial assured, when they shall have paid the debt and released the property? In such a case they seem to have strong equitable, as well as legal, claims to pay for the loss, and should be permitted to use the name of the mortgagee to recover. Had they taken this policy in their own names, with the loss payable to appellee, according to his interest, and they had subsequently paid the debt, no one, we presume, would question their right to sue in the name of the mortgagee, and recover for their own use.

We understand it to be the settled law that, when the mortgagor or pledgor insures the property, and a loss occurs, he may recover because he has an insurable interest in the property, and reason and justice require that when he pays the premium, although he insures in the name of the incumbrancer, and he afterwards pays the debt, he should be permitted to recover for loss to the property. And this rule is supported by the authorities. *King* v. *The State Mutual Fire Insurance Co.* 7 Cush. 1; *Concord Union Mutual Fire Insurance Co.* v. *Woodbury*, 45 Me. 447; *Kernochan* v. *The New York Fire Insurance Co.* 17 N. Y. R. 428. The first of these cases, however, goes further, and holds that the mortgagee may insure, and, in case of loss, may collect his debt and recover on the policy; and the insurer has no right to subrogation. But these latter propositions are not in harmony with the current of the authorities, but the opinion sustains the rule we have announced.

It is again urged that the premises became vacant for more than twenty days, and the policy became void under the condition in the policy. A careful examination of the evidence discloses the fact that the premises were not vacated. Boyington, Cash & Wilder had ceased to manufacture meats and their produce as early, at any rate, as the twenty-fifth of March, and the insurance was effected on the third of April following. The property insured was not removed, but it only ceased to be used for manufacturing purposes. No one resided in the property to remove from it, or to vacate it, and a watchman

was employed to guard it after the policy was issued, as he had before. In fact, so far as we can see, no change whatever took place as regards the occupancy of the premises after the policy was issued. As there were no representations as to its occupancy in the application, no reason is perceived why any forfeiture could be declared because it remained in the same condition until the fire occurred. There was, in fact, no vacation of the property after the policy was issued. It was occupied up till the fire as it was on the day the insurance was effected.

We now come to consider the remaining point urged by appellants; that is, that other insurances were effected by Boyington, Cash & Wilder, without the written consent of appellants. The policy declares that other prior or subsequent insurance on the property therein described shall vacate the policy, unless consent is given by the company, in writing. It appears that other insurance was effected by Boyington, Cash & Wilder, and that consent was given therefor to the amount of $2500, by the policy itself. But it is not pretended that appellee ever procured any, or that any other policy was issued in his name. But it is claimed that Boyington, Cash & Wilder did obtain other policies to a large amount, and without the written consent of the company. Inasmuch as appellants have not abstracted the evidence upon which they raise this question, we should have supposed they placed no great reliance upon it, had they not urged it with apparent earnestness in their argument.

In the body of the policy we find that other insurance is allowed to the amount of $2500. And from a careful examination of the record we find that, on the same day this policy was issued, Boyington, Cash & Wilder took a policy from the Albany City Fire Insurance Co. of $2000, on grease, tallow, and meats, their own, and held for others by them, in trust, &c. contained in their packing house. It will be observed that, although the property insured by this policy may have been in the same building, it was not the same covered by appellee's

policy. It was on different property, and hence could, in no wise, affect the validity of the policy in controversy.

It appears, from an agreement between Boyington, Cash & Wilder and appellee, which is set out in the record, that the firm had obtained a policy for $2500 of the Mutual Security Company. It does not, however, appear that this policy embraced the same property, and unless it did, it could in no way invalidate this policy. We have examined, with some care, the great volume of questions and answers contained in this record, and fail to find any other proof of other insurance on this property. As appellant's counsel has given no reference to the page where such evidence may be found, and after much time spent in a fruitless search for it, we conclude that the record does not contain it.

It then becomes unnecessary to determine whether, as Boyington, Cash & Wilder had effected the insurance in the name of appellee, and paid the premium, and being entitled to receive the insurance money, they would have lost the right by taking other policies contrary to the conditions contained in this. Had it appeared that there were other policies in their name beyond the sum specified in this policy, then that question would have been presented. The judgment of the court below is affirmed.

Judgment affirmed.

MARIA HILLIARD, Impleaded, etc.

v.

JAMES W. SCOVILLE *et al.*

1. PARTITION—*who entitled thereto.* One tenant in common may sue out a writ of partition, even though there be a subsisting life estate in another in the premises, notwithstanding the objection of the owner of the

life estate; and, in case partition can not be made, he may obtain an order for the sale of the whole of the premises, subject to the life estate.

2. And though the premises may sell for less by reason of the life estate in them, that is no reason why either of the remainder-men should be delayed in proceeding to sever the tenancy, as between themselves.

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

This case was before this court at the September term, 1868, and will be found reported in 48 Ill. 453, where a full statement of the case, as presented at that time, will be found in the opinion of the court. The additional facts appearing on the second hearing below are presented in the opinion.

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

As the court did not decide, in the other case, that a sale could be decreed, but only a partition could be made, and that, because the owner of the life estate did not appear to object, we submit again the question to the court, that a sale of this undivided property can not be decreed against the objection of the owner of the life estate, and against the objection of the appellant, who owns two-thirds of the property, and again cite the following cases—*Culver* v. *Culver*, 2 Root, 278; *Nichols* v. *Nichols*, 28 Vermont, 228; *Nichols* v. *Nichols*, ib. 658—in support of our position.

Mr. GEORGE SCOVILLE, for the appellees.

PER CURIAM: When this case was before us at the last term, we fully considered all the authorities cited, supposed to bear upon the case, and we reached the conclusion there was no reason why one tenant in common might not sue out a writ of partition, even though there was a subsisting life estate in another in the premises.

By the record now before us, it appears the owner of the life interest objected to the partition, notwithstanding which, the court allowed the partition, and appointed commissioners to divide the lot. The commissioners reported partition could not be made, whereupon a sale of the lot was ordered, subject to the life estate.

This order was a natural and legal sequence of the decision of this court, and was proper. The owner of the life estate can not be injured by a sale, nor can the tenants in common. Either of them can become the purchaser, and so may the tenant for life. But, independent of this consideration, there can be no legal impediment to the sale, if a partition can not be made. Though the premises may sell for less by reason of the life estate in them, that is no reason why either of the remainder-men should be delayed in proceeding to sever the tenancy as between themselves. The sooner it is severed the better it would appear to be for all parties.

The judgment of the court below is affirmed.

Judgment affirmed.

Chicago, Burlington & Quincy Railroad Company

v.

James B. Dunn.

1. Damages—*of exemplary—and when excessive.* In an action against a railroad company, for injuries to the plaintiff, caused by the alleged negligence of defendants' servants in blowing the whistle on an engine, at a time and place, however, when and where it was customary to blow it, while too near a team of mules attached to a wagon in which the plaintiff was riding, it was *held*, that compensatory damages only should be given. And the only injury sustained by the plaintiff being a sprained ankle, from which with proper care he would have recovered in five or six weeks, a verdict for $1525 was regarded as excessive.

2. Negligence—*contributory—comparative.* In an action to recover damages occasioned by the negligence of the defendant, the plaintiff can not recover when he has been guilty of contributory negligence, unless his negligence is far less in degree than that of the defendant, and then his own negligence is not a bar to his recovery.

Appeal from the Circuit Court of Knox county; the Hon. Joseph Sibley, Judge, presiding.

This was an action of trespass on the case, brought by James B. Dunn, against the Chicago, Burlington & Quincy railroad company, to recover for injuries to the person of the plaintiff caused by the alleged negligence of the servants of the defendants. It appears from the record, that while the plaintiff, with one Marvin R. Dunn, was riding in a wagon, drawn by a pair of mules, across the track of defendants' road, the mules became greatly frightened at the sounding of the whistle on defendants' engine, which was standing at the side of the crossing, and while thus frightened and in consequence thereof, turned suddenly around, overturned the wagon, and threw the plaintiff violently upon the ground, spraining his ankle. The jury returned a verdict for $1525, and judgment was entered thereon. To reverse this judgment defendants appealed.

Messrs. Lanphere & Price and Mr. A. M. Craig, for the appellants.

Mr. J. Douglas and Messrs. Kitchell & Arnold, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

Upon the question whether the employees of the railway company were really guilty of carelessness, the testimony was conflicting, and the verdict can not be set aside as unsustained by the evidence. But we reverse the judgment because of the excessive damages. In any view that may be taken of the

case, it is one for compensatory and not punitive, damages, the only fault chargeable upon the appellants, being that the engineer blew his whistle when too near the mules, although at a time and place when and where it was customary to blow it. The mules and wagon did not belong to the plaintiff, and the only injury to him was a sprained ankle. The physicians testify that he would have recovered from the sprain in five or six weeks, if he had taken proper care of his ankle, but this he did not do. The day after the accident he went from the house where he lived to Warren county, in a buggy, a distance of six miles, returning the same day, and when advised to bandage his ankle, said he could not keep quiet as he had work to do. The consequence was his ankle swelled, and he went on crutches for three or four weeks, but he testifies he was not long confined to the house. He also testified, that at the time of the trial it had ceased to trouble him unless he wore coarse boots or walked a good deal. There is no evidence that he ever took any care of his ankle, except to buy for use upon it one or two bottles of liniment. It is evident that the injury was at no time serious, and would have been very slight if he had taken proper care.

For this injury the jury gave him $1525 damages. There is no evidence of severe bodily pain, or of any facts upon which this verdict could be based, except those we have above set forth.

We have had occasion, in the case of the *Illinois Central Railroad* v. *Welch*, *ante*, 183, to make some comments upon the unreasoning prejudice which so often prompts juries to give verdicts against railway corporations, for damages which they would never think of assessing in similar suits between individuals, and we will not repeat what we there said. This verdict is wholly unreasonable and must be set aside.

It is unnecessary to discuss the instructions. Taken together, they gave the law to the jury with substantial accuracy, but those given for the plaintiff are carelessly drawn, and on the

next trial should be prepared with greater accuracy. The conclusion of the sixth instruction might be construed as implying that if the plaintiff and defendant were both careless, and equally careless, in causing the injury, the plaintiff might nevertheless recover. This was no doubt the result of inadvertence, as this court has so often said that the plaintiff can not recover where he has been guilty of contributory negligence, unless his negligence is far less in degree than that of the defendant, and then his own negligence is not a bar to his recovery.

Judgment reversed and the cause remanded.

Judgment reversed.

BOARD OF SUPERVISORS OF HENRY COUNTY

v.

THE WINNEBAGO SWAMP DRAINAGE COMPANY *et al.*

1. LIMITATIONS—*how availed of.* The bar of the statute of limitations may be availed of, in chancery, by demurrer, where it appears from the face of the bill.

2. SAME—*in equity.* Equity follows the law in the application of the statute of limitations. So, where a remedy at law, in case one existed, would not be barred, neither would the remedy in chancery, in respect to the same contract.

3. SPECIFIC PERFORMANCE—*where a part of the conditions of a contract remain unperformed.* Where parties enter into a written agreement to convey by deed, one to the other, certain pieces of real estate for and in consideration of the grantee's execution of certain promissory notes, and of certain conditions to be by him afterwards performed, the giving of the deed and the execution of the notes, in pursuance of the agreement, does not destroy or render invalid the remaining portions of the agreement, but the same are still binding and may be enforced. They are not like conversations which precede a written agreement, and are supposed to have merged in the same or been abandoned.

Syllabus.

4. AGENCY—*ratification by the principal.* Where an agent was empowered, originally, to make a contract for the conveyance of lands of the principal, upon certain conditions, and, in making the contract, the agent added other conditions favorable to his principal, not mentioned in his original authority, and which were afterwards, and before the conveyance of the lands, approved by the principal, who directed the agent to convey according to the conditions so expressed: *Held*, that such action of the principal was a ratification of the act of the agent, in respect to such new conditions, and their binding effect upon the other party to the contract could not be questioned for the want of authority in the agent to insert them.

5. SAME—*when a party is estopped to deny agent's authority.* And the party to whom the lands were to be conveyed under such agreement, having acceded to the new conditions by entering into the agreement containing them, and accepting the deed in pursuance thereof, would be estopped to deny the authority of the agent in respect thereto.

6. TRUST—*when it arises in respect to swamp and overflowed lands.* Where swamp and overflowed lands, granted by the general government to the State, and by the State to the several counties, are conveyed by a county to an incorporated company, on the condition that the grantees shall drain the lands, the latter take the lands burdened with the trust arising under such condition, and a court of equity may enforce its execution.

7. SAME—*executing a trust cy pres.* The court of chancery will, in a class of public charities and trusts, rather than permit the trust to fail, and in furtherance of the object contemplated in creating the trust, devise a plan for its execution, in the absence of any mode being prescribed by the party declaring the trust.

8. But such jurisdiction will not be exercised in all cases; it is only when the trust can be executed by the employment of the ordinary agencies to which the court can readily and practically resort, that it will undertake to execute the trust *cy pres.*

9. So, where a board of supervisors of a county conveyed the swamp lands of the county, one of the conditions of the conveyance being, that the grantee should drain the lands, so far as the same might be practicable, notwithstanding the vagueness and uncertainty as to the mode in which the grantee should execute the trust arising from such condition, a court of chancery would not devise a plan for executing the trust, by reason of the impracticability of the court employing the necessary agencies required in the accomplishment of the object of the trust.

10. SAME—*failure of trustee to execute the trust—rescission.* But in such case, the court will not permit the trust fund to be wasted and misapplied. The trust remaining unexecuted by the grantees, and they having sold a portion of the lands, and divided the residue among themselves, the court will take the trust in charge and restore the fund to the former trustees, the

county authorities, to be by them applied in the execution of the trust. The grantees having violated their contract in respect to the trust, it should be rescinded, and they required to account for the fund.

11. CONSIDERATION—*mutuality.* Where a county conveys its swamp and overflowed lands, for a certain sum of money agreed to be paid by the grantee, and upon the condition that he shall drain and reclaim the lands conveyed, there is such mutuality of consideration, that the county may enforce the performance of the condition respecting the drainage of the lands.

12. PARTIES—*in chancery.* Where the board of supervisors of a county entered into a contract to convey the swamp and overflowed lands belonging to the county, for a certain sum of money, and upon condition the grantees should drain the lands conveyed, such board may maintain a bill in chancery against the grantees, to assert and enforce the rights of the county concerning the subject of such condition, and the trust arising in respect thereto.

13. And although such grantees may have sold and conveyed a portion of the lands before suit brought, yet the original grantees, or their representatives, are the only necessary parties defendant to such a bill.

APPEAL from the Circuit Court of Henry county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

The opinion sufficiently states the case.

Messrs. SHAW & CRAWFORD, for the appellants.

Messrs. BENNETT & VEEDER, Mr. GEORGE E. WAIT and Mr. IRA O. WILKINSON, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit in chancery, brought by appellants, in the Henry circuit court, against appellees, for a specific performance of a contract entered into by the parties for the drainage of the swamp and overflowed lands in Henry county. The bill alleges that the general assembly, by an act adopted on the fourteenth day of February, 1855, incorporated appellees as The Winnebago Swamp Drainage Company, with the powers necessary to accomplish the purposes of their creation;

that the general assembly, having given the lands to Henry county, and to reclaim the lands, and to add to the salubrity of the adjacent country, the county entered into an agreement with the company, by which the latter undertook, by a proper system of drainage, to reclaim the lands; that, for the purpose of carrying out the arrangement, the county conveyed the lands to the company, who agreed to perform the labor and pay the county the sum of $20,000, to be paid in ten years, with interest; that the company had failed to construct the work, but had divided the lands among the members of the corporation, without the members paying any consideration for the same; that a portion of the members of the corporation had died, but that their share had descended to their children and heirs; that the stockholders had sold a part of the lands.

The bill prays that defendants be required to perform their agreement by draining the lands, and on their failing to do so, that such lands as have not passed into the hands of innocent purchasers be sold, and the proceeds be placed in the hands of a receiver, to be by him paid to the drainage commissioners of the several towns in which the lands are situated.

Appellees demurred to the bill, and assign as causes, that the relief sought is barred by the statute of limitations; that appellants sold the lands to appellees for general revenue purposes, and thereby parted with all control over the subject of their drainage; that appellants can, in no event, maintain the suit; that specific performance can not be decreed under the contract, for the want of mutuality between the parties, and because the contract is too vague, uncertain and indefinite to be enforced; that to grant the prayer of the bill, the court would have to make a contract for the parties, and for want of proper parties. The court below sustained the demurrer, and rendered a decree dismissing the bill, and the record is brought to this court to reverse that decree.

We shall consider the grounds of demurrer in the order in which they are specified. It, at one time, seems to have been held that the bar of the statute of limitations could not be insisted upon by demurrer, but must be interposed by way of plea, but the doctrine is now settled that, if it appears on the face of the bill, and no circumstances are alleged to take the case out of the statute, the bill will be obnoxious to a demurrer. Story's Eq. Pl. sec. 503, 751. It appears, from the allegations of the bill, the contract was entered into in March, 1856. From an examination of the agreement, it appears no time was fixed within which appellees were to complete the drainage of the lands referred to in the agreement. But, even if it was, there has not been such a lapse of time as would bar an action at law on the written agreement. A suit could be instituted on it at any time within sixteen years after a default had occurred. A suit in equity will always lie when an action at law would not be barred. Equity follows the law in regard to the application of the statute.

It is next urged, the county sold the lands for general revenue purposes, and thereby lost all control over their drainage, or right to insist upon appellees proceeding to drain the same. It appears the parties entered into an agreement on the eighth of March, 1856, by which the county agreed to convey the lands to appellees, and they agreed to execute their notes for $20,000, secured by a mortgage on the lands, and to drain the lands, so far as the same might be practicable. This was the consideration of the purchase. In pursuance of the agreement, the county conveyed the lands and the deed was accepted. The county, no doubt, sold the lands at a reduced price in consideration that the drainage should be made. There was, no doubt, a large deduction made for that reason. It may have been, and we can well presume it was, the controlling consideration for the conveyance.

Here was a large body of lands which were swamp and overflowed, and until reclaimed not only useless, but calculated to produce disease. By reclaiming them, the health of that

county would, no doubt, be improved, and the land become productive, and not only the health, but the prosperity of the county advanced. And here was a large trust fund, in the hands of the county, to be managed by its authorities for this or other purposes. We can see that they would be anxious to accomplish the purpose, and at the same time increase the county revenues. We must conclude that appellees believed the lands were worth the cost of drainage and $20,000, and that they so regarded it, is manifest from their agreement with the county. The agreement to drain these lands entered as fully into and formed a portion of the consideration for the conveyance as did the money they agreed to pay. The agreement renders this so manifest that there is no possible escape from the conclusion. The parties have, in terms, said it was, and reasoning can not render it plainer or more conclusive. This is not like conversations which precede a written agreement, and are supposed to have merged in the agreement, or been abandoned, and hence can not be shown to vary or contradict the writing. In this case, the agreement was written and consummated by the parties, and the execution of the deed and notes was in pursuance of, and not to the destruction of the agreement. After they were executed, the other portions of the agreement were neither fulfilled nor destroyed. They remained in full force and binding as before.

But it is said that the agent inserted that part of the agreement without authority, he not being required, by the order appointing him to negotiate the contract. He was appointed by, and acting for the county as its agent, and there is no pretense that appellees were incapable of thus binding themselves to its performance, and they voluntarily entered into the agreement. After it was made, the agent reported the agreement to the board of supervisors, and they then authorized him to convey upon the terms of the agreement. Thus they fully ratified the agreement, and whether the terms of the agreement had been in the contemplation of the board previous to that time, did not matter, as they then ratified and

confirmed the terms of the agreement. And under the order of the board the agent could alone convey on those terms. And the presumption is, that appellees knew of the terms and conditions upon which he was authorized to convey, as his authority was a matter of record, and they accepted the deed upon those terms. But whether they did in fact, they knew that it was under and in strict pursuance to their agreement, and they are estopped from denying his authority, and must be held to have accepted the deed upon those terms and conditions

This property which the county held as a trust, then, passed to appellees, burdened with the charge of their drainage, and to that extent it was a trust fund. And it is charged that appellees have failed to relieve it of the charge they, by their agreement deliberately entered into, have placed it under. They have assumed the trust and have failed to perform it. The board of supervisors, being parties to the contract, and the original trustees, then, are the proper, and it may be the only, persons who may call on a court to have the trust executed or for an account of the trust fund. It hence follows, if appellants have otherwise shown equity, they have a right to have this trust properly administered. The board having the right to apply these lands to drainage or other purposes, could have executed the trust themselves through agents, and they could have applied all of the fund for drainage, or only a portion of it, either by themselves or through other trustees, whom they could select, and to whom they could convey the title. They have pursued the latter course, and have the right to see that the trust is properly executed.

What has been said disposes of the objection, that the board of supervisors can not maintain this suit. In fact, that objection is contained in the preceding objection.

It is next urged, that a specific performance can not be decreed because there is not mutuality of consideration. We see no force in this objection. There seems to have been mutuality of consideration, ample and sufficient. On the part

of appellees, they received from the county a large quantity of lands which they say, by their agreement, are worth $20,000, and the expense of draining them, so far as is practicable. On the part of the county, it was to receive that sum of money and the drainage of these lands. The board of supervisors are the agents of the county, and as such attending to its affairs and performing the duties imposed upon them, to promote the welfare of the inhabitants of that political division. And holding these lands as a trust fund for the county, they had a right to apply all or a portion of the value thereof to the drainage of the same. And they had the same right to have the drainage performed by the application of the lands or a part of the proceeds, or to sell the lands and apply the proceeds arising from such sale.

We now come to the consideration of the question, whether the agreement is too vague and uncertain to admit of its specific performance. Counsel for appellants seem to concede that it is, but urge that as it is a public trust fund, the court should execute the trust *cy pres*; that the court, in such cases, rather than permit the trust to fail, will, in furtherance of the object contemplated by the parties, in creating the trust, devise a plan for executing the trust which the parties have failed to adopt and specify in declaring the trust. That the court has such a jurisdiction in a class of public charities and trusts, seems to be undeniable; but it does not follow that the court can and will do so in all cases. It is only where the trust can be executed by the employment of the ordinary agencies to which the court can readily and practicably resort. But it can not do so in numerous cases, from the fact that courts can not use the agencies indispensable to their accomplishment, or if employed would not, in all reasonable probability, accomplish the end.

In this case the court is urged to adopt and execute a plan *cy pres*. And to do so, it is obvious that the court, from the very nature of the trust, would be compelled to employ a corps of

engineers, to survey and report plans, specifications and estimates of cost of construction. It would then have to choose a plan, employ agents and laborers, or let the contract, by biddings, to contractors for the performance of the work; then employ agents, engineers and superintendents to carry out the plan. In other words, the court would have to organize all of the necessary means for an extensive internal improvement. Such would not be adapted to the organization of a court of chancery, and could never be practically carried into effect. To do so with any reasonable hope of success, the court would have to remain in daily session during the progress of the work, for the purpose of making orders and the change of plans and other necessary directions in the prosecution of the work. Such a course would be impracticable. We are aware of no precedent for such a course in this class of cases, and could one be referred to, we would hesitate to follow it on account of the complications and impracticable character of such a course.

But being a trust fund, which remains unappropriated and the trust unexecuted, a court of chancery will so far take it in charge as to prevent it from being wasted or misapplied, and will restore it to the former trustees, to be by them applied to the execution of the trust. In this case the legislature entrusted the use of this fund to the board of supervisors, to be used for the purpose of drainage or otherwise. That body is better adapted to the execution of the trust, than is a court of chancery, and all that equity can do is to restore the fund, and permit the board of supervisors to use and appropriate the fund as was the design of the legislature when the title was vested in the county.

Appellees have received this large fund; have paid but a part of the consideration, and have failed to execute the trust that was reposed, as the remainder of the consideration agreed to be given for the land. They then have trust funds, for which they have failed to render the services agreed to be performed for a large portion of the fund. Having failed to

perform their agreement, and broken their contract, it should be rescinded, and they required to account for the fund which they have received, and for which they have failed to render the consideration. They have no pretense of right to hold this fund, according to the allegations of the bill, which the demurrer admits to be true.

The objection that the court can not grant the relief asked, without making a contract for the parties, has been sufficiently considered in what we have already said, and its further discussion is unnecessary.

As to the objection that there is a want of proper parties, we fail to see the force of the objection. The original grantees, or their representatives, are made parties, and none other are necessary to a decree doing complete justice between the parties in interest.

The drainage company having received the lands, as we have seen, for a money consideration, and upon an agreement to drain them, and having permitted a number of years to elapse without performance on their part, and they having divided the lands among members of the company years since, they have thus practically put it out of their power to perform their contract, or at least shown no disposition to keep their agreement. The court may, therefore, treat the contract as repudiated by the drainage company, and require it, or the members who composed it, and who have received and appropriated the fund, to account to the county for the property itself, if not sold and disposed of to purchasers; and, when such sales have been made, to account for the money received thereon, and require each member to reconvey such portion of the lands as he may hold. But, in stating the account, appellees should be allowed for all moneys paid to the county on the contract, and for all money expended for the purposes of drainage under the agreement. If, on the coming in of the answer and the hearing of the proof, the allegations of the bill should be proved, then appellants would be entitled to the relief indicated in this opinion.

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

Decree reversed.

THE COMMERCIAL INSURANCE COMPANY OF CHICAGO

v.

LEHMAN HUCKBERGER *et al.*

1. INSURANCE—*preliminary statement of loss—whether conclusive.* It has been held by this court that, where a party, in making an account of his loss under an insurance, to be submitted with the preliminary proofs, omits any article therefrom, even by inadvertence, he will be concluded thereby, if the company settles the loss promptly according to the account exhibited; but if the assured is compelled to resort to his action to obtain justice, he may prove the loss of any article inadvertently omitted from his account.

2. SAME—*statement of assured under oath, respecting loss—whether conclusive.* Where the assured, besides the preliminary proofs, is required to submit to an examination under oath, touching the condition of his affairs as connected with the insurance, and upon such examination the company withhold his books of account from him, so that he must speak from memory alone, if he make a mistake in his statement he will not be concluded thereby, but it will be open to correction.

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

This was an action brought by Huckberger and others, against the Commercial Insurance Company of Chicago, to recover upon a policy of insurance upon the stock of goods of the plaintiffs. A trial resulted in a verdict and judgment for the plaintiffs. The defendants appealed.

Mr. O. B. SANSUM, for the appellants.

Messrs. STORRS & WILSON, for the appellees.

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

There is no important point of law raised on this record. It is very voluminous, but consists almost entirely of facts, which we have carefully examined. That they make a mass of testimony, more or less conflicting, is nothing more than should be expected in an insurance case, when the effort is made to establish fraudulent conduct upon the assured, and to hold that party up to the public as an incendiary. In such a case, when such an effort is made, we know of no organized body more capable of investigating and arriving at the truth, than a jury of twelve men, selected for their probity and general intelligence, and restrained by the solemn oaths they have taken from indulging in prejudice, or acting from passion, or from unworthy motives. The charge of incendiarism and of perjury was freely made by the appellants—a charge of the most serious character, every step in which the most indifferent jury would watch with the most intense and searching scrutiny. The most liberal course of examination was permitted them. Every argument was used, no doubt, to bring the minds of the jury in accord and sympathy with the defendant company, but they, on their oaths, have said the plaintiffs and their witnesses were worthy of belief, and their claim to the damages allowed them rested on a solid basis, and we cannot gainsay it. There never was, or can be, a case more especially adapted to the consideration of a jury, than this, and the court called upon to review their action must see most clearly that they have either mistaken the evidence or come to conclusions so opposed to the whole tenor of it, as to warrant the belief that passion or prejudice has swayed them, and not their own deliberate judgments. This, it is impossible for us to say.

A point is made by appellants on the modification by the court of one of appellants' instructions.

To understand the applicability of the modification, it is only necessary to advert to the fact that, besides the preliminary proofs the assured were required to furnish, they were also required to submit to an examination under oath, touching the condition of their trade, amount of stock, &c. when, at the same time, the underwriters had possession of their books, which compelled them to speak from memory, without an opportunity of refreshing their recollection by the books. The court, under this state of case, told the jury if they believed from the evidence that the plaintiffs did not make fair, honest, and true statements in this respect, and that this was done intentionally, then there was not a compliance with the terms of the policy. The point is, as appellants contend, that it makes no difference whether it was intentional or not; that the only question for the jury was, were the statements true or false? and reference is made to *Campbell* v. *Charter Oak Fire & Marine Insurance Co.* 10 Allen, 213, and to *Irving* v. *Excelsior Fire Insurance Co.* 1 Bosw. (C. P.) 507.

Both those cases refer to the condition in a policy against fire, that the assured shall deliver to the company, as a part of the preliminary proofs, a just and true account of his loss, and it was held the delivery of this account was a condition precedent to the maintenance of an action for the recovery of the loss, and that, upon the trial, the assured could not make proof of a different account; that he must be bound by the statement first made.

This court held, in the case of the *Ætna Insurance Co.* v. *Stevens*, 48 Ill. 31, that when the assured had been compelled to bring suit for the loss, he had a right to prove the value of articles, which, by mere inadvertence, had been omitted from his account submitted with the preliminary proofs. And, on reflection, we are satisfied there is justice in this. If the insurance company settle a loss promptly, according to the account exhibited, there being no pretense of fraud, the assured should be bound by it. If, however, the assured is compelled to resort to an action to obtain justice, then he should be

permitted to prove the loss of any article he may, from inadvertence, have omitted from his account. But the question in this case was not in regard to the account accompanying the preliminary proofs of loss. It arose on their examination under oath in the absence of their books of account. Common justice would demand that a mistake made under such circumstances should be open to correction.

Giving the seventh instruction for appellees—it is noted as eighth in appellant's brief—is complained of as wanting evidence on which to base it. There was evidence that Rosenfeldt and Hill were at the store acting as appraisers, and that Rosenfeldt appeared on the part of the assured, and Hill for the several companies who had taken risks in the concern. There was no proof that appellants ever consented to pay either of them for their services, yet there was sufficient shown that they were not meddling in the business without authority.

As to the jury disregarding the instructions of the court, we cannot see wherein. The only trouble is, the jury did not look at the facts with the eyes of appellants' counsel, nor were they influenced by his peculiar opinions. They did not believe that appellees' statements were contradictory in material points, and therefore did not feel justified in rejecting them. It is evident the jury gave full credence to the plaintiffs' testimony and to their witnesses, and we cannot well see why they should not have done so.

Instructions as favorable to the appellants as they had any right to ask, were given by the court. The evidence sustains the verdict, and the judgment thereon must be affirmed.

Judgment affirmed.

Syllabus. Opinion of the Court.

JOHN WAGGEMAN

v.

DANIEL J. BRACKEN.

1. CONTRACTS—*mutuality.* An article of agreement, purporting to be made between two parties, imposing mutual obligations upon them, showing upon its face it was to be executed by both parties before it would be binding on either, but only executed by one of them, can not be given as evidence to the jury for any purpose, not even against the party executing it.

2. Such a paper could have no other effect than that of a mere memorandum which could be used by the witness to refresh his memory.

3. CONTRACT—*evidence of a special contract.* Where a party makes a proposition to another in regard to building a house for the latter, the mere fact that the former commences the work with the assent of the latter, is not conclusive evidence of a special contract in respect thereto. The work may have been commenced under a *quantum meruit.*

4. INSTRUCTION—*should present the different hypotheses of the parties.* In an action where the question was, whether a special contract existed as to the subject matter of the suit, an instruction was asked, by which it was sought to tell the jury that certain things would constitute a special contract between the parties, by summing up one view of the evidence, without qualification by reference to the opposite hypothesis: *Held*, that this was properly changed, by saying that the matters enumerated would be proper to be considered in determining the question of contract.

APPEAL from the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

The opinion states the case.

Messrs. COOPER & MOSS, for the appellant.

Mr. J. S. STARR and Messrs. JOHNSON & HOPKINS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Bracken against Waggeman, to recover a balance due for building a house. The plaintiff recovered a verdict and judgment.

The point chiefly relied upon by appellant is, that the court erred in excluding from the jury a certain article of agreement, which the appellant insists was the contract under which the house was built, while the appellee claims there was no special contract. The recovery in the circuit court was upon a *quantum meruit.*

It appears that Bracken, having furnished Waggeman with certain written estimates of the different items of expense, based upon the plans and specifications, drew up a formal article of agreement, purporting to be made between Bracken, as party of the first part, and Waggeman, as party of the second part, by which Bracken was to bind himself to furnish certain materials and perform certain labor as set forth in detail in the article, and Waggeman was to undertake to pay a certain sum of money in the manner therein specified. Bracken prepared this agreement, signed it, and handed it to Waggeman, who took it and made numerous and material alterations in it, but never signed it. Bracken swears he never saw the agreement after he signed it, until Waggeman produced it at the trial. Waggeman swears, when Bracken gave him the agreement, he proposed to take it, with the plans, estimates and specifications, to the architect, and have them condensed, as he terms it, into one, to which Bracken assented, and he took them to the architect. The latter delayed preparing the papers, and he procured them again, and, having made his alterations, showed them to Bracken, who, as Waggeman testifies, assented to them. During the delay, while the papers were in the hands of the architect, Bracken commenced the house, but, as Waggeman swears, became dissatisfied, from the fear that he would lose money, and after a proposition to give up the work, and some talk about that, Waggeman testifies that he went on, "with the understanding that the estimates,

plans, &c., should govern." This is the language of the witness, and it is to be observed, he does not swear that the written article was to govern, but only the estimates and plans, unless we are to conclude that the article was comprised in the "&c." Bracken swears he was to go on and do the work for what it should be worth.

Under this evidence, we are of opinion the court did not err in refusing to let the article of agreement go to the jury. It shows upon its face that it was to be executed by both parties, and was not to bind either until executed by both. Yet it was never executed by Waggeman. There was no mutuality. If Bracken had brought suit upon this agreement, Waggeman would have successfully defended on the ground that he never executed it. Viewed even as a proposition in writing by Bracken, of the terms upon which he would do the work, and even admitting that Waggeman could have accepted it without making it mutual by executing it, which we do not admit, because inconsistent with the evident intent of the instrument, yet Waggeman did not accept it, but materially changed its terms. True, he swears Bracken assented to these changes, but the latter denies this, and Waggeman only testifies that the work went on, "with the understanding that the estimates, plans, &c. should govern, and that what I did should be deducted." This loose statement by him tends to confirm the testimony of Bracken, that the article of agreement was abandoned. The estimates were allowed to go in evidence. But it is enough to say that the instrument, on its face, shows it was not designed as a written proposition embodying the terms upon which Bracken would do the work, but as an instrument to be executed *inter partes*, each binding himself to the performance of certain obligations, and it was never executed by Waggeman.

His counsel, however, insist that, if not a contract in itself, it tended to show there was a contract, and its terms, and should therefore have gone to the jury. This position is not tenable. If it was not a contract, intended and executed by the parties

as such, it was a nullity, and had no place in the evidence. Its introduction would have tended simply to bewilder and mislead a jury. It was wholly immaterial what its provisions were, as they were not binding. If there was a special contract between these parties, it was a verbal one, and if the house was built under such verbal contract, the defendant was at liberty so to state in his testimony, and to give its terms. If he desired to do so, he could refer to this paper to refresh his memory, as he might have referred to any private memorandum made at the time by himself, and kept in his possession. But, as a distinct and independent piece of evidence, it proved nothing, and was clearly inadmissible. A contract can not be partly in writing and partly in parol, and if this paper was not a contract binding upon the parties, as it clearly was not, then it was nothing as evidence. The appellee denies there was any contract of any sort. Suppose the appellant should swear there was, and that its terms had been embodied in a memorandum made by him at the time, but not executed by the parties. Such a memorandum would have occupied the same position as this paper, and could have been used by the witness to enable him to testify as to the terms of the alleged verbal contract, but could not have gone to the jury as evidence in itself that a contract was verbally made, or as to what were its terms. The appellant in this case was not denied the privilege of stating in full the terms of the alleged verbal contract, or of referring to the written article to enable him to state them, as he might think proper. He was only denied the privilege of sending this unexecuted and mutilated paper to the jury as a piece of evidence shedding light upon the question whether there was a contract or not, and if there was, what were its terms, and in this there was no error.

Counsel for appellant take some exceptions to plaintiff's instructions, but they only announce familiar principles of law, and can not have misled the jury.

It is also objected that the defendant's fifth instruction, as drawn, was refused, but it was properly refused. It sought

to tell the jury that certain things would constitute a special contract between the parties, by summing up one view of the evidence, without qualification by reference to the opposite hypothesis. The court changed the instruction by saying, the matters enumerated would be proper for the consideration of the jury in determining the question of contract. It might, with propriety, have refused the instruction altogether, as calculated to mislead. As drawn, the instruction did not require an acceptance by defendant of plaintiff's proposition, but merely that the jury should believe the plaintiff commenced work with the assent of defendant. Until the defendant had accepted his proposition, the mere commencement of work would not be conclusive evidence of a contract. It might have been commenced under a *quantum meruit*, as plaintiff swears it was.

Judgment affirmed.

JOHN V. HESS *et al.*

v.

ARNO VOSS *et al.*

1. JURISDICTION IN CHANCERY—*in partition.* Equity has jurisdiction in case of partition. Nor does the fact, that a concurrent remedy exists at the common law, under the writ of partition, or under our statute, in the least affect such jurisdiction.

2. GUARDIAN AD LITEM—*how to be designated.* An order appointing "the clerk of the court" guardian *ad litem*, is sufficient, without designating him by his name

3. SAME—*who may prepare his answer.* In a chancery proceeding for partition of lands, where there are minor defendants, the fact that the answer of the guardian *ad litem*, the same admitting nothing and waiving nothing, but leaving complainants to prove their bill, was drafted by complainants' solicitor, can be of no avail in a proceeding to reverse the decree granting the partition.

Syllabus.

4. MASTER IN CHANCERY—*necessity of an order of reference.* It is not essential to the authority of a master to take proofs in a case, that there should be a formal order of reference entered of record. The decree of the court being based upon the master's report, and confirming the same, will be regarded as record evidence that the reference was properly made, even in the absence of a formal order to that effect.

5. SAME—*whether a decree was rendered before the master's report was made.* It appeared that the testimony of a witness, embraced in a master's report, was represented by the report to have been sworn to the day after the hearing of the same. The record failed to show any date of the filing of the report, nor did the report itself bear any date. But, upon it being objected that the report had not been made when it was confirmed by the decree, it was *held*, it would be presumed the report was made before the court took action upon it. Moreover, the decree referred to the report in such a way as to leave no other inference to be drawn.

6. INFANT DEFENDANTS—*in chancery—whether the decree must give them a day in court.* The practice in courts of chancery does not require that a day in court shall be specifically given in the decree, to an infant defendant; and it is not error that the decree fails to expressly reserve his rights, as whether or not a day in court is given a minor, he may file a bill to impeach a decree procured by fraud, or for error appearing on its face, and is not driven to a bill of review or a rehearing.

7. PARTITION—*proof of notice of sale—whether it must appear of record.* It has been held, in a proceeding for partition under the statute, where there was an order of sale, the commissioner appointed to execute the decree must file a copy of the notice of the sale, with an affidavit that it was posted, or if printed, a copy with a certificate of the publisher.

8. But where the partition was sought in chancery, and there was a decree of sale, the master who executed the decree reported that he had given the required notice, and furnished a copy with his report, and it was held not to be essential, as the proceeding was in chancery, that the record should show the notice with an affidavit or publisher's certificate.

9. PURCHASER—*of an attorney as a purchaser.* There is no rule of law which prohibits an attorney in a cause from becoming a purchaser at the master's sale under the decree therein, even of land belonging to his client; though in such case his conduct will be closely scrutinized, and if he has not acted with strict fairness the purchase will be held to have been made for his client.

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.

Mr. A. E. WOLCOTT, for the appellants.

Messrs. MOORE & CAULFIELD, for the appellees, Voss and Ostlangenberg, and Messrs. RUNYON & AVERY, for the apellee, Peter Munn.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears from this record, that in April, 1851, Frederick Vogt and Christiana, his wife, filed their bill in equity against John V., John C. and Martha Hess, minors, setting forth that petitioners were of lawful age, and that Christiana had a legal title to and was seized in fee of one undivided fourth part of lot 145, with its improvements, in Butterfield's addition to Chicago. That Christiana Vogt, John V., John C. and Martha Hess were seized in fee as coparceners, of the lot, and prayed a partition of the same. The clerk of the court was appointed guardian *ad litem* for the minor defendants. He answered for them, and submitted their rights to the protection of the court.

On the twenty-ninth of May, 1851, the master in chancery reported, the case having been referred to him to take and report the evidence, which he embodied in his report, and from which it appears that the allegations of the petition were proved, and the evidence shows that the property was not susceptible of division and was worth about $200, at that time, and the master reported that it could not be divided, and recommended a sale. The report was approved and a hearing had, and a decree rendered finding that the parties were the owners as set forth in the bill, and the property was ordered to be sold in the manner therein specified, and the proceeds of the sale were ordered to be distributed among the parties.

The master subsequently reported that he sold the premises for $185, to Arno Voss, partly for cash and partly on time, in installments. That he had made a deed to the property and had made a distribution of the portion received, in the mode pointed out by the decree. The report was approved, and the cause stricken from the docket.

The bill in this case was filed, reciting the former proceedings, and admits the general allegations of the former bill to be true, but alleges that the other coparceners aided Christiana in paying their mother's funeral expenses, and her debts; that Christiana and her husband had occupied the property from February until in October, of 1851; that since that time, Voss has been in the occupancy of the property by his tenants, and received the rents and profits; that Christiana died in August, 1852, leaving a child, the only issue of the marriage, which also died a few days later, leaving its father only heir to its mother's property; that he had released his interest in the property to complainants; that Voss has incumbered the property by mortgages to different persons; that the property when sold was worth $800, and the rental value since has been from $50 to $100, a year; that there was no just reason for selling the premises, but the same could readily have been partitioned among the owners; that Voss, who purchased the premises at the master's sale, was the solicitor who conducted the proceedings for the partition and sale; that persons were deterred from entering into competition for the property, owing to an apprehension that the sale was illegal, and that Voss was offered $400, the day after the purchase, for the property, if he would warrant the title, but he declined.

The bill charges that Voss fraudulently procured the decree and sale, and so became the purchaser for less than one-fourth of its value; that the decree is erroneous and should be reversed and set aside; and they assign for errors, that by the bill it appeared that the relief was adequate at law, and they should have been left to pursue their statutory remedy, and equity should not have taken jurisdiction; that no certain

person was appointed guardian *ad litem* for the defendants; that he was named simply as "The Clerk of the court;" that no answer was filed by defendants or their guardian *ad litem;* that the master in chancery was not authorized to take testimony in the case; that his report was approved by the court before it was in fact made and filed; that the decree of the court does not give the minors a day in court, and in decreeing the costs to be equally apportioned among the parties, and in ordering the master to pay Vogt $24, by him expended on the lot; that Mannier, the master who succeeded Skinner, sold the lot; that the court approved Mannier's report.

The bill prays that the former decree be reversed, and complainants be relieved in the premises according to equity and good conscience; that the deeds and incumbrances given on the property, be, as to complainants and the premises, declared void, given up and canceled, and the land released therefrom; and for an account of the rents and profits, and for other and further relief.

Arno Voss and Ida Miller filed a demurrer to the bill, which was overruled, and Voss thereupon filed an answer, to which a replication was filed. Ostlangenberg filed an answer and a cross bill setting up his mortgage on the premises for $1110, with interest, and that Muno, Phillips, and C. W. T. Miller also claim to hold mortgages on the premises; Muno and complainants answered the cross bill, and replications were filed. A hearing was had on the bill and answer, the cross bill, answers thereto, and replications, exhibits and proofs, when the court below dismissed the original bill, also the cross bill, without prejudice. The complainants have appealed, and brought the record to this court, and assigned for error, that the court refused to reverse the former decree and proceedings in the partition suit, and in dismissing the bill in this case.

The law is firmly established that equity has jurisdiction in cases of partition. It has been recognized and acted upon in courts of chancery from an early period in the jurisprudence of that tribunal. Nor does the fact that a concurrent

remedy existed at the common law, under the writ of partition or under our statute, in the least affect such jurisdiction. It is but like other cases of concurrent jurisdiction between the courts, where litigants have a choice of the forum in which they will proceed. Because a partition could have been had under the statute in this case, it does not follow that equity was deprived of its jurisdiction.

The fact that the court below in the original case appointed "the clerk of the court" guardian *ad litem*, without naming him, was sufficient. The court knew who occupied that office, and when he filed the answer signed by his individual name, the court knew that the answer was made by the person intended by the order. This objection is untenable, and we are unable to see that there could have possibly resulted the slightest injury to the minors by the omission of his name in the order appointing him. He was as certainly known by the designation employed as if his name had been inserted. It therefore follows, that there was an answer filed for the minor defendants, and by their regularly appointed guardian *ad litem*. Nor did it matter in the least that the answer was drafted by complainants' solicitor, as it left them to prove their bill. It admitted nothing and waived nothing.

While it might be, and no doubt is, more strictly according to the practice of the court, that an order of reference to the master should be made, still it is not necessarily a fatal error when a formal order fails to appear in the record. While each order made by the court should appear, it is not indispensable that it should be entered up in form. It may appear in recitals or by reference in other portions of the record. *Tibbs* v. *Allen*, 27 Ill. 119. In this case the master reports that the case was referred to him, and the court in the final decree confirmed the report, and refers to the evidence it contained and based the decree upon this report.

This we regard as record evidence that the case was properly referred to him to hear and report the evidence. Had no reference been made to his report by the subsequent action

of the court, then a very different question would have been presented. It is, from the decree, perfectly apparent that he had been duly authorized to hear and report the evidence. The order no doubt was never spread upon the record and has been lost. The court would not have approved the report if it had been without authority.

Another error assigned on the decree is, that the master's report was not made when it was confirmed by the final decree. It appears that the hearing was had on the twenty-eighth day of May, and one of the witnesses whose deposition was reported, was sworn to it on the next day. We have looked into the record, but fail to find any date of the filing of the master's report, nor is it even dated. We must therefore conclude that the report was on file and before the court on the hearing. In fact, the decree refers to it in such a manner that no other inference can be indulged. After making the report, we presume that it may have been supposed that it was necessary that the jurat should be attached, or it may be that the clerk has entered the decree under a prior and wrong date. The court omitted to sign and date the decree, which is a practice that is highly desirable, as it frequently relieves from much uncertainty and frequently prevents unnecessary expense. But we find, from the decree, such direct reference to this report, that we can not but believe it was before the court, and if so it was acted upon, and it was not material what date it might bear. The court had accomplished the object of the reference by obtaining evidence upon which to act, and had procured it in the regular course and in proper form.

The decree rendered by the court was warranted by the master's report. Nor does the practice require that the infant defendants shall have a day in court given specifically in the decree. This was not error, as this court has repeatedly held that whether the decree gives a day in court or not, a minor may file a bill to impeach a decree procured by fraud, or for error appearing upon the face of the decree. *Kuchenbeiser* v. *Beckert*, 41 Ill. 172; *Loyd* v. *Malone*, 23 Ill. 43. In this latter case

the authorities are reviewed, and it is held that an infant may file such a bill to impeach a decree for fraud or error apparent on the decree, and is not driven to a bill of review or a rehearing. We perceive no reason for overruling or modifying the rule there announced. When other rights have attached since the rendition of the decree sought to be impeached, it might be that such rights would be protected precisely as they would under a reversal on error.

It is urged that the court erred in approving the sale made by the master, for want of proof of proper notice of the sale. In this case the master reported that he had given the required notice, and furnished a copy with his report, which appears to conform to the decree. In *Tibbs* v. *Allen*, 29 Ill. 535, it was said that the commissioners should have filed a copy of the notice, with an affidavit that it was posted, or if printed, a copy, with a certificate of the publisher. That case, it will be remembered, was a proceeding under the statute, and the decree was executed by the commissioners appointed by the court, while in this case the proceeding was in chancery, and the decree was executed by the master, one of the officers of the court, and no reason is perceived why a different rule should govern in this, than ordinary cases in chancery. A decree would not ordinarily be reversed because the record did not show the notice, with an affidavit or publisher's certificate. We do not therefore think this was an error requiring a reversal.

It is urged that the court erred in decreeing that out of the proceeds Vogt be paid $24, for money expended on the land. The decree states that this was proved before and reported by the master. Upon examining his report we find that it was proved that his wife had paid $20 on the purchase, after her mother's death, and this must be the sum referred to in the decree. It is true, the two amounts do not exactly correspond, but as this is an original bill, we do not feel that the rules of equity require that we should reverse the decree for so slight an error, when it may be that a considerable portion of the four

dollars allowed was for interest; but if not, the amount is too small to require a reversal.

We have been considering the case simply on the record of the original proceeding. But when we come to examine the evidence in the case, we find that Vogt placed improvements on the premises, which would exceed the four dollars erroneously decreed to him, even had he been charged with rents. When a minor files a bill to impeach a decree for fraud, it must be sustained by satisfactory evidence; it must clearly appear that wrong and injustice has been done; that fraud has entered into and produced the result. In this case it appears that the lot was remote from the settled portions of the city; that such property was used for gardening purposes, and that it was of little value. Smith, who appears to have been well informed, testified before the master, that it was not worth more than two hundred dollars; others place its value at as high as six hundred. But after the lapse of fifteen or twenty years it is exceedingly difficult to ascertain the value of the property at the time, especially in a city of the unprecedented growth of Chicago.

None of these witnesses speak of the sale of property similarly situated; and the fact that it brought but $185, one-fourth in hand, and the balance in equal payments, in six, nine and twelve months, is a strong circumstance to rebut the inference of a sacrifice; and the evidence seems to show that the master was in no haste to strike it off, as he waited a considerable time for an advance on the last bid, and this too, in the presence of a number of persons who had attended the sale. It is true, Vogt, at the first sale, bid the property off at $300, but gave it up because he was unable to meet the payments, as he swears. If this property was worth six hundred, or even four hundred dollars, it would seem that he would have found no difficulty in finding some one who would have paid him something for his bargain. Again, we find no one who was willing to have paid more or desired to purchase, even if doubts whether the title would be good had not prevailed;

while the property was no doubt low, still we can not say that it was sacrificed.

There is no rule of law which prohibits an attorney from becoming a purchaser at a master's sale, even of land owned by his client, but in such cases the attorney must act in good faith. On such a purchase the conduct of the attorney will be closely scrutinized, and if he has not acted with strict fairness his purchase will be held to have been made for his client. In this case Voss became the purchaser. He swears the sale had commenced when he arrived at the place of sale, and there had then been bid but $150; that he thereupon bid $185, simply to prevent it from being sacrificed, but no one advanced on his bid, although at his request the offering was continued for a considerable time. There is no evidence in the record that contradicts or impeaches this evidence, and we must, unimpeached, regard it as true. We, from this, or from all of the evidence in the case, can see no fraud; that, in view of the great rise in this kind of property, it may be a misfortune of the minors that their property was sold, but the misfortune arises from want of foresight, common to the great mass of men, who could not have seen the future growth of the city. But that is no reason for affording the relief sought. After a careful examination of this record we fail to find any such error as requires us to reverse the decree of the court below, and it must be affirmed.

Decree affirmed.

CITY OF CHICAGO
v.
ROBERT M. HOBSON *et al.*

CITY ORDINANCE—*in relation to inspection of fish—construction thereof.* A city ordinance, requiring that all fresh water fish in packages, brought into the city for sale, shall, before being sold, be inspected and branded, and imposing a penalty for its violation, does not render a person liable to the penalty for selling such fish in packages not inspected and branded, when the same are made up from other packages that have been duly inspected and branded.

APPEAL from the Recorder's Court of the city of Chicago; the Hon. WILLIAM K. MCALLISTER, Judge, presiding.

The opinion states the case.

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

Messrs. SLEEPER, WHITON & DURHAM, for the appellees.

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

This action was brought before a police justice of the city of Chicago, to recover a penalty for the violation of one of the ordinances of that city, entitled, "Inspection of Fish." A recovery was had before the justice, which, on appeal to the recorder's court, was reversed, and a judgment rendered for the defendants.

The following is the section on which the action was brought:

"SECTION 5. Any and all persons bringing or causing to be brought, to the city of Chicago, or receiving on consignment or otherwise, for the purpose of sale, any fresh water fish in packages, shall have the same duly inspected by the fish

inspector of the city of Chicago before such fish shall be sold or in any way disposed of; and it shall be the duty of every person having such fish in possession for the purpose of selling or dealing in the same, and of every consignee having fish on consignment, before the said fish shall be sold or in any way disposed of, to give notice to the inspector, and have such fish duly inspected and branded; and for this purpose such person shall arrange the packages in a convenient manner, and have them in a suitable place.

"Any person or persons violating any of the provisions of this section, shall be fined in a sum not to exceed twenty-five dollars for every barrel or other package of fish so sold without such inspection."

The charter of the city provides, among other things, as follows:

"SECTION 10. It shall be the duty of the fish inspector to inspect all pickled or salted fresh water fish sold or received for sale or on consignment in the city of Chicago. Any person or persons bringing or causing to be brought to the city of Chicago for the purpose of sale any fresh water fish, shall have the same duly inspected by the said inspector before such fish shall be sold, or in any way disposed of; and it shall be the duty of every person having such fish in his possession, for the purpose of selling or dealing in the same, and of every consignee having fish on consignment, before the said fish shall be sold or in anywise disposed of, to give notice to the inspector, and have such fish duly inspected and branded; and for this purpose, such person shall arrange the packages in a convenient manner, and have them in some suitable place.

"It shall be the duty of the inspector, on due application of any person or persons having such fish in possession, to repair to the place of deposit of such fish, if the same shall be within the limits of the city of Chicago, and inspect the same with

as little delay as possible. The said inspector shall procure sealed weights, and carefully weigh all fish offered for inspection; and to entitle said inspector to grant a certificate of due inspection, or to brand the packages as duly inspected, he shall first find that the contents and weights of the several packages are as follows, viz: each barrel shall contain 200 lbs.; each half barrel shall contain 100 lbs.; each quarter barrel shall contain 50 lbs., and each eighth barrel shall contain 25 lbs. Such inspector shall, also, on branding any package of fish, plainly and distinctly mark on the head of each package, in some indelible manner, the kind, quantity and quality of fish contained in each package, respectively, together with his name, and the year and month in which the same shall have been inspected."

The facts were these: The defendants, on the twenty-second day of July, 1869, sold to a purchaser five packages of white fish, of fifteen pounds each, and five packages of trout of the same. They were branded with the defendants' brand, as packed No. 1 white fish—No. 1 trout, and were of that quality. The packages had no fish inspector's brand upon them. They were, originally, in half barrels, containing one hundred pounds; had been inspected by the fish inspector of Chicago, and each package, or half barrel, had his inspection brand upon it, showing the quality and quantity, and the month and year in which he had inspected them. The defendants broke these packages, or half barrels, for the purpose of packing them into fifteen pound packages, and having them arranged in such packages, in a convenient manner and in a suitable place, they applied to the fish inspector to inspect them and brand them, which he refused to do, on the ground they did not contain twenty-five pounds each. This was before the sale, as above stated, and were the same fish defendants had requested the inspector to brand.

The question is, were the defendants liable to this penalty?

The case has very much the appearance of being gotten up for the benefit of fish inspectors, and with speculative views.

Without going into the consideration of the various points made by appellant's counsel, we deem it sufficient to advert to the terms of the ordinance itself. By that, it is very clear the only inspection demanded is of barrels, half barrels, quarter barrels and eighth barrels, the latter of a weight not less than twenty-five pounds. Of such packages an inspection is demanded before the fish can be sold.

This demand of the ordinance had been complied with before the fish in question were sold. It would be hard, indeed, upon a retailer of this article, after the law had been observed, and his package branded by the inspector, that he should not be at liberty to break it up into smaller packages for the accommodation of his trade.

The inspector was called upon to inspect the packages when arranged into packages of fifteen pounds, which he declined to do, on the ground that they contained less than twenty-five pounds. In this he pursued the ordinance.

The defendants violated no law in disposing of the packages. The judgment of the court below must be affirmed.

Judgment affirmed.

ELIAS RAY

v.

GEORGE W. HAINES.

MINOR—*not bound by his contract.* Where a minor contracted to work nine months, but worked one month and a half, and quit, *it was held*, he was not bound by his contract, and could recover from his employer the value of the services rendered.

APPEAL from the Circuit Court of Woodford county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The opinion sufficiently states the case.

Messrs. INGERSOLL & MCCUNE, for the appellant.

Mr. W. G. RANDALL and Messrs. BANGS & SHAW, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

In this case a minor had contracted to work for the defendant nine months, but left after working six weeks. Being a minor, his contract was not obligatory upon him, and he was entitled to recover from his employer the value of the services rendered. This value the court inferred from the amount admitted by the defendant to have been due the plaintiff when he left, as wages, and we are not inclined to reverse because the proof was not more positive.

Judgment affirmed.

WILLIAM PHELAN *et al.*

v.

SAMUEL L. ANDREWS *et al.*

1. VARIANCE—*between declaration and contract in suit for breach of warranty.* In a suit for breach of warranty, where the declaration sets out the contract only in substance, and not in *hæc verba*, a variance, to be fatal, between the contract, as declared on, and the one offered in evidence, must be in some material matter.

2. In a suit to recover damages for an alleged breach of warranty, in the manufacture of two steam boilers, the declaration alleged they "were

intended for driving a grist mill, at Annawa, in the county of Henry, and State of Illinois," while the contract was silent as to their purpose, or place where they were to be used: *Held*, there being no averment that the contract stated they were to be so used, and the declaration only purporting to set out the contract in substance, this was not a variance.

3. Nor is there any substantial difference between the averment that the boilers "should be built and manufactured in a first class manner," and that "the work should be done in a first class manner."

4. SAME—*implied warranty.* So, where the declaration alleged that, "in consideration of the manufacture, sale and warranty of the boilers, plaintiffs agreed to pay $2400," while the contract read, "defendants were to build two steam boilers with a mud-receiver, for $2400:" *Held*, this was not a variance, as the pleader, in averring the warranty, only stated the substance of the agreement, and a mud-receiver constituted a part and necessary portion of the boilers—it being a well recognized rule of law that when a manufacturer furnishes his wares, he impliedly warrants them to be reasonably suited to the purpose for which such articles are designed, and to be skillfully and properly constructed.

5. Nor is there a variance when the declaration avers that plaintiffs were to pay $2000, on the completion of the boilers, and $400 on June the 1st, 1867, with ten per cent interest; and, by the contract, plaintiffs were to pay $2000 cash at the shop of defendants on completion of the work, "and give a lien note for $400, payable June 1st, 1867, with ten per cent interest, payable at Second National Bank, Peoria"—the terms and conditions of the contract being only stated as inducement to the warranty, upon which the action is based, and mere inducement is not required to be set out with the same degree of particularity as the contract itself.

6. MEASURE OF DAMAGES—*for breach of warranty.* In a suit to recover damages for a breach of warranty, the plaintiff is entitled to recover for all damages which are the natural and proximate result of the failure of the warranty. And where a manufacturer has broken his warranty, in the construction and sale of two steam boilers, the necessary expense of repairing them, the loss of time while so engaged, as well as the increased quantity of fuel necessarily consumed to generate steam, would be considered as both natural and proximate damages.

APPEAL from the Circuit Court of Henry county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

The opinion states the case.

Mr. D. MCCULLOCH, for the appellants.

Mr. B. C. COOK, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought to recover damages for an alleged breach of a contract for manufacturing two steam boilers. The declaration contains two special counts on the contract, and to it the plea of the general issue was filed. On the trial, plaintiff offered the contract in evidence, and it was excluded under the first count, but was admitted under the second.

It is urged the court erred in admitting the contract in evidence, as it is claimed there was a material variance between the contract described and the contract read in evidence. The declaration avers the boilers "were intended for driving a grist mill, at Annawan, in the county of Henry, and State of Illinois," while the contract is silent as to the purpose, or place where they were to be used. In this no variance is perceived. There is no averment that the contract states they were to be so used, and hence there can be no variance. There could be no variance unless the contract declared upon varied from that offered in evidence in a material matter, unless it was set out in *hæc verba*. In this case it is only set out in substance; and, had the averment been that it was a part of the contract, it would be immaterial.

Nor do we perceive any substantial difference between the averment that the boilers "should be built and manufactured in a first class manner," and that "the work should be done in a first class manner." The meaning is the same, and the declaration only purports to give the substance, and not the language of the agreement.

The same is true of the averment that, in consideration of the manufacture, sale and warranty of the boilers, plaintiff agreed to pay $2400, while the contract says the defendants were to build two steam boilers, with a mud receiver, for

$2400. It it a well recognized rule of law that, when a manufacturer furnishes his wares, they shall be reasonably suited to the purpose for which such articles are designed, and shall be skillfully and properly constructed. To this extent the law implies a warranty. In averring a warranty, the pleader only stated the substance of the agreement.

As we understand it, a mud receiver is a part and a necessary portion of the boilers. If so, then there was no variance. If, however, it is no part of the boilers, there was a variance, as the contract would then be incorrectly described.

It is also objected that there is a variance as to the mode of payment. The declaration avers that plaintiffs were to pay $2000 on the completion of the boilers, and $400 on June the 1st, 1867, with ten per cent interest. By the contract, plaintiffs were to pay $2000 cash, at the shop of defendants, on completion of the work, "and give a lien note for $400, payable June 1st, 1867, with ten per cent interest, payable at Second National Bank, Peoria." The law requires the debtor to seek his creditor for the purpose of making payment, and hence the statement that appellees agreed to pay $2000 on the completion, was the same in substance as an agreement to pay at the shop of appellants, as that was their place of business. But the terms and conditions of the contract are only stated as inducement to the warranty upon which the action is based. Had appellees alleged they had bought and paid for the boilers, without saying when, where, or in what manner, and that appellants had warranted them, and averred the terms of the warranty and the breach, there would be no doubt that it would have been sufficient. And because appellees have failed to set out every particular as to the time and manner payment was to be made, the effect should not be different. The suit is for the breach of the warranty, and the substance of the contract is set out, and an averment that appellees have performed their part of the agreement, and that was sufficient. There is nothing in the description of the contract that is repugnant to the instrument when produced. It is something

more minute and rather fuller than the description in the declaration, but the agreement contains all that is found set out in substance in the declaration, and this action being only for the breach of warranty, there was not a variance that should have excluded the contract. This is not like a suit on a note where a recovery is sought for its non-payment. There the plaintiff must show time, place, and the manner in which payment was to be made, and negative a performance, and there a misdescription in the declaration is held to constitute a variance. Mere inducement is not required to be set out with the same degree of particularity as the contract itself. And this was but inducement to show the consideration for the contract of warranty. Had there been a misdescription of the terms of the warranty, then there would have been a fatal variance. But it was truly set out, and was sufficient. There was no error in admitting the agreement in evidence.

It is next objected that the court below misdirected the jury as to the measure of damages; that the recovery for loss of time, and the expense of repairing the boilers, and the increased quantity of fuel necessary to run the mill, were remote damages, and not properly recovered. In this case the warranty was, that the work should be first class; and if, when applied to use, it proved defective, and the boilers leaked, or if they required more fuel to generate steam than such boilers, when properly constructed, usually do, then the warranty was broken, and the rule of law is, that appellees were entitled to recover all damages which were the natural and proximate result of the breach of the warranty. And it is clear the expense of repairing them, and the loss of time while so engaged, would be both natural and proximate. In such a case the reasonable value for the use of the boiler, lost by it standing idle during the time the repairs were being made, would be proximate.

In the case of *Strawn* v. *Cogswell*, 28 Ill. 457, a case similar in principle to this, it was said that, "If, after receiving the work, it be found to be defective, the owner may recover a sum of money sufficient to alter the defective machinery to what it

should have been under the contract, with a reasonable compensation for its use for the period of time necessary to make the change. This is the damage he has sustained, and is the true measure." The cases of *Green* v. *Mann*, 11 Ill. 613; *The Sangamon & Morgan Railroad Co.* v. *Henry*, 14 Ill. 156, and *Chicago & Rock Island Railroad Co.* v. *Ward*, 16 Ill. 522, announce the same rule.

It follows, from what has been said, that there was no error in giving the instructions for appellees, or in refusing instructions asked by appellants. The judgment of the court below is affirmed.

Judgment affirmed.

GEORGE METZ *et al.*

v.

JACOB ALBRECHT.

1. CONTRACT OF SALE—*time of payment.* Under a contract for the sale and delivery of chattels, which is silent as to the time of payment, the inference is, the money is to be paid on delivery of the property sold.

2. SAME—*construction of a contract, in that regard.* A contract was as follows: "I, the undersigned, Jacob Albrecht, of Ohio Town, have to-day sold 10,000 bushels good barley, according to samples Nos. 1 and 2, to Metz & Stege, in Chicago, at one dollar per bushel. I promise to deliver the above quantity in such a manner that one thousand bushels shall be delivered each week:" *Held*, there being no time specified when the money should be paid, the proper construction is, the delivery of the grain and the payment of the money were concurrent.

3. SALES—*readiness of purchaser to pay.* In case of a sale of goods to be paid for on delivery, in order that the buyer may recover damages for non-delivery, it is incumbent on him to prove he was ready to receive and pay for the goods as delivered, and upon request for payment. This is the doctrine applicable to all cash sales.

Syllabus. Statement of the case.

4. SAME—*where two qualities of goods are sold, and the quantity of each not specified.* Where a party sold and agreed to deliver "ten thousand bushels barley, according to samples Nos. 1 and 2," it was *held*, Nos. one and two barley, the copulative conjunction being used, is the kind spoken of, and the quantity of each not being specified, it was at the option of the seller how much of each kind he would deliver.

5. ALLEGATIONS AND PROOFS—*must correspond.* In every case, a party suing must recover on his allegations and proofs. So, in an action to recover damages for non-delivery of grain purchased by the plaintiff, where the contract provided for the delivery of the grain in installments at different times, if the declaration was framed on the theory that payment was to be made only on the delivery of the whole quantity bought, the plaintiff can not recover upon a contract under which payment was to be made on the delivery of each installment of the grain.

6. PLEADING—CONSTRUCTION THEREOF. Upon a contract for the sale of ten thousand bushels of barley, to be delivered in such manner that one thousand bushels should be delivered each week, in an action, by the buyer, for non-delivery of the grain, it was alleged in the declaration that the plaintiff had "promised the defendant to accept and receive the said goods, and to pay him for the same at the price aforesaid," "and although said time for the delivery of said goods as aforesaid, hath long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said goods, and to pay for the same at the rate or price aforesaid," yet the defendant had not, within the time stipulated, or at any time, delivered the grain, except a certain portion of it: *Held*, that the true meaning and legal effect of the count was, that payment was to be made on the delivery of the whole ten thousand bushels, and not on the delivery of each weekly installment.

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

This was an action of assumpsit, the declaration in which contained several counts, but substantially alike, so far as concerns the questions arising thereon. The first count was as follows:

"George Metz and Edward Stege, plaintiffs, complain of Jacob Albrecht, the defendant, who is summoned, &c., of a plea of trespass on the case on promises; for that whereas heretofore to-wit: on the twenty-fifth day of August, A. D.

1867, at Chicago, in said county of Cook, the said plaintiffs, at the special instance and request of the said defendant, bargained with the defendant to buy of the defendant, and the defendant then and there sold to the plaintiffs a large quantity of goods, to-wit: ten thousand bushels of barley—Nos. 1 and 2—according to sample, at the price of one dollar per bushel, to be delivered by defendant to the plaintiffs at Chicago, aforesaid, in such quantities that the said plaintiffs should receive of the said barley one thousand bushels per week, for the ten weeks next after the making of said contract, as aforesaid, until the full amount of said barley should be delivered, as aforesaid, and in consideration thereof, and that the plaintiffs, at the like special instance and request of said defendant, had then and there promised the defendant to accept and receive the said goods and to pay him for the same at the price aforesaid, he, the defendant, promised the plaintiffs to deliver the said goods to the plaintiffs, as aforesaid, and although the said time for the delivery of the said goods, as aforesaid, hath long since elapsed, and the plaintiffs have always been ready and willing to accept and receive the said goods, and to pay for the same at the rate or price aforesaid, to-wit, at Chicago, in the said county of Cook, whereof the said defendant hath always had notice, yet the defendant, not regarding his said promises, did not nor would, within the time aforesaid, or at any time afterwards, deliver the said goods, or any part thereof, for the plaintiffs at Chicago, aforesaid, or elsewhere, except the sum of eight hundred bushels, and has otherwise wholly neglected and refused to deliver said goods, or comply with his said agreement, whereby the plaintiffs have lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to them from the delivery of the said goods to the said plaintiffs as aforesaid, to-wit: at Chicago, in said county of Cook, and to the damages of said plaintiffs of four thousand dollars, and therefore bring suit."

One of the questions in the case arises on the proper construction of the declaration—whether its legal effect is, that payment was to be made for the barley only on the delivery of the whole ten thousand bushels sold, or upon the delivery of each weekly installment.

Mr. H. BARBER, for the appellants.

Mr. MILTON T. PETERS, for the appellee.

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

This was an action of assumpsit, brought to the Cook circuit court, by George Metz and Edward Stege against Jacob Albrecht, for damages occasioned by the failure of the defendant to deliver to plaintiffs a certain quantity of barley he had contracted to deliver to plaintiffs. The pleas were, *non assumpsit* and set-off. There was a verdict and judgment for the defendant to the amount of his set-off, to reverse which plaintiffs bring the record to this court.

The principal points are made upon the instructions. Some controversy is made upon the construction of the contract—the defendant alleging he sold the barley for cash on delivery; the plaintiffs, that the sale was on credit.

It appeared, from the plaintiffs' books, there was due the defendant for barley delivered by defendant, under the contract, eight hundred and seventy-one dollars ninety cents.

This was the contract: "I, the undersigned, Jacob Albrecht, of Ohio Town, have to-day sold ten thousand bushels good barley, according to samples Nos. 1 and 2, to Metz & Stege, in Chicago, at one dollar per bushel. I promise to deliver the above quantity in such a manner that one thousand bushels shall be delivered each week."

It appears that defendant had, prior to this contract, delivered quantities of barley to plaintiffs, for which they had a settlement, and they testified on the trial that they were to

pay for the barley as they had for that before delivered, and that was, cash when they had it, and if they did not have it, give notes. One witness said they were to give notes at thirty or sixty days if they had no money.

The defendant testified, the plaintiffs were to pay him for the barley as fast as each car load was delivered, and at the time the plaintiffs brought their action, they owed him, on the contract, eight hundred and seventy-one dollars ninety cents, being the value of two car loads delivered. When the suit was commenced, he had another car load in the city ready to be delivered upon the contract, and offered to deliver it to plaintiffs before the suit was commenced if they would pay him for it, and for the other two car loads. At the same time, he demanded the amount due him, which they refused to pay, and refused to pay for the car load then on hand, which he kept two weeks awaiting the plaintiffs' demand if they should conclude to pay him. He also stated that Metz, one of the plaintiffs, told him, before he commenced delivering the barley, that No. 2 delivered on the contract would be as satisfactory as No. 1; that it would answer their purpose equally as well.

Several letters from the plaintiffs to defendant, of rather an apologetic tone, were in evidence.

There is nothing said in the contract about payment for the barley, and the inference must be, as when any article is sold, that the money was to be paid on delivery, and this is the weight of the testimony, and plaintiffs' letters lead to the same conclusion. The parties seem to have given that construction to the contract, and we think it is the proper construction. The delivery of the grain and the payment of the money were concurrent.

The uncontradicted evidence shows the plaintiffs were largely in arrears when they brought their action, and that defendant demanded payment, which they refused.

The plaintiffs complain, that the court refused to give the instruction asked by them, but in lieu thereof gave the following, which they insist is erroneous:

"That if the jury believe, from the evidence, that the defendant contracted with the plaintiffs, at the time alleged, to deliver to them, at Chicago, ten thousand bushels of barley—five thousand thereof to be such as was known as No. 1, and five thousand bushels of such as was known as No. 2, at the price of one dollar per bushel, the same to be delivered so that the plaintiffs should receive thereof the quantity of one thousand bushels per week, for the ten weeks next ensuing after the making of the contract, 'and to be paid for after the whole was delivered;' and they further find that defendant, without any fault on the part of the plaintiffs, 'the plaintiffs being willing and ready to pay for the same,' failed to deliver all or any portion of said barley according to the terms of the contract with plaintiffs, then the plaintiffs are entitled to recover such damages as they may have shown themselves to have sustained in consequence of the failure of said defendant to keep his contract, and deliver the barley at the time specified.

"If the jury believe, from the evidence, that defendant made with plaintiffs such a contract for the delivery of barley as is set forth in either of the counts of the plaintiffs' declaration, and that the plaintiffs were ready and willing to receive said barley, and pay for the same in accordance with the contract, and the defendant failed to perform his contract without fault on the part of the plaintiffs, then the defendant is liable to damages for such breach of the contract on his part, and the rate of damages is the difference between the contract price and the market value of the barley at the time the said barley should have been delivered under the contract."

These instructions, we think, state the law of the case very fairly for the plaintiffs, and do not differ very essentially from the one asked. They bring fairly before the jury the true points in controversy, and were all the plaintiffs could ask.

Plaintiffs also complain, that instructions numbered one, two, three, four and six, given for the defendant, are erroneous

in assuming that the contract was to pay on delivery. This, we have said, is the true construction of the contract, and it was incumbent on the plaintiffs to prove they were ready to receive and pay for the barley as delivered, and upon request for payment. The second instruction proceeds upon the ground, that if the plaintiffs, had the barley been delivered, were not prepared with the money to pay for ten thousand bushels upon reasonable request for payment, the defendant was not in default so as to entitle the plaintiffs to claim damages for such non-delivery.

This instruction but applies the doctrine applicable to cash sales, which this was, and was unobjectionable.

To the third, there can be no serious objection, for, if the hypothesis thereof be correct, the plaintiffs could not recover, because they had made no such case in the declaration. The true meaning and legal effect of all the counts is, that payment was to be made on the delivery of the whole ten thousand bushels.

This being so, the evidence did not support the declaration, and the attention of the jury was properly called to that point. In every case, a party suing must recover on his allegations and proofs.

Instruction six is not obnoxious to the criticism applied to it. Nos. one and two barley—the copulative conjunction being used—is the kind spoken of in it, and if the quantity of each was not specified, then it was at the option of defendant how much of each kind he would deliver.

From the whole record, we are of opinion justice has been done. The evidence sustains the verdict, and the instructions are right. The judgment must be affirmed.

Judgment affirmed.

Syllabus.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* JOSEPH SHURTZ,

v.

THE COMMISSIONERS OF HIGHWAYS OF WORTH TOWNSHIP, IN THE COUNTY OF WOODFORD.

1. HIGHWAYS—*what constitutes, so as to impose upon the public authorities the duty to keep them in repair.* The third section of article 17, of the township organization law of 1861, which requires the commissioners of highways "to cause such roads, used as highways, as have been laid out but not sufficiently described, and such as have been used for twenty years, but not recorded, to be ascertained, described, and entered of record in the town clerk's office," is construed as referring to roads which have been recognized as highways by the proper authorities, and not to every road which the owner of land may have laid out for his own use, and permitted the public to travel over.

2. By such words as "are used as highways," is meant those roads whose character as highways has been established by the consent of the owners of the soil, and of the proper authorities, but of which no accurate survey and record have been made.

3. It is not enough, to bind the town or county to repair, that there has been a dedication of a public way by the owner of the soil, and the public use of it. To bind the corporate body to this extent, there must be some evidence of acquiescence or adoption by the corporation itself.

4. MANDAMUS—*whether the peremptory writ may be refused.* The third section of the chapter of the Revised Statutes, entitled "Mandamus," which requires the court to award a peremptory writ in cases where a jury have found a verdict for the petitioner, refers only to cases where the petition makes a *prima facie* case, and the issue found by the verdict is material. The action of the court in denying the peremptory writ, notwithstanding a verdict for the petitioner, is like arresting the judgment in an ordinary action at law.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

The opinion states the case.

Messrs. CLARK & CHRISTIAN, for the appellants, insisted that, under the third section of the statute on mandamus, when a jury have found a verdict for the petitioner, the court has no discretion to refuse the peremptory writ.

Counsel said, that section of our mandamus act is, in all respects, substantially the same as the 2d section of chapter 20 of the statute of 9 Anne, and in passing upon the latter, Lord DENMAN, C. J. in the *Queen* v. *The Earl of Dartmouth*, 5 Q. B. 881, held that, after the issues (feigned issue) had been submitted to the jury, and a verdict rendered by the jury, the only thing left for the court to do, was to follow the plain provisions of the act; that is, if the verdict was in favor of the relator, the peremptory writ must be granted, and that without delay, provided the court could see no other remedy. Rev. Stat. Chap. 67, sec. 3; Stat. 9 Anne, Chap. 20, sec. 2.

Messrs. INGERSOLL & MCCUNE, and Mr. S. D. PUTERBAUGH, for the appellees.

No public highway can be established by dedication merely, and without the assent, express or implied, of the town or county bound by law to keep it in repair. *Bower* v. *Suffolk Manufacturing Co.* 4 Cush. 332; *Dimon* v. *The People*, 17 Ill. 422; *Town of Lewistown* v. *Proctor*, 27 Ill. 418; *Eyman* v. *The People*, 1 Gilm. 9.

If such were not the law, any land owner might, for his own interest, and without regard to public convenience or necessity, establish a highway, and subject the town or county within which it lies, to the burden of supporting it. There can certainly be no good reason why the burden of keeping a road in repair, and of building and maintaining bridges, should be imposed upon towns without their assent, and without any opportunity to make their objections. Commissioners of highways are empowered to inquire into when and where new roads are needed, and proceed to lay out such as the public exigencies require, having due regard to private rights

and public burdens. 2 Greenlf. Ev. sec. 662; *Hemphill* v. *City of Boston*, 8 Cush. 195; *Gentleman* v. *Soule*, 32 Ill. 279; *Alvord* v. *Ashley*, 17 Ill. 363.

It is urged by the relator that the court below erred in refusing the peremptory mandamus.

Granting the writ of mandamus, under many circumstances where it might be a proper remedy, is yet within the sound discretion of the court. *The People, &c.* v. *Curyea*, 16 Ill. 447; *The People, &c.* v. *Kilduff*, 15 Ill. 501; Tapping on Mandamus, 165, 166; *The People* v. *Hatch*, 33 Ill. 9. In the case of *The People* v. *Curyea*, this court refused a mandamus to compel commissioners of highways to open a road. We also cite, *People* v. *Commissioners, &c.* 27 Barb. 94; *Ex parte Clapper*, 3 Hill, N. Y. R. 458.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a petition for a mandamus, by Joseph Shurtz, as relator, to compel the commissioners of highways of Worth township to "ascertain, describe, and enter of record in the town clerk's office," a certain road, on the ground that it had been a public highway for twenty years, that duty being imposed on such commissioners in certain cases, by the third section of article 17 of the township organization law of 1861, page 764 of Gross' Statutes. The defendants answered, denying the existence of the alleged road, and an issue was made up for a jury, who returned a verdict that the road in question had been open and used by the public for twenty years. Notwithstanding the verdict, the court refused to award a peremptory mandamus, but dismissed the proceeding. The relator appealed, and insists that, after the finding of the jury, the court had no discretion as to awarding the writ. The appellees assign cross errors, insisting the court erred in its instructions to the jury.

The cross errors are well assigned.

The court refused to give the jury for the respondents the following instructions, or any equivalent therefor:

"The voluntary use of a way by the public with the assent of the owner of the soil, is not, of itself, sufficient to make it a public highway, and impose upon the proper public authorities the duty of repair."

"The court instructs the jury, if they believe, from the evidence, that the township of Worth or the county have never acquiesced in said road being a public highway, then the jury will find that the road in question is not a highway."

On the other hand the court instructed, it was not necessary to prove the town authorities had recognized said road as a public highway.

In its ruling on these instructions we think the court erred.

In a question of dedication of a right of way, as between the owner and the public, the recognition of a road by the county or town authorities as a public highway, would of course not be necessary. As against the owner, the acceptance of the dedication may be by the general public, which can manifest its acceptance by using the road, and thus acquire a right of way. But in a proceeding of this character, the object of which is to impose upon the town the expense of building bridges and keeping roads in repair, the question whether the county or town has ever recognized such an obligation, in reference to the road in controversy, goes to the very merits of the case. It is true, the language of the act above cited, is general. It requires the commissioners "to cause such roads, used as highways, as have been laid out, but not sufficiently described, and such as have been used for twenty years, but not recorded, to be ascertained, described, and entered of record in the town clerk's office." But this must be construed as referring to roads which have been recognized as highways by the proper authorities, and not to every road which the owner of land may have laid out for his own use, and permitted the public to travel over. Unless we adopt this construction, it would follow, that every owner of land, by opening a road where he might desire one for his own accommodation, and leaving it

open as a highway for such uses as the public could make of it, might, in twenty years, impose upon the town the expense of keeping it in repair. We have no idea the legislature intended such a result. When they speak, in the foregoing clause, of such roads as are "used as highways," they undoubtedly meant, by this phrase, to indicate those roads whose character as highways has been established by the consent of the owners of the soil and of the proper authorities, but of which no accurate survey and record have been made.

It is said, in 2 Greenleaf's Evidence, sec. 662, that "it does not follow, because there is a dedication of a public way by the owner of the soil, and the public use it, that the town or county is therefore bound to repair. To bind the corporate body to this extent, it is said there must be some evidence of acquiescence or adoption by the corporation itself, such as having actually repaired it, or erected lights or guide posts thereon, or having assigned it to the proper surveyor of highways for his supervision, or the like."

The rule here laid down seems to us eminently just and reasonable. If it be not adopted, towns and counties might have great and unjust burdens imposed upon them against their will. The owner of land can easily estop himself by laying out and dedicating a road, and having more or less persons use it in behalf of the public, but we can not hold that a municipality may thus have a highway thrust upon it for improvement and repair against the wishes of its proper officers and of a great majority of its people. This was the principle laid down in *Rex* v. *St. Benedict*, 4 Barn. & Ald. 448, and although a different rule seems to be recognized in *Rex* v. *Leake*, 5 Barn. & Ald. 469, the doctrine of the former case is, in our judgment, more reasonable in itself, and certainly much the safer and better rule for adoption in a State like ours, as yet comparatively new and undeveloped, in which the making and repairing of roads and the building of bridges are the cause of such large expenditures and severe taxation.

As we have already stated, the court, notwithstanding the verdict, refused the peremptory writ, and on examining the entire record we are not inclined to reverse its judgment. Counsel for appellants insist that the statute entitled "Mandamus" requires the court to award a peremptory writ in cases where a jury has found a verdict for the petitioner. But this can refer only to cases where the petitioner makes a *prima facie* case, and the issue found by the verdict is material. In this case, the petition was not good, and the issue was immaterial. The action of the court in denying the peremptory writ was like arresting the judgment in an ordinary action at law. The petition merely avers that "the above described road has been used for twenty years," but not that it has been used as a public road or highway. The verdict merely finds "that the road in question has been opened and used by the public for twenty years before the commencement of this proceeding." For aught that the verdict finds, the road may have been a mere private road, but still open to the public, and used by them whenever any persons had occasion to travel it. On examining the evidence we find it was in fact a private road, so far as the town anthorities are concerned. It has never been worked by them, or recognized by them in any manner as a public highway. It is simply a neighborhood lane, about twenty feet wide, for the accommodation of a few persons, but upon which any could travel who might desire. The petition being insufficient, the verdict immaterial, and the evidence showing there was no public highway which the town was under obligations to keep in order, the court rightly refused the peremptory mandamus.

Judgment affirmed.

Syllabus.

WILLIAM T. HOPKINS

v.

ELIHU GRANGER *et al.*

1. JURISDICTION IN CHANCERY—*trusts.* It is one of the oldest heads of chancery jurisdiction, to execute and control trusts and trust funds.

2. So, where a deed of trust was given by one of several makers of a promissory note, to secure the same, and he afterwards sold and conveyed the property embraced in the trust deed to another of the makers, the latter has his remedy in chancery in case of a misapplication of the money realized by a sale under the trust deed, by there being a less sum credited upon the debt than the property was sold for.

3. TRUSTS—*of expenses attending their execution—fraud.* Where the trustee under a deed of trust, and the creditor, procure a fraudulent sale to be made of the land, for the purpose of defeating the title of a subsequent purchaser thereof, the expenses and charges for making such sale will not be allowed in a suit by such purchaser to adjust the equities of the parties in respect to such trust fund.

4. SAME—*of the expense of setting aside such sale.* And where the creditor for whose security the trust deed was given, in the execution of the fraudulent design under the sale, placed the title to the land in a third person, and beyond his control, and, in order to the proper application of the trust fund, a suit was instituted to set aside such fraudulent sale, the creditor, upon his promise so to do, would be required to pay the costs of that suit, occasioned by his fraudulent conduct.

5. SAME—*what costs should be allowed in such case.* In ascertaining the costs of such suit, the subsequent purchaser, to defraud whom the sale was made, and in whose name the suit was brought, would be allowed his reasonable expenses incurred in its prosecution, but not for his time in attending to it.

6. ANSWER IN CHANCERY—*when not evidence.* An answer in chancery not sworn to, or even if sworn to, the oath being waived by the bill, is not evidence.

7. EVIDENCE—*of affidavits, on a final hearing in chancery.* Depositions taken on a motion to dissolve an injunction may, under the 14th section of the statute entitled, "Ne exeat and injunctions," be read on the final hearing of the cause; but affidavits taken in reference to such motion can not be read on the final hearing.

Syllabus. Opinion of the Court.

8. CLOUD UPON TITLE—*who may ask to have it removed.* Where a party shows he has no title to land, it is not for him to complain that there is a cloud upon it.

9. INTEREST—*when allowed.* Where a fraudulent sale has been had under a deed of trust, and the sale set aside, interest may be properly allowed on a judgment for the debt, which accrued between the time of setting aside the fraudulent sale and a subsequent sale under the deed.

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

The opinion states the case.

Mr. B. C. COOK and Mr. WILLIAM T. BURGESS, for the appellant.

Mr. U. F. LINDER, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that appellant, on the tenth day of June, 1868, filed a bill in the Cook circuit court against appellees. In it, he charges that, on the first of January, 1858, appellant, with Couch and Gould, executed to Granger two notes of that date, each for $600, payable, with interest, one in six and the other in eighteen months from date. At the same time, Couch, in order to secure the same, made to Shipman a deed of trust on two tracts of land, one containing seventy and the other eighty acres. The deed provided that, in case of default in payment of the notes, or any part thereof, then, on the application of the holder thereof, Shipman, after giving notice as specified, should sell the same at auction, make a deed to the purchaser, out of the proceeds pay the costs or expenses of advertising and selling the premises, and the principal and interest due upon the notes, or upon payment of the notes by the makers, re-convey the premises to Couch.

It further appears that, soon afterwards, Couch and wife conveyed the premises to appellant, subject to the deed of trust, and, on the ninth of March, 1858, it was recorded, and became notice to Granger and Shipman; that, about the fifteenth of February, 1859, Granger caused Shipman to advertise the land for sale under the trust deed on the third of March, 1859; that, on the second day of March, appellant filed in the Grundy circuit court a bill in chancery against Granger and Shipman, alleging that the sale, if allowed to proceed, would be contrary to the duty of the trustee, and to equity and good conscience; and prayed that the sale might be restrained. A writ of injunction was thereupon issued, and served upon Shipman and Granger.

That afterwards, about the first of September, 1859, while the suit was still pending and the injunction still in force, Shipman made a conveyance of the premises, for the consideration of $20, to Addison Weeks. The deed recited the execution of the trust deed; that notice of sale was given; that Weeks had become the purchaser for that sum; but there was no advertisement, in fact, of the time, place and terms of the sale, in any newspaper published in the county, as required by the deed of trust; that Shipman did not attend the sale, and if made, it was by one George H. Robinson, at the instance and on the procurement of Granger, and in the absence of Shipman. This was all done without the knowledge or consent of appellant, with intent to defraud him; that Weeks, in fact, paid no money on the purchase, but it was falsely pretended that the sale was made to him, to give the transaction the color of a *bona fide* transaction; that Weeks was ignorant of the transaction, was not present at the sale, but, when afterwards informed of it, acceded to the arrangement to aid Granger and Shipman in carrying out their fraud; that he never paid any money on the sale; that he confessed judgments in favor of several persons in the superior court, for various sums, upon which executions were issued to the sheriff of Grundy county, who levied upon the

lands as the property of Weeks, which were sold thereunder to Taylor for the amount of the judgments. The land not having been redeemed, the sheriff executed a deed to the purchaser; that the levy, sale and sheriff's deed were all procured by Taylor to further the fraudulent designs of Granger and Shipman, to defraud appellant out of this land.

For the purpose of setting aside these various proceedings, appellant filed a bill in the Grundy circuit court, against Granger, Shipman, Weeks and Taylor, on the nineteenth of July, 1862, in which he charged the same facts as are set forth in this bill. In it, among other things, it was prayed that the title of Weeks and Taylor might be held for naught; that, on the hearing, those deeds were decreed to be canceled. Taylor prosecuted a writ of error to the supreme court to reverse that decree, but, on a hearing, it was affirmed; that thereupon Shipman again proceeded to advertise the land under the trust deed, on the twenty-seventh day of November, 1865, and sold the same for $1610, which was paid to Granger, and Shipman executed a deed of conveyance to the purchaser, and appellant, to cure a defect in the notice, executed a release to the purchaser.

The bill alleges that, in consequence of the fraudulent acts of Granger and Shipman, appellant was put to great expense and sustained loss by being compelled to employ counsel to set aside the sale; also to sustain the decree in the supreme court on error; that he lost time, incurred expense and costs in prosecuting and defending that litigation, by which he had been damnified and suffered loss to the amount of $1500, which Granger and Shipman should pay; that, by reason of the fraudulent sale, appellant had been prevented from selling the land to pay the debt, by which a large amount of interest had accrued, which they should pay; that, on the twenty-fourth day of September, 1859, Granger sued appellant, and the other makers of the notes, in the Cook circuit court, and, on the twelfth of October following, recovered a judgment thereon for the sum of $1524.62, the amount due

and unpaid; that, on the twenty-fourth of March, 1866, execution was issued, under which lands were sold for $100, of which $68.06 was paid to Granger; that afterwards an *alias* execution was issued to the sheriff of Grundy county, endorsed by the $68.06 and $1024.49 as of November 27, 1865; that Granger, instead of allowing appellant the sum of $1610, less the costs of sale, for which the land was sold by Shipman, only allowed a credit of $1024.49, and has refused, fraudulently, to credit the balance on the debt; that the judgment should be deemed satisfied; that Granger and Shipman are insolvent; that Granger claims that $677 is due on the judgment, which should be restrained until these several matters are adjusted; that appellant also, at the same time, executed a trust deed to Shipman to secure the same notes, on forty acres of land in Grundy county; that Granger caused Shipman, in 1859, to advertise it for sale, and when it was offered, Granger bid the sum of $100, and received a deed therefor, but that, owing to his neglect in recording the trust deed, a judgment recovered against appellant became a prior lien; that Granger gave no credit on the notes for the amount bid on this tract, as the title had become absolute in the purchaser under the judgment. Appellant offers to allow the costs of that sale in an account, when taken, if Granger shall release this forty acres to him.

There was a prayer for an answer without oath, that an account might be taken, including loss and damages sustained by appellant, and for money expended, &c., and for a decree against Granger and Shipman for whatever sum may be found due, and for an injunction to restrain the collection of the judgment.

Granger filed an answer, in which he admits the execution of the notes, trust deed, the sales, suits and decrees as charged, but sets up as a defense that, at the sale by Shipman, he became the purchaser, and had the land conveyed to his nephew, Weeks; that appellant then refused to recognize Granger's right to the land, whereby it became necessary that legal

proceedings should be taken to divest Weeks of the title, and appellant consented that Granger might use his name for the purpose; that he employed counsel to draw a bill in appellant's name, which was filed, and the proceedings named in the bill were had, the sale set aside, and a new sale made, as charged in the bill; alleges that appellant agreed to come to Chicago and look over the charges, which should be deducted from the amount for which the land was sold, that the balance might be credited on the judgment, but failing to do so, he made the deductions and endorsed the credit; that he afterwards sued out an execution, which was stayed, on appellant's motion and claim of a larger credit; that the matter of such deductions from the sale was, by consent, referred to the master in chancery to determine, which he afterwards did. He alleges that all the credits to which appellant is entitled have been endorsed on the judgment.

Appellant then amended his bill, and in the amendment alleges, that Granger only had the bill prepared and filed, but did nothing more to have Weeks divested of title; that it became necessary to amend the bill, and to employ counsel to prosecute the suit, and to attend to the case in the supreme court, the expense of which he paid. He denies the power of the master in chancery to settle and adjust equitable rights in a court of law. Granger, in answer to the amended bill, refers to his former answer.

A replication was filed, and a hearing had on the bill, answer, replication, exhibits and proofs. The bill was dismissed and a decree rendered against complainant for costs. To reverse that decree this appeal is prosecuted, and various errors are assigned upon the record.

The bill on its face presents a case requiring the interposition of a court of equity. It shows that a trust was created, and that Shipman accepted it; that he sold the trust property for $1610, while, by a misapplication of the fund, appellant received a credit of but $1024.49. It stands admitted that the sale was made for that sum, and the credit thus given. If

this is true, and the balance was not properly applied, there was such a misapplication of the trust fund as invested a court of equity with jurisdiction. It is one of the oldest heads of chancery jurisdiction, to execute and control trusts and trust funds. The bill and answers show that the land sold for a larger sum, to the amount of $585.51, than was credited on the debt to secure which the deed of trust was executed, and entitled appellant to a larger credit than was given.

It is true, Granger, in his answer, claims that a dispute having arisen as to the deductions which should be made from the gross amount of the sale, and appellant having procured a stay of execution until the amount should be ascertained, and a larger credit given, on the motion then pending in the court from which the execution issued, that it was agreed the question should be submitted to the master in chancery to be decided, and report; and that he returned the sum due on the execution at $391.91. But his report, or any other evidence of his finding, is not contained in the certificate of evidence contained in the record. The answer not under oath, or, if sworn to, the oath being dispensed with by the bill, is not evidence. It devolved on Granger to prove the allegations of his answer; and in this he has failed. The court, therefore, erred in dismissing the bill on the proof adduced on the trial.

It is manifest, that Granger or Shipman had no right to retain any expenses or charges for making the fraudulent sale by Robinson. It was not only unauthorized, but was made for the admitted purpose of defrauding appellant out of the land. To allow compensation for performing, or attempting to perform, so unrighteous an act would be monstrous. This should not have been allowed by the master.

As to whether Granger should have paid the expense of obtaining the vacation of that sale, it would seem no more than just, if he agreed that he would. He, by his fraud, had placed the property beyond his reach, and he had also placed himself in the position that appellant could have compelled a

credit on the debt for the full value of the land. Had appellant taken that course, Granger would have thereby lost his debt, and the land would have been held by Weeks. Appellant could have shown all the facts on a motion to have the judgment entered satisfied, and thus have obtained relief without filing a bill in equity. It therefore appears that the bill, and all proceedings under it to set aside that sale, were for the benefit of Granger, and he received the full benefit of it, and he should pay the expense according to his promise, if one was made. Whether the reference to the master was of such a character as to estop appellant from questioning his report, does not appear from this record. The order under which it was made, and the manner in which he stated the account, do not appear from the evidence. We do not see whether it was stated *ex parte*, or on notice to appellant, and hence express no opinion on that question.

As regards the allowance to appellant for the expenses of prosecuting the suit to set aside the sale, he should be allowed for money actually paid or expense incurred, if Granger agreed to pay them, unless appellant has estopped himself by a reference to the master, and by appearing, or being notified to appear before the master when he stated the account. But we fail to perceive why he should receive pay for his time in attending to that suit. He should, if at all, be allowed only for reasonable expenses.

It is insisted that the court below erred in excluding the affidavit of appellant, used on the motion to dissolve the injunction, when the case was on a final hearing. We have been referred to no authority sanctioning such a practice.

The 14th section of the chapter entitled, "Ne exeat and injunctions," (Gross' Stat.) declares that the testimony to be heard on a motion to dissolve, aside from the bill and answer, shall be by depositions in writing, as in other cases in chancery proceedings, except the affidavits which may have been filed with the bill or answer, which may be read on such motion as heretofore; and the depositions taken to dissolve

an injunction may be read on the final hearing of the cause. From this provision, it is manifest that the affidavits thus taken should not be read on the final hearing. It only authorizes them to be read on the motion, and the depositions on the final hearing. To sanction such a practice would cut off the unquestioned right of the opposite party to cross examine witnesses. There was no error in rejecting the affidavits.

We do not perceive any reason why appellant should have a release from Granger of the forty acre tract purchased by him at the master's sale. He shows by his bill that he has no title, and if so, it is no concern of his whether there is a cloud on the title.

As to the interest which accrued on the judgment between the fraudulent and the last sale, we see no reason why it should be deducted. Granger did not agree to do so, nor is there any evidence that appellant would, or even could, have sold the land to pay the debt. Had he desired to avoid such accumulation of interest, he should have paid the debt.

We perceive no necessity for considering the question of the assessment of damages on the dissolution of the injunction. But for the error indicated, the decree of the court below must be reversed and the cause remanded.

Decree reversed.

SAMUEL H. KERFOOT *et al.*

v.

ROBERT W. HYMAN.

1. AGENT—*as a purchaser.* An agent employed to sell land, can not himself become the purchaser.

2. SAME—*can not profit from the subject of his agency.* Where an agent is authorized to sell land at a fixed price, and sells it for a greater price, he must account to his principal for the excess.

Syllabus. Statement of the case.

3. So, where an agent, who was authorized to sell a tract of land at a given price, sold a portion of it for a larger sum, and placed the legal title to the residue in a third person for his benefit, a court of chancery decreed, properly, that the agent should account to his principal for the excess received for the portion sold, and that the legal title to the residue of the land not sold, should be released to him.

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

This was a suit in chancery, brought by Robert W. Hyman against Samuel H. Kerfoot, Samuel Gehr and John C. Rives, to rescind a sale of real estate and compel the payment of money which, it is alleged, Kerfoot received while acting as the agent of the complainant. The bill alleges that complainant, being the owner of certain tracts of land in the city of Chicago, employed Kerfoot, a real estate broker, to sell the same for the sum of $6500, and afterwards, on payment of the price agreed upon, less commission, $232.90, executed and delivered to Kerfoot a deed to the premises, leaving a blank for the name of the purchaser; that Kerfoot had, at the time the deed was executed, sold a portion of the lands to John C. Rives for the sum of $6500; and that, with the intention of cheating and defrauding complainant, he combined and confederated with defendant Gehr, inserting the name of Gehr in the deed as grantee; that Gehr executed a deed to Rives for a portion of the premises, in consideration of the sum of $6500, paid by Rives to Kerfoot for the same; and that the legal title to the remaining portion of the lands, remained in Gehr. Kerfoot claims, in his answer, to have purchased the lands of Hyman for the sum of $6500, less a bonus of $232.90, and that Hyman delivered to him a deed for the same with the name of Gehr as grantee; and that the only reason Gehr was named as grantee, was because Kerfoot was embarrassed, and could not safely hold property in his own name, without its being sold under execution; and denies that he in any way or manner acted as the agent of Hyman in the sale of the land. The

court below rendered a decree dismissing the bill as to Rives, and directing that Gehr reconvey to Hyman the portion of the lands to which he still held the title, that Kerfoot pay to Hyman $249, and that Kerfoot and Gehr pay the costs of suit. To reverse this decree defendants appealed.

Mr. JOHN J. MCKINNON, for the appellants.

Messrs. KING, SCOTT & PAYSON, for the appellee.

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

The only question presented by this record is, as stated by appellants, in what capacity did Kerfoot act in the transaction? Was he the agent of appellee, or was he a principal, acting for himself?

Both Hyman and Kerfoot testified in the cause, and they are in direct conflict, but Hyman is sustained by LeMoyne, a party wholly disinterested, who corroborates appellee in every essential particular.

Appellants admit this testimony makes out the case stated in the bill, and as that is framed on the basis of an agency in Kerfoot, that ends the case. It is well settled, an agent employed to sell land, can not himself become the purchaser, and he is held to the strictest fairness and integrity, and bound to act in the utmost good faith; so that, if he is authorized to sell land at a fixed price, and sells it for a greater price, he must account to his principal for the excess. *Merryman* v. *David*, 31 Ill. 404. This rule is so well established, reference to authority is unnecessary.

Appellants insist, inasmuch as appellee and LeMoyne both testified there was no written agreement between these parties, and as there was a writing in evidence signed by appellee, that writing was an agreement and the record showing its existence, that fact should weaken their testimony or tend to their discredit. The writing in evidence, was a memorandum

only, signed by appellee, of the price he would take for the property, and a figuring of his own, made in the margin, of the net proceeds after deducting the commission to be paid to Kerfoot. It contains nothing more than a description of the lands, and the sum the owner was willing to take for them. Surely, Kerfoot was not bound by it, to take the lands at those terms, nor did he agree so to do. He informed appellee he was in negotiation with a party in the east, who he had no doubt would purchase, and wanted the price definitely stated, and he distinctly stated, he was acting for the owner in the sale, and would look to him for his commission. In truth, he was acting in a double capacity, that of agent of the seller and of the purchaser. He was a real estate agent, whose business was buying and selling lots and lands for others.

The very form the transaction took, dissipates all idea of a sale to Kerfoot. If it was a sale to him, why should any commission or brokerage be stipulated? It may be true, "one man's money is as good as another's," and that Kerfoot had a right, in the first instance, to be the purchaser. Yet if he had been such purchaser, it is incredible, brokerage should be agreed upon.

But there is something more in support of appellee and LeMoyne, and that is, the letters by Kerfoot to Mr. Rives and his in reply. Those letters can not be read without forcing the conviction that the sale of these lands was effected by Kerfoot as an agent. Nowhere, in any one of them, is there the slightest intimation that Kerfoot was the owner of the property or intended to be, or that it was under his control. Mr. Rives, judging from the tenor of his letters, knew Kerfoot was acting for other parties. The negotiation with him was on that basis alone.

It appears the lots and land, for which appellee agreed to take the net sum of $6316, contained fifteen acres. Kerfoot sold to Mr. Rives thirteen acres thereof, for $6500, and proposes to put in his own pocket the difference, and hold as

his own the remaining two acres unsold; the legal title to which he has passed to his co-appellant, Gehr.

This claim is so at war with justice, equity and fair dealing, and so contrary to well established principles, that it can not be listened to for a single moment. A more distinctly marked case of agency rarely comes before a court of justice. The evidence is conclusive, and the court below, in decreeing to appellee the difference between the sum he stipulated to take, if no more could be had, and the sum actually received by Kerfoot, and that his grantee, Gehr, should release to appellee all his right to the two acres, carried out the true principles which govern this case, and the decree is affirmed in all its parts.

Decree affirmed.

CITY OF CHICAGO
v.
ANDREW GARRISON.

NEW TRIAL—*verdict against the evidence.* In this case the evidence was very conflicting, and it was only claimed that the preponderance was against the verdict, which the court refused to disturb as being against the weight of the testimony.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action brought by Garrison against the city of Chicago. A trial resulted in a verdict and judgment for the plaintiff. The city thereupon sued out a writ of error.

Mr. S. A. IRVIN, for the plaintiff in error.

Mr. ANDREW GARRISON, *pro se.*

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the appellee against the city of Chicago, to recover damages for injuries received in falling from certain steps that were a part of the sidewalk. No question of law is made upon the record, and the counsel for appellant asks a reversal solely on the ground that the preponderance of evidence, as counsel insists, shows the sidewalk was not unsafe, or, if it was, that the city had neither actual nor constructive notice of that fact, and that the plaintiff himself was guilty of carelessness.

As to the last point, we need only say there was not the slightest evidence of want of ordinary care on the part of the plaintiff.

As to the other points, the evidence is admitted by the counsel for the city to be very contradictory, and it is only claimed that the preponderance was for the defense. It would answer no good purpose to review it in detail. We have examined it with care, and find it conflicting to such a degree that we can not reverse the judgment and direct a new trial without disregarding the established rules of the court in regard to the respect due to the verdicts of juries in cases of contradictory testimony. We are very far from being able to say the verdict was against the weight of evidence.

Judgment affirmed.

Syllabus.

SAMUEL L. KEITH *et al.*

v.

THE GLOBE INSURANCE COMPANY.

1. INSURANCE—*reforming a mistake in a policy, as to the persons obtaining the insurance.* Where a member of a partnership firm applied for insurance upon partnership property, and in the name of the firm, and the officers of the company so understood the application, but, by mistake, issued the policy in the name of the individual partner alone, it was *held*, a court of equity would reform the policy so as to make it conform to the intention of the parties.

2. SAME—*how far companies are bound by the acts and knowledge of their agents.* And where such application was made to an agent of the company insuring, who was informed that it was the interest of the firm, not that of the individual partner alone, which was to be insured, and agreed so to insure it, the agent at the time having full knowledge of the ownership of the property, the company would be bound by the acts and knowledge of the agent in respect thereto, which would form a sufficient basis upon which to require a court of equity to reform the policy issued by the officers of the company to the individual partner alone.

3. SAME—*by the acts and knowledge of what character of agents companies are bound.* The fact that such agent was not a regular agent of the company would not relieve the latter from being bound, he having previously obtained insurance for the company for which they paid him a commission, and having also obtained the particular insurance and received his commission therefor,—holding such relation to the company he would be deemed their agent in respect to the insurance which he negotiated, and they would be bound by his acts and knowledge concerning it.

4. SAME—*disclosure of facts affecting the risk.* While it is a general rule, that on an application for insurance, all material facts which directly tend to increase the hazard must be disclosed by the applicant, the fact that he is obnoxious to numerous persons in the vicinity of the property sought to be insured, is not within that rule, and need not be disclosed unless he is interrogated on the subject.

5. In this case the property sought to be insured, was a lot of cotton in the State of Mississippi, the insurance being effected in Chicago, and it was held not essential to the validity of the policy that the applicant should disclose, unasked, that the guards who were in charge of the cotton smoked pipes, and had fire in the immediate vicinity for the purpose of warming themselves.

Syllabus. Brief for the appellants.

6. SAME—*effect of a seizure of the property insured, by a government officer.* At the time the cotton was insured, the place where it was situated was under military occupation by the United States, and it was held that the mere seizure of the property under the order of a government officer, without evidence of its condemnation, or of an act of forfeiture, would not divest the owner's title, or affect his right to recover the insurance.

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

The opinion states the case.

Messrs. HIGGINS, SWETT & QUIGG, and Mr. ISAAC N. ARNOLD, for the appellants.

A mistake in putting the name of an individual partner in a policy of insurance, instead of the firm name, will not defeat the contract, but it may be reformed in a court of equity. *Ellis* v. *Towsley*, 1 Paige Ch. 278; *Franklin Fire Ins. Co.* v. *Hewett*, 3 B. Mon. 231; *Harris* v. *Columbian Ins. Co.* 18 Ohio, 121; *New York Ice Co.* v. *Northwestern Ins. Co.* 23 N. Y. Rep. 359; *Malleable Iron Works* v. *Phœnix Ins. Co.* 25 Conn. 465; *The Bank* v. *Charter Oak Ins. Co.* 21 Conn. 529.

Although a person may not be the general agent of an insurance company, he will be considered the special agent in the particular case, when he received a commission for effecting the arrangement with the assured. *Woodbury Savings Bank* v. *Charter Oak Insurance Company*, 31 Conn. pp. 518, 519, 526–7–8; 25 Conn. p. 477; *Beebe* v. *Hartford County Fire Insurance Company*, 25 Conn. p. 51; *Malleable Iron Works* v. *Phœnix Insurance Company*, 25 Conn. 465, 528, 529.

In regard to a failure on the part of an applicant for insurance, to disclose facts concerning the property, or circumstances affecting the risk, the rule is, a fraudulent concealment must be proved.

The presumption is that the contract was fairly made.

"The burden of proof of misrepresentation is upon the defendants." *Catlin* v. *Springfield Insurance Company*, 1 Sumner (U. S.) Rep. p. 434; 8 Cushing Rep. p. 82.

Defendants must show not only that the fact alleged was concealed, but that it increased the risk. *Newhall* v. *Union Mutual Fire Insurance Company*, 52 Maine Rep. p. 108.

"If enough is disclosed to put the party upon inquiry and they fail to inquire, they are liable." *Beebe* v. *Hartford County Mutual Fire Insurance Company*, 25 Conn. p. 51.

"It is sufficient, in the absence of fraud, if the applicant answer all questions put to him." *Boggs et al.* v. *American Insurance Company*, 30 Missouri, p. 63.

The leading case on the subject of concealment is *Carter* v. *Boehm*, 3 Burrow's (English) Reports, p. 1905.

"The insured need not mention what the underwriter *ought to know;* what he *takes upon himself* the knowledge of; or what he *waives* being informed of. The underwriter need not be told what lessened the risk agreed and understood to be run by the express terms of the policy. He need not be told general topics of speculation; as, for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may *occasion political perils;* from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, etc." (P. 1911.)

In *Boggs et al.* v. *American Insurance Company*, 30 Missouri, p. 70, the Court say:

"In contracts of fire insurance, there being no fraud, if the applicant make a true and full answer to the questions put to him by the insurer in respect to the subject of insurance, it is enough; he is not answerable for any omission to mention the existence of other facts about which no inquiry is made

of him, though they may turn out to be material for the insurer in taking the risk; (*Gates* v. *Madison County Mutual Insurance Company*, 5 N. Y. 475,) because, observes the the Court, "he has a right to suppose that the insurer, in making the inquiries in respect to the particular facts, deems all others to be immaterial to the risk to be taken, or that he takes upon himself the knowledge or waives information of them."

Mr. JAMES L. STARK, for the appellees.

In this case, Holmes & Brother were not the agents of the Globe Insurance Company, in any such sense as that notice to them would be notice to the company. Angell & Ames on Cor. secs. 306, 307; *Bank of U. S.* v. *Davis*, 2 Hill, 462; *President, &c.* v. *Conner*, 37 N. Y. 320. The cases cited by appellants on this subject relate to local agents acting for the company generally.

There is no doubt but what a court of chancery will correct a written instrument for a mistake, but the mistake must be made out by full proof. 1 Story Eq. Jur. sec. 157; *Shay* v. *Pettes*, 35 Ill. 362; *Ruffner* v. *McConnel*, 17 Ill. 216; *Hunter, Admr.* v. *Bilyeu*, 30 Ill. 248.

The property insured was a lot of cotton in the State of Mississippi, owned by northern men. That portion of the country was still under military control. The owners of the cotton were obnoxious to the people of that locality, for reasons growing out of the war. That fact should have been disclosed to the insurer. 3 Kent's Com. 385; Angell on Ins. sec. 172; *New York Bowery Ins. Co.* v. *The New York Ins. Co.* 17 Wend. 357; *Stebbins* v. *Globe Ins. Co.* 2 Hall, 612; *Delongnemars* v. *Tradesman Ins. Co. of N. Y.* 2 Hall, 580; *Vail* v. *Phœnix Ins. Co.* 1 Wash. Cir. Co. R. 283.

The cotton had been seized by the United States government, and was in the possession of the government when it

was burned. This being the case, the assured can not recover. *Pipon* v. *Cope*, 1 Campb. 434.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in chancery, filed by appellants against appellees. It alleges that during the summer and autumn of 1865, the firm of Keith, Snell & Taylor purchased and placed in store at West Point, in Mississippi, a quantity of cotton, for which they paid a large sum of money. To make these purchases the firm, through Samuel S. Keith, one of the partners, procured the money on a loan from the Third National Bank of Chicago, in the name of and for the firm.

On the sixth of December, 1865, Keith applied to Ira Holmes, the cashier of the bank, who was also, with his brothers, general insurance agent at Chicago, to procure a policy of insurance on the cotton. Holmes was also the treasurer of appellees. On being spoken to on the subject, Holmes referred Keith to Holmes & Brothers, to make out the policy. Ira had previously instructed Holmes & Brothers, that when an application should amount to more than the companies which they represented wished to take, to place the amount with appellees. An agreement was made by Keith and Holmes & Brothers, they acting for various insurance companies, to insure the cotton.

A certificate of insurance was made to Keith individually. The amount of insurance applied for by Keith being larger than the companies for which Holmes & Brothers were agents, were willing to take, they applied to appellees and obtained a policy from them for $7,500 on the cotton. It was burned on the sixth of January, 1866. Appellees refused to pay, on the ground that, if liable at all, they were liable to pay only one-third of the loss, because the certificate was made out to Samuel L. Keith in his individual name, and as he owned but a third interest in the cotton, they were only liable to make

good his loss, and not that of his partners. Thereupon appellants filed this bill to reform and enforce the contract as it was made, and should have been written, alleging that the insurance was made for the firm, and that he so informed the agents, and was assured by them that it should all be made right, but they had taken it in his individual name. On the hearing in the court below, the relief prayed was refused and the bill dismissed.

Complainant, Keith, testified, that he went to Holmes & Brothers on the sixth or seventh of December, 1865, to procure an insurance on two hundred and twenty bales of cotton, worth $52,000; that he saw Edgar and Albert Holmes and informed them of his business; stated to them the quantity of cotton, and where and how it was situated, and that it was guarded night and day; that it belonged to Keith, Snell & Taylor, and would be consigned to Keith at New York, and only awaited transportation to that point, and Albert Holmes said he would take the risk; that the rate was agreed upon; that he then made out a list of the companies by which the insurance would be made; that the amount was fixed at $49,500; that Holmes said the companies they represented could take but $42,000, but he would go out and get another company to take $7,500 more, making the amount; that on the same or next day he met Albert Holmes and he said that he had placed $7,500 in the office of appellees; that he said to him the cotton belonged to Keith, Snell & Taylor, to be consigned to Keith at New York, and asked if it would make any difference whether the policy was issued in his name or that of Keith, Snell & Taylor; if it would, to issue it in the name of the firm and not in his; that Holmes replied that he did not think it would, but he would make it all right; that Ira Holmes, the treasurer of appellees, knew to whom the cotton belonged; that before applying for the insurance he saw Ira Holmes and asked him if he wanted the risk; that he told witness to go to the insurance office and they would fix it up, and that he went and made the arrangement; the

premium was not paid at the time, as the time the policy would run was not then fixed, as that depended upon when it would be shipped; that the premium was paid in the latter part of January or early in February; that after the loss, he had a conversation with Ira Holmes and he said he was treasurer of appellees, and if the loss was a straight one, their company should pay it without taking any advantage of technicalities in the policies; that he said he knew the cotton belonged to Keith, Snell & Taylor, and if it was a fair loss no advantage would be taken by reason of its being in Keith's name; that after the proofs were made he heard no objections by Holmes or any officer of the company in regard to the proofs; that Holmes & Brothers held the policy at the time of the fire and when the premium was paid; that in the month of May he consulted Swett at his office, when the policies were sent for, and that he and Swett then went to the office of Holmes & Brothers and asked them to change them to Keith, Snell & Taylor; that they did not deny that the cotton belonged to or was insured for the firm, but said that as some trouble was likely to grow out of the transaction they declined to make the change.

Joseph A. Holmes corroborates Keith in the material portions of his evidence, and further says that he took the certificate of insurance to appellees' office and requested the Secretary to insert the words "loss, if any, payable to Keith, Snell & Taylor," and as a reason for the request, informed him that the cotton belonged to that firm, and he thereupon inserted the language as desired; that appellees paid Holmes & Brothers ten per cent. of the premium for soliciting or obtaining this insurance. He said he thought Ira Holmes, treasurer, knew of the insurance at the time the policy was issued; that he paid the premium, $75, less their commissions, to appellees on the twenty-fifth of January, 1866, and after he heard of the loss.

Ira Holmes corroborates Keith's evidence in part, and does not contradict his testimony. He also says, that when the

insurance was taken, he, as treasurer of the company, knew the cotton belonged to Keith, Snell & Taylor; that he thinks Bowen, the president of the bank, knew the purpose for which the money was loaned, and knew of the insurance of the cotton soon after it was effected.

Rawley testifies that he was employed and was in Holmes & Brothers' office when Keith applied for the insurance; that after Edgar Holmes said he would take the risk, he made an entry in the book; Keith observing that it was made in his name, informed Holmes that the firm was Keith, Snell & Taylor, and after noticing the entry, asked Holmes whether it would be right to use his name instead of the firm; that Holmes told him it would make no difference; that Keith said the amount of insurance wanted was $49,500 and the cotton belonged to the firm; that the amount was calculated at so much a bale; that the rate was high, the risk being regarded as very hazardous. Albert Holmes, however, says he has no recollection of Keith saying that he wanted the insurance in the name of the firm, or of saying that it would make no difference if it was in Keith's name, or that he would make it right.

Swett testified that he went with Keith, in the month of May, 1866, to the office of Holmes & Brothers, and there had a conversation with one of the Holmes in reference to the policies; that Holmes stated that he had contracted to insure the full amount of the cotton, and had been paid the full premium; that he knew the cotton belonged to the firm of Keith, Snell & Taylor. On being asked to change the policy, he declined, saying trouble had arisen in reference to the matter.

From this evidence, it is manifest that Keith intended to insure and supposed he had insured the entire property, and not merely his interest in it. He expressly applied for the insurance in the name of the firm, and seeing the entry in the book in his name, asked whether it would not make a difference if it was not in the name of the firm, and at the same

time stated that it belonged to his firm, when Holmes said he thought not, but would make it right. The mind can arrive at no other rational conclusion, from this evidence, than that Keith intended to insure and supposed he had so insured the property for the firm and not his separate interest.

Again, Holmes ascertained the amount by calculating its value by the number of bales, and not by calculating the value of Keith's interest in the cotton. Keith also paid the premium on the full amount of the cotton and not on his interest. From all of these facts we must conclude that the agents understood, and could have understood nothing else than that Keith desired to insure the entire lot of cotton in the name of his firm. And it is equally clear that the agents agreed to do so when the application was made; and we will not presume that they designed to perpetrate a fraud on Keith. That it was not so insured by the agents, must have arisen from inattention or from a want of knowledge that it was material that the firm name should be inserted in the policy as the assured. And we presume it was for the latter reason, from the fact that they had inserted, "loss, if any, payable to Keith, Snell & Taylor," perhaps under the supposition that such a clause would have the same effect as inserting the firm name as the assured.

It, however, remains to ascertain whether the officers of appellees' company understood and intended to insure the entire interest in the cotton held by Keith's firm. They knew they were insuring all of the cotton, and not an undivided interest. They received a full premium, and specifically state that they had insured two hundred and twenty bales. Their treasurer knew that the firm had borrowed money from their bank to purchase the cotton, and it nowhere appears that Keith ever owned any cotton in his individual right, much less this large quantity. They must, therefore, have known what Keith's interest was, and the true ownership of the property, when the policy was issued, and they must also have known that the sum at which it was valued was three-fold the value

of his individual interest. This might not, of itself, be sufficient to establish a mistake requiring a reformation of the contract, but it is strong evidence when considered in connection with the other circumstances of the case.

In addition to all this, Holmes & Brothers were the agents of appellees. They, it is true, were not their regular agents, but they had previously solicited insurance for them, and had been paid a percentage therefor, and were in this case paid ten per cent. of the premium received by appellees on this policy, and one or more of the members of the firm of Holmes & Brothers were stockholders in the company, and Ira was not only a stockholder, but was the treasurer of the company, and a member of the firm of Holmes & Brothers. The firm, therefore, had notice of the nature of the application, and agreed to insure in the name of Keith, Snell & Taylor.

In the case of *The Atlantic Ins. Co.* v. *Wright*, 22 Ill. 462, it was held, that if an agent of an insurance company is informed of all the facts connected with the interest of the assured in the property described in the policy, and does not require a statement of the same, the company will be bound by his acts and can not avoid the policy, because the true interest was not stated, but will be estopped by the acts of their agents. And the same rule has since been repeatedly recognized and applied by this court. Then, if knowledge by the agent is sufficient to charge the company, much more, an application disclosing all the facts, and a request by the assured to have it insured according to that interest, and an agreement by the agent to do so, should bind the company. Holmes & Brothers, then, acting in the capacity of agents of appellees, and having been fully informed that it was the interest of the firm, and not Keith's alone, that was to be insured, and having agreed to do so, when coupled with the knowledge of the circumstances of the ownership of the cotton, and their receiving a premium on the full value of all the cotton, and not of Keith's interest, we think, fully establishes the mistake in executing the policy, and requires that it should be reformed so as to make Keith,

Snell & Taylor the assured, as was intended by the parties when it was issued.

A careful perusal of the evidence convinces us that there could not have been two hundred and twenty-five bales of cotton destroyed by the fire. It is true, appellants' witnesses all estimate the number at two hundred or more. But appellees' witnesses fix the number from the lowest, at seventy-five, and the highest at one hundred and fifteen; the larger number at about one hundred bales. The witnesses on the part of appellees are more numerous. There were ten or eleven witnesses, including Taylor, and the certificates of two others, on the part of the appellants, who fix the number at from two hundred to two hundred and twenty. On the other side, there are thirteen or fourteen who place it at less than one hundred and sixteen. Besides, Collins swears that the guard sold what was known as Taylor's cotton, of nights, and on one night when he was guarding cotton of his brother, in the same shed, some seven or eight bales were hauled away, the guard assisting to load it into the carts or wagons. In this conflict of evidence, it is difficult to determine the true amount that was burned, with any degree of certainty, but we are inclined to believe that it did not exceed one hundred bales. There seems to have been more of appellees' witnesses who counted one tier of the cotton, and thus estimated the number of bales by the number of tiers, than of appellants' witnesses. It is true, appellants prove that some three of appellees' witnesses were on very unfriendly terms with Taylor. But one of their witnesses was a railroad agent, who had been spoken to by Taylor, in reference to shipping the lot of cotton, and who examined it but a day or two previous to the fire, with a view to its shipment, and he, by a count of one tier and multiplying the number of bales it contained by the number of tiers, made it but ninety-seven.

Appellants proved by different persons, that they had sold and delivered to Taylor, small lots in the shed, in the aggregate, sixty-four bales. They also proved by an agent, who

purchased and acted for them from the eleventh of October, 1865, until the first of December, that the whole number of bales was one hundred and thirty-six. He says, it was purchased in small lots, in October and November, 1865, and delivered at various times. Without appellants shall adduce further and more satisfactory evidence as to the number of bales burned, we think that one hundred is the highest number a court would be warranted in finding were thus destroyed.

For the error indicated, the decree of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

At the September term, 1870, a petition for a rehearing of this cause was presented on behalf of the insurance company, in disposing of which, the court delivered the following additional opinion:

PER CURIAM: A petition for a rehearing has been presented in this cause, which we have attentively considered, but are unable to perceive any reason for changing the conclusions at which we arrived when we rendered the decree of reversal then announced. But inasmuch as we omitted to discuss one or two points urged in the argument previously filed by appellees, we deem it proper now to consider them.

It is urged that appellants failed to disclose facts that added greatly to the hazard of the risk, and which, if disclosed to appellees, would have prevented them from taking the risk, or would have added to the premium. It is first said, Taylor was obnoxious to the people in the vicinity of the place where the cotton was stored, and that fact should have been disclosed to the company when the application was made. It is a general rule, that all material facts, which directly tend to increase the hazard, must be disclosed by the applicant. While this is true, the rule must have a practical application. It can not be said that because the assured was at variance with a few

persons, he is bound to disclose the fact to the agent of the company, to render his policy binding. Nor is he required to inquire whether he is popular or unpopular, that he may disclose the fact to the company. No case has, we presume, gone that length. If, however, the assured be interrogated when he makes the application, then he must give true answers on all matters connected with the hazard of the policy.

In this case, we must presume that the agents of appellees were as fully apprised of the unsettled condition of the country in the vicinity of West Point, Mississippi, as were the applicants. As intelligent men, they must have been fully aware of the fact, that northern men, at that time, were obnoxious to the people of that locality. That was a matter they must have known as well as appellants.

It is likewise urged, that the disclosures were not full as to the situation of the cotton, or the manner it was guarded. Keith, so far as is disclosed by the evidence, did give a full statement of the place where it was stored, and its exposure to fire from passing engines. It is true, he did not inform the insurance agents that the guards smoked pipes, and had fire in the immediate vicinity for the purpose of warming themselves. But at the season of the year at which this transaction occurred, it being in the winter, all persons know that fire would be necessary to the guard, and that it must be kept within, or near to the building, to be of use to the guard. And no questions were asked in reference to the fire, nor as to whether any of the guard smoked. The probabilities are, that it did not occur to either of them that the cotton might be thus exposed, and it is not probable that Keith could have answered, had the questions been propounded to him by the agents. We can see no evidence of fraud or bad faith in failing, unasked, to disclose the facts of which complaint is now made.

It is urged that inasmuch as the cotton was seized under the order of a government officer, appellants can not recover. None of the grounds of the seizure appear in the record, unless we might infer that it was procured to be done by a person

whose cotton had been seized, on information furnished by Taylor, as a matter of retaliation. We are entirely uninformed whether the seizure was warranted by the facts, and we are not at liberty to infer, in the absence of proof, that there were legal grounds for the action of the officer. The seizure did not, and could not, of itself, divest appellants of their title to the cotton. There was, so far as we are advised, no trial or condemnation, nor is there any proof that appellants had done any act authorizing a seizure. We are therefore constrained to hold that the mere seizure, unaccompanied with the evidence of its condemnation, or proof of an act of forfeiture, could not divest appellants' title or bar a recovery. If it has been held that a seizure by government produced such a result, it could only be where it appeared that the owner had done some act which forfeited the property, which had been followed by a seizure by the government. Beyond that, we could not assent to go, in the application of the rule. In this case the evidence does not show that fact.

That the property was seized, and was subsequently guarded by government troops, was one of the perils incident to the military occupation of the country where the cotton was stored. The condition of the country must have been known and considered in fixing the premium, which was at the highest rate they charged. Nor does it appear that there was more hazard to the cotton from the military guard, than would have been incurred by a guard of citizens. That the military authorities would be as careful as citizens, we may reasonably suppose. The guard were under military discipline and were accountable to that authority, and it may be inferred that they would feel as much or more responsibility for their conduct than would citizens of the place with whom appellees contend Taylor was unpopular. From a careful examination of the entire record, and mature consideration of appellees' argument previously filed, together with their petition for a rehearing, we are unable to perceive that the decree heretofore rendered is in any respect erroneous.

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9. *In behalf of a creditor of an estate.* A creditor of an estate presented his claim to the probate court, at the term appointed by the executor for that purpose, and a portion of it was allowed. The creditor thereupon appealed to the circuit court, when the matter was improperly referred to arbitration, and a judgment was entered on the award for the full amount of the claim. The distributees of the estate filed their bill in chancery to vacate that judgment, which was done, except to the amount allowed in the probate court. After a time, the assignee of the judgment filed his bill in chancery, asking to have that decree annulled, and for an account from the personal representative of the estate, of the

ADMINISTRATION OF ESTATES.

JURISDICTION IN CHANCERY. *Continued.*

personal assets, and in default of any, that he be decreed to sell the realty to pay the debt. The estate had not been settled, and soon after the allowance of the claim in the probate court, all the papers and records of that court were destroyed by fire: *Held*, that this bill of the creditor should be entertained; under the circumstances of the loss of the records and papers by fire, he had a right to ask an account from the personal representative, and a discovery of assets, and a decree for a sale of realty in default of other assets. *Clark et al.* v. *Hogle, et al.* 427.

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3. So, where an agent, who was authorized to sell a tract of land at a given price, sold a portion of it for a larger sum, and placed the legal title to the residue in a third person for his benefit, a court of chancery decreed, properly, that the agent should account to his principal for the excess received for the portion sold, and that the legal title to the residue of the land not sold, should be released to him. Ibid. 512.

RATIFICATION BY THE PRINCIPAL.

4. Where an agent was empowered, originally, to make a contract for the conveyance of lands of the principal, upon certain conditions, and, in making the contract, the agent added other conditions favorable to his principal, not mentioned in his original authority, and which

AGENCY. Ratification by the principal. *Continued.*
were afterwards, and before the conveyance of the lands, approved by the principal, who directed the agent to convey according to the conditions so expressed: *Held*, that such action of the principal was a ratification of the act of the agent, in respect to such new conditions, and their binding effect upon the other party to the contract could not be questioned for the want of authority in the agent to insert them. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 455.

Denying agents' authority.
5. *Estoppel.* And the party to whom the lands were to be conveyed under such agreement, having acceded to the new conditions by entering into the agreement containing them, and accepting the deed in pursuance thereof, would be estopped to deny the authority of the agent in respect thereto. Ibid. 455.

Of insurance agents.
How far insurance companies bound by the acts and knowledge of their agents. See INSURANCE, 1 to 5.

ALIMONY. See DIVORCE AND ALIMONY, 2.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 1, 3 to 7.

APPEALS.

Appeals to circuit courts.
From action of county courts, in respect to settlement of estates—not the proper remedy of heirs. See ADMINISTRATION OF ESTATES, 3.

APPEARANCE.

As to several defendants, generally.
1. In actions where there are several defendants, an appearance by an attorney for the defendants, generally, must be construed as an appearance for all. *Kenyon* v. *Shreck et al.* 382.

Appearance by attorney.
2. *Denial of attorney's authority—when allowable and when not.* See ATTORNEY AT LAW, 3, 4.

ARBITRATION.

Arbitration by an executor or administrator.
1. *Of their power in reference thereto.* An executor or administrator has no power to submit a claim against an estate to arbitration so as to bind the estate, and if he undertakes to do so, a judgment rendered on the award will be void. *Clark et al.* v. *Hogle et al.* 427.

ARBITRATION. *Continued.*

EFFECT OF VOID SUBMISSION.

2. *Upon a prior valid judgment.* But where such submission was upon an appeal to a circuit court from a judgment in a probate court, allowing a claim against the estate, the void judgment entered upon the award in the circuit court will not affect in any manner, or invalidate the judgment appealed from. *Clark et al.* v. *Hogle et al.* 427.

ARREST.

OF AN ILLEGAL ARREST.

Where a party is enticed within the jurisdiction of the court by fraud. See JURISDICTION, 1 to 4.

ARREST OF JUDGMENT.

WHAT OBJECTIONS CAN BE HEARD.

1. Upon a motion in arrest of judgment, objections going to the substance, only, can be heard. *Nelson et ux.* v. *Borchenius*, 236. See SLANDER, 1.

ASSAULT AND BATTERY.

WHAT CONSTITUTES.

1. *And herein of the law of self-defense.* It is not essential to the right to maintain an action for an assault and battery, that the plaintiff should have been guilty of no provocation. It is immaterial what language he may have used toward the defendant, so far as the right to maintain an action is concerned. *Ogden* v. *Claycomb*, 365.

2. And even if the plaintiff went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense. Ibid. 365.

3. So, if it appear, in such an action, that the plaintiff advanced upon the defendant in a threatening manner, for the purpose of fighting, and a fight followed, no more violence can be used by the party attacked than a reasonable man would, under the circumstances, regard necessary for his defense. If he strikes a blow not necessary to his defense, or after all danger is past, or by way of revenge, he is guilty of an assault and battery, for which an action will lie. He will not be justified in exceeding the just bounds of self-defense, even though he desist as soon as the attacking party asks him to do so. Ibid. 365.

ASSIGNMENT.

LIABILITY OF ASSIGNOR.

1. *Insolvency of maker.* Where the assignee of a promissory note for $1000, sought to recover against the assignor, on the ground that the

ASSIGNMENT. Liability of assignor. *Continued.*
maker was insolvent at the maturity of the note, and a suit against him would have been unavailing, the evidence showed the maker to have been the owner of a fine library, which filled two large book cases, worth from $150 to $200 each, and furniture of the value of from $2500 to $3000: *Held*, the assignor was not liable, although the maker of the note may have been heavily in debt. *Shufeldt* v. *Sutphen*, 255.

Assignee after maturity.
2. The assignee of a promissory note, after maturity, takes it subject to all the equities then existing between the original parties. *Lock* v. *Fulford*, 166.

Assignee of a mortgage debt.
3. *With notice of a prior sale by the mortgagor—of his relations to the grantee of the mortgagor.* See MORTGAGES, 14.

ASSIGNMENT OF ERRORS.
By whom. See PRACTICE IN THE SUPREME COURT, 1, 2.

ASSUMPSIT.
When it will lie.
1. *For value of property bailed.* While the general rule may be, that assumpsit will not lie for the value of property which has been bailed, unless it has been sold and converted into money, or money's worth, yet where the bailee fails to return the property, and agrees to pay for it, the bailment is converted into a sale, and assumpsit will lie as in case of any other sale of goods. *Parker* v. *Tiffany*, 286.

By one tenant in common against another.
2. *Assumpsit will not lie.* See TENANTS IN COMMON, 1.

ATTACHMENT.
When it will lie.
1. *In respect to property mortgaged.* Should a mortgagor and mortgagee of chattels collude to make use of the mortgage for the purpose, by an unfair sale, of hindering, delaying and defrauding creditors of the former, by preventing anything being saved at the sale after payment of the mortgage, it might be plausibly argued, that the property would be liable to attachment under the amendatory attachment act of 1865. *Laflin et al.* v. *The Central Publishing House et al.* 432.

2. But a fraud in the sale under the mortgage, merely, by the mortgagee upon the mortgagor, would not, of itself, bring the case within the statute, and enable creditors to attach. Ibid. 432.

3. Or, if the mortgagee should sell the property *en masse*, and for less than its value, whatever might be the right of the mortgagor to

ATTACHMENT. When it will lie. *Continued.*

avoid the sale, that fact would not, of itself, authorize an attachment by creditors. *Laflin et al.* v. *The Central Publishing House et al.* 432.

4. It would be difficult to imagine a case where a creditor would have a right to attach the mortgaged property, under the statute, in absence of a corrupt intent to defraud creditors, by collusion between the mortgagor and mortgagee. Ibid. 432.

Attaching creditor.

5. *Of his remedy against another creditor of the same debtor, who has obtained payment out of the property attached.* See CREDITORS, 1.

ATTACHMENT OF BOATS AND VESSELS.

Under act of 1857.

1. *Whether confined to boats navigating rivers.* The act of 1857, giving a summary remedy in certain cases against steamboats, and other water craft, is not confined in its operation to that class of vessels navigating the rivers within or bordering upon this State, but embraces those employed upon any of our navigable waters, whether lake or river. *Schooner "Norway"* v. *Jensen*, 373.

2. *For what cause the statutory remedy may be invoked.* This act gives the remedy against the craft or vessel, by seizure, &c., "for injuries done to persons by such craft," the bearing and spirit of which provision is, as inanimate things have no will to direct them, but must be controlled by intellect, that the vessel or craft assumes the personalty of the owner, who is liable for an injury done by it. Ibid. 373.

3. So, where a sailor on board a vessel was injured by reason of the negligence of the owner to provide ropes in a sound and safe condition, with which to cat the anchor, this was held to be within that clause of the statute giving the remedy "for injuries done to persons by such craft," and it is sufficient, in such case, to allege that the injury was the result of the negligence of the owners. Ibid. 373.

ATTORNEY AT LAW.

Attorney and client.

1. *When the relation exists.* A party who had obtained a divorce from his wife, entered into a written agreement, creating a lien upon his property, to secure the payment of money to the wife, as a settlement between them. The attorney who prepared the written contract, did so at the request of the former husband, and though, at the same time, he was acting, in respect to the subject matter of the agreement, as the attorney of the divorced wife, yet his relations to her did not prohibit him from preparing the contract at the instance of the other party, for which the latter could be compelled to pay him. *Cooper & Moss* v. *Hamilton*, 119.

ATTORNEY AT LAW. *Continued.*

MODE OF RETAINING COUNSEL.

2. It is not essential to the right of recovery by an attorney against his client for professional services, that there should be shown an express request, but if the services were rendered under such circumstances as will reasonably imply that they were performed with the assent and upon the request of such party, a recovery therefor may be had. *Cooper & Moss* v. *Hamilton*, 119.

DENIAL OF HIS AUTHORITY.

3. *To enter an appearance.* Whatever the true rule may be in regard to the question, to what extent, for what purposes, and under what circumstances, a party for whom an appearance to a suit has been entered, can deny the authority of the attorney and ask relief from the court, the claim to do so is viewed with great disfavor by courts whenever innocent third parties have acquired rights under the judgment or decree. *Kenyon* v. *Shreck et al.* 382.

4. *To let a party in to redeem.* In this case, a party became the purchaser of a tract of land under an execution sale, subject to a mortgage. Fourteen months and a half after the purchase, a bill was filed to foreclose the mortgage. The purchaser was made one of the parties defendant to the bill, but was not served with process. The appearance, however, of the defendants, was entered, generally. A decree of foreclosure was pronounced and the property was sold, the mortgagee becoming the purchaser. The purchaser under the execution took no steps to redeem, or set aside the decree, not even procuring a sheriff's deed on his certificate of purchase, though the evidence showed he was aware of the foreclosure, but some six years afterward, sold his certificate of purchase to the complainant, who obtained a sheriff's deed and filed his bill for redemption. The land, in the meantime, was constantly occupied under the foreclosure title, and several times changed hands, and, at the time of the purchase of the certificate by the complainant, was occupied by the defendant: *Held*, for the purpose of allowing a redemption under such circumstances, evidence could not be received impeaching the authority of the attorneys in entering the appearance of the purchaser under the execution, in the foreclosure suit; that it was the duty of such purchaser, if he wished to redeem, to have come forward within a reasonable time, and asked the decree of foreclosure to be opened as to him, and that the complainant's equities were no stronger than those of the execution purchaser would be if he were complainant, being chargeable with notice of all the facts with which such purchaser would be chargeable. Ibid. 382.

OF AN ATTORNEY'S LIEN.

For his fees. See LIEN, 2.

PRIVILEGED COMMUNICATIONS.

As between attorney and client. See EVIDENCE, 23.

OF AN ATTORNEY AS A PURCHASER. See PURCHASERS, 2.

BAGGAGE.

BAGGAGE OF PASSENGERS ON RAILROADS.

1. *Ticket includes baggage.* The price paid for a passenger ticket upon a railroad includes the carrying of his baggage, and the recognition by the road over which the passenger is entitled to travel, of the validity of the ticket, is an admission that the check given for the baggage is equally binding. *Chicago & Rock Island Railroad Co.* v. *Fahey*, 81.

2. *Where the line of transit is over the roads of different companies—liability of each for loss of baggage.* Where a passenger ticket entitles the holder to travel over different lines of road to his place of destination, and to which his baggage is checked, all of them recognizing the validity of the ticket when presented by the passenger, each company to whose possession the baggage may come will be liable to the owner for its loss while in the possession of such company. Ibid. 81.

3. *Of whom tickets may be purchased.* Where a passenger seeks to hold one of several roads in his line of transit, liable for the loss of his baggage, the recognition of his ticket purchased at the beginning of his trip, by the conductor of such road, is, in effect, an admission that it was issued by some person having competent authority to bind the company, and in such case it is immaterial whether the ticket was issued by a special agent of the company sought to be held liable, or or by the ticket agent of some other company. Ibid. 81.

4. *Liability of railroads as warehousemen for baggage of passengers.* When a passenger upon a railroad purchases his ticket and checks his baggage to the place of his destination, and such baggage arrived at its destination, and is not, from any cause, delivered to such passenger, or to his agent, it was *held*, that it was the duty of the company to deposit such baggage in their baggage room, in which event their responsibility becomes that of warehousemen, and they must respond in damages for any neglect in that capacity. *Chicago, Rock Island & Pacific Railroad Co.* v. *Fairclough*, 106.

5. It is not necessary that such place of deposit should be absolutely fire-proof, or burglar proof, but such a place as a man of ordinary prudence would use for the storage of his own goods. Ibid. 106.

BILLS OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS, 2, 3, 4.

BILL OF LADING.

CONSTRUCTION THEREOF.

As a "through freight contract." See RAILROADS, 1.

BOUNDARIES OF ILLINOIS.

EMBRACING A PART OF LAKE MICHIGAN.

By the act of congress prescribing the boundaries of this State, and by the constitution of the State conformable thereto, so much of Lake Michigan as is included by lines, one running north from the point where our eastern boundary strikes the southern bend of the lake to a point in the middle of the lake, in north latitude 42 degrees 30 minutes, and thence west along that parallel, is within the limits of this State. *Schooner "Norway" v. Jensen*, 373.

BURDEN OF PROOF. See EVIDENCE, 14, 15, 16.

CARRIERS.

OF OVERCHARGE OF FREIGHT.

1. *Of the respective rights and duties of a shipper and common carrier.* Where the owner of a carriage shipped the same by a common carrier, the amount to be charged for the transportation being first agreed upon, and, upon the carriage reaching its destination, was demanded by the owner, he offering to pay the charges as agreed, but the agent of the carrier refused to deliver it except upon the payment of a larger amount: *Held*, this was a conversion of the property by the carrier, and the owner could maintain trover therefor. The latter discharged his duty by making a demand for the carriage immediately on its arrival, and offering to pay the freight agreed upon. *Northern Trans. Co. of Ohio* v. *Sellick*, 249.

2. The carriage, while in the possession of the carrier, and after the refusal to deliver it to the owner, was destroyed by fire, and it was held that the owner did not waive the effect of such refusal by agreeing at the time to communicate with the agent with whom the contract was made, at the place of shipment, in respect to the amount of freight agreed to be paid. If there was an overcharge for freight, it was as much the duty of the agent of the carrier to make an effort to have it corrected, as it was that of the owner. Ibid. 249.

3. Nor was the owner under any obligation to pay the overcharge of freight, upon the verbal promise of the warehouseman to refund all over a proper charge. He was not required to put his money in such jeopardy. Ibid. 249.

DELIVERY OF FREIGHT BEYOND THEIR LINES.

Liability in respect thereto—construction of bill of lading. See RAILROADS, 1.

CARRIERS OF PASSENGERS.

Liability for their baggage. See BAGGAGE, 1, 2, 3.

CHANCERY.

STATUTE OF LIMITATIONS.

1. *How availed of.* The bar of the statute of limitations may be availed of, in chancery, by demurrer, where it appears from the face of the bill. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 454.

2. *To avoid the statute of limitations.* In order to prevent the statute of limitations being availed of on a demurrer to a bill in chancery, if there be grounds which take the case out of the statute, they should be stated in the bill. Ibid. 299.

ALLEGATION OF FRAUD.

3. *When sufficient.* In a bill filed by the board of supervisors of a county against a drainage company, to recover the proceeds of drafts which had come to the State from the general government, for swamp and overflowed lands sold by the latter after their selection, and which had been obtained from the State by the defendants, it was alleged that the secretary of the drainage company obtained the drafts from the State by some fraudulent pretense, the character of such pretense being unknown to the complainants, and that the secretary converted the drafts into money, and paid it over to the company: *Held*, upon demurrer to the bill, that, although all the circumstances attending the fraud were not stated, yet the allegation was as full as it could be made, and this was admitted by the demurrer, and was deemed sufficient. Ibid. 299.

4. *Allegation as to time when the fraud was discovered.* The bill alleged that a knowledge of the facts connected with the receipt of the drafts by the secretary of the company, and their conversion and application, did not come to the complainants until within two years before the filing of the bill, and this was regarded a sufficient allegation on that subject, without an allegation of facts and circumstances tending to explain the reason why the information did not reach them at an earlier period. Ibid. 299.

CREDITOR'S BILL.

5. *What constitutes, and when it may be maintained.* A creditor's bill, strictly, is a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to a levy and sale under an execution at law. *Newman et al.* v. *Willetts*, 98.

6. To maintain such a bill, the creditor must have exhausted his remedy at law, by obtaining judgment and getting an execution returned *nulla bona*, this being necessary to give the court jurisdiction, for otherwise it would not appear but that the party has a complete remedy at law.* Ibid. 98.

*See, also, *McNab* v. *Heald et al.* 41 Ill. 326; *Heacock et al.* v. *Durand*, 42 ib. 230; *McConnel* v. *Dickson et al.* 43 ib. 100; *Horner* v. *Zimmerman et al.* 45 ib. 14. But there is an exception to the rule that an execution must issue before a creditor's bill will be entertained, in the case of proceedings against an insolvent estate. See *Steere et al.* v. *Hoagland et al.* 39 ib. 264.

CHANCERY. CREDITOR'S BILL. *Continued.*

7. *And herein, of a bill to set aside a fraudulent conveyance.* But there is another sort of creditor's bill, very nearly allied to the former, by means of which a party seeks to remove a fraudulent conveyance out of the way of his execution. This he may file so soon as he obtains his judgment, and is not required to show that he could not obtain satisfaction out of other property of the defendant. *Newman et al.* v. *Willetts*, 98.

8. But a naked bill to set aside a fraudulent deed, which seeks no discovery of any property, *chose in action*, or other thing alleged to belong to the defendant, and which ought to be subjected to the payment of his judgment, is not a creditor's bill in the sense in which that term is understood and accepted, and provision for which is made by sections thirty-six and thirty-seven of our chancery code. Ibid. 98.

9. And in order to maintain a bill to set aside a fraudulent conveyance, as an obstacle in the way of collecting the complainant's judgment, it must appear the judgment was an existing lien on the property conveyed; so that where the judgment was obtained more than a year before the filing of the bill, and it did not appear that an execution had issued thereon within that time, the bill cannot be maintained. Ibid. 98.

SPECIFIC PERFORMANCE.

10. *Where a part of the conditions of a contract remain unperformed.* Where parties enter into a written agreement to convey by deed, one to the other, certain pieces of real estate for and in consideration of the grantee's execution of certain promissory notes, and of certain conditions to be by him afterwards performed, the giving of the deed and the execution of the notes, in pursuance of the agreement, does not destroy or render invalid the remaining portions of the agreement, but the same are still binding and may be enforced. They are not like conversations which precede a written agreement, and are supposed to have merged in the same or been abandoned. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 454.

CLOUD UPON TITLE.

11. *Who may ask to have it removed.* Where a party shows he has no title to land, it is not for him to complain that there is a cloud upon it. *Hopkins* v. *Granger et al.* 505.

MASTER IN CHANCERY.

12. *Of the necessity of an order of reference.* It is not essential to the authority of a master to take proofs in a case, that there should be a formal order of reference entered of record. The decree of the court being based upon the master's report, and confirming the same, will be regarded as record evidence that the reference was properly made, even in the absence of a formal order to that effect. *Hess et al.* v. *Voss et al.* 473.

CHANCERY. MASTER IN CHANCERY. *Continued.*

13. *Whether a decree was rendered before the master's report was made.* It appeared that the testimony of a witness, embraced in a master's report, was represented by the report to have been sworn to the day after the hearing of the cause. The record failed to show any date of the filing of the report, nor did the report itself bear any date. But, upon it being objected that the report had not been made when it was confirmed by the decree, it was *held*, it would be presumed the report was made before the court took action upon it. Moreover, the decree referred to the report in such a way as to leave no other inference to be drawn. *Hess et al.* v. *Voss et al.* 473.

INFANT DEFENDANTS IN CHANCERY.

14. *Whether the decree must give them a day in court.* The practice in courts of chancery does not require that a day in court shall be specifically given in the decree, to an infant defendant; and it is not error that the decree fails to expressly reserve his rights, as whether or not a day in court is given a minor, he may file a bill to impeach a decree procured by fraud, or for error appearing on its face, and is not driven to a bill of review or a rehearing. Ibid. 473.

ANSWER IN CHANCERY.

15. *When not evidence.* An answer in chancery not sworn to, or even if sworn to, the oath being waived by the bill, is not evidence. *Hopkins* v. *Granger et al.* 504.

EVIDENCE ON FINAL HEARING.

Affidavits not admissible. See EVIDENCE, 19.

RESCISSION OF CONTRACTS. See CONTRACTS, 5 to 8.

ADMINISTRATION OF ESTATES.

Jurisdiction in chancery. See ADMINISTRATION OF ESTATES, 9.

SETTLEMENT OF ESTATES.

Remedy of heirs in respect thereto, is in chancery. See ADMINISTRATION OF ESTATES, 3.

MISTAKE IN AN INSURANCE POLICY.

May be reformed in chancery. See INSURANCE, 23.

IN RELATION TO TRUSTS.

Of the control and management thereof, in chancery. See TRUSTS, 3 to 8.

JURISDICTION IN CHANCERY.

In partition. See PARTITION, 3.

GUARDIAN AD LITEM. See that title.

CHATTEL REAL.

WHAT CONSTITUTES. See REAL AND PERSONAL PROPERTY, 1.

CLOUD UPON TITLE. See CHANCERY, 1.

COLOR OF TITLE. See LIMITATIONS, 12.

COMITY.

CONTRACT FOR SALE OF A NEGRO SLAVE.

Whether enforcible in this State. See CONFLICT OF LAWS, 1, 2.

COMPOUNDING A CRIMINAL OFFENSE.

WHAT CONSTITUTES. See CRIMINAL LAW, 1, 2.

CONFESSION OF JUDGMENT.

REDEMPTION BY JUDGMENT CREDITOR.

Confession of judgment to enable a creditor to redeem from a prior execution sale—not fraudulent. See REDEMPTION, 1.

CONFLICT OF LAWS.

CONTRACT FOR SALE OF A NEGRO SLAVE.

1. *When the lex loci contractus governs.* Where an instrument executed in the State of Kentucky, prior to the abolition of slavery in that State, for the purchase price of a negro slave sold there, was sued upon in this State: *Held*, that the contract being valid and enforcible in the State where it was made, will be enforced in our courts, under the law of comity, notwithstanding such a contract could not have originated here, by reason of slavery being prohibited in this State. *Roundtree* v. *Baker*, 241.

2. *Effect of the abolition of slavery after the contract was made.* The abolition of slavery in Kentucky, after the making of the contract, did not affect its validity or impair the consideration upon which it was based. Ibid. 241.

OF WILLS EXECUTED AND PROVED IN OTHER STATES.

When admissible in evidence in this State. See WILLS, 4, 5.

CONSIDERATION.

WHETHER SUFFICIENT.

1. *To support a quit claim deed from a mortgagor to a purchaser under the mortgage.* At a sale of mortgaged premises, under a power in the mortgage, a third person, a stranger to the mortgage, became the purchaser. The mortgagor and the purchaser, both being uncertain as to their rights in the premises, owing to some alleged illegality in the sale, and to settle any question in respect thereto, entered into an arrangement by which the mortgagor executed a quit-claim deed to the

CONSIDERATION. WHETHER SUFFICIENT. *Continued.*
purchaser, for a nominal consideration, and received in return a written instrument, giving him the option to re-purchase, within a given time, at a price stated: *Held*, that the consideration of the quit-claim deed was the contract, which gave to the mortgagor a certain right of purchase on fair terms, in place of an uncertain right of redemption, depending upon the validity or invalidity of the sale under the mortgage. *Ranstead* v. *Otis et al.* 30.

MUTUALITY.

2. *Sufficiency thereof.* Where a county conveys its swamp and overflowed lands, for a certain sum of money agreed to be paid by the grantee, and upon the condition that he shall drain and reclaim the lands conveyed, there is such mutuality of consideration, that the county may enforce the performance of the condition respecting the drainage of the lands. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 456.

WANT OF CONSIDERATION.

3. Where a party gave to a constable his written obligation to pay a sum of money, the sole consideration for which was the forbearance on the part of the officer from levying a writ of attachment on the property of a third person, and the evidence showed there was no intention on the part of the officer to make the levy, the property being exempt from execution: *Held*, the contract was void for want of consideration. *Hennessey* v. *Hill*, 281.

OF A FURTHER CONSIDERATION.

4. *Whether necessary.* Where a sale of land has been made under a judgment, and a certificate of purchase issued to the plaintiff therein, who afterwards assigns the judgment to a third person for a valuable consideration, upon an assignment of the certificate of purchase to the assignee of the judgment, subsequent to the assignment of the judgment, and to carry out the original intention of the parties, no further consideration is necessary to support the transaction. *Mansfield, Admr.* v. *Hoagland*, 320.

WHETHER CONSIDERATION MUST BE PROVEN.

5. An instrument was made as follows: "Value received in seven-thirty United States bonds, to the amount of twenty-four hundred dollars, with interest coupons due," etc., following with a promise to pay their value in other bonds: *Held*, in a suit upon the instrument, it was not necessary to prove the consideration, as it states upon its face what the consideration was. Nor does it matter that the consideration was bonds and not money. *Childs* v. *Fischer*, 205.

AVERMENT OF CONSIDERATION.

What sufficient. See PLEADING, 3.

CONSTITUTIONAL LAW.

QUESTIONING TAX TITLE—BY WHOM.

Of the revenue law of 1845, *requiring a person to pay all taxes due and assessed upon lands before he can question a tax title thereto.* See TAXES AND TAX TITLES, 4.

CONTEMPT.

WHAT CONSTITUTES.

1. While a justice of the peace was hearing a motion for a continuance of a cause pending before him, an attorney in the cause, in resisting the motion, addressed to the justice this language: "You can fine and be damned." The attorney was held to have been guilty of contempt in open court, for which the justice should punish him. *Hill* v. *Crandall*, 70.

WARRANT FOR CONTEMPT.

2. *To whom it shall be addressed, when issued by a justice of the peace.* See PROCESS, 2.

CONTRACTS.

WHO SHALL PREPARE THEM.

1. A party residing in this State, having obtained a divorce from his wife in Indiana, proposed a settlement with her in order to prevent her attacking the divorce. An agreement was entered into, in writing, the effect of which was to create a lien on the real estate of the former husband, to secure the payment of money to the wife: *Held*, that in the absence of any understanding on the subject, the contract should be prepared at the expense of the party whose lands were to become encumbered by it. *Cooper & Moss* v. *Hamilton*, 119.

MUST BE MUTUALLY BINDING.

2. An article of agreement, purporting to be made between two parties, imposing mutual obligations upon them, showing upon its face it was to be executed by both parties before it would be binding on either, but only executed by one of them, can not be given as evidence to the jury for any purpose, not even against the party executing it. *Waggeman* v. *Bracken*, 468.

3. Such a paper could have no other effect than that of a mere memorandum, which could be used by the witness to refresh his memory. Ibid. 468.

EVIDENCE OF A SPECIAL CONTRACT.

4. Where a party makes a proposition to another in regard to building a house for the latter, the mere fact that the former commences the work with the assent of the latter, is not conclusive evidence of a special contract in respect thereto. The work may have been commenced under a *quantum meruit*. Ibid. 468.

CONTRACTS. *Continued.*

RESCISSION OF CONTRACTS.

5. *Placing the parties in statu quo.* Where parties have exchanged lands, and one of them seeks to rescind the contract, on the ground of fraud, he must restore, or offer to restore, to the other party the property received, before he can properly demand a return of that which he gave in exchange. *Underwood* v. *West*, 397.

6. And so, where the party seeking to rescind, has retained the possession of a portion of the lands received by him in the exchange, he will not be permitted to rescind without accounting for the rents and profits. Ibid. 397.

7. *And herein of a purchaser buying in an outstanding title.* A party who has exchanged lands with another, and agreed to pay off a mortgage to a third person, upon the lands he was to receive, and is seeking a rescission in a court of equity, upon the ground of fraud, he can not avoid the rule that he must restore to the other party that which he received from him, by permitting a foreclosure of such mortgage, and buying in the title under the foreclosure, for his own benefit. Whatever might have been his right to purchase in the outstanding title under the foreclosure, had he restored the property to the other party, he could not do so while in under his purchase, and still recover back the property he gave for it. Ibid. 397.

8. *Herein of giving compensation instead of rescinding—rights of purchasers pendente lite.* In this case, the bill filed for a rescission was dismissed upon a hearing, and the complainant appealed. He had not restored the lands he had received in the exchange, but continued in the possession and use of them. Pending the appeal a third person purchased from the defendant one of the tracts conveyed to him by the complainant, for a valuable consideration. The original decree of dismissal was reversed on the appeal, and upon a second hearing below the defendant brought into court the amount paid by the complainant to secure the title to a portion of the property he was to receive in the exchange, but which the defendant did not own, and in reference to the title to which the latter had made fraudulent representations, for which the rescission was sought: *Held*, the court properly refused to decree a rescission of the contract, but requiring the complainant to receive the money tendered, as a settlement of all the equities between the parties. While the purchaser *pendente lite* could not claim protection as such, yet his position gave force to the fact that the complainant had not offered to place the defendant in *statu quo*, and equity favors compensation, when the law permits it to be made. Ibid. 397.

CONTRACTS CONSTRUED.

9. *Construction of a contract payable in negotiable securities.* An instrument was given as follows: "Value received, in seven-thirty United States bonds, to the amount of $2400, with interest coupons due

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

the 15th of February next, and the bonds due or convertible into five-twenty bonds on the 15th of August next, we jointly and severally promise to pay Frederick J. Fischer or order $2400 in United States bonds, or the equal value of the above described bonds at maturity, with the interest accrued on the same to this date. To be paid in five-twenty or ten-forty bonds, or money, at the election of said Fischer, one year from date, with interest at the rate of ten per cent per annum." Under this contract, Fischer should make his election within the year, if he desired to receive five-twenty or ten-forty bonds,—he could not elect after the note matured. Failing to make such election, the maker could elect whether he would pay in United States bonds, and the amount to be paid, in that event, would be the value of $2400, of seven-thirty bonds, with the premium, and all interest which had accrued on them at the date of the contract, with ten per cent interest. *Childs* v. *Fischer*, 205.

10. *Bill of lading construed, as being a "through freight contract."* See RAILROADS, 1.

11. *A mortgage construed, as to giving to mortgagee authority to buy at his own sale.* See MORTGAGES, 17, 18, 19.

OF JOINT OBLIGATIONS.

Of an individual with a body of individuals. See JOINT OBLIGATIONS, 1.

CONTRACT FOR SALE OF A NEGRO SLAVE.

Whether enforcible in this State. See CONFLICT OF LAWS, 1, 2.

INFANTS.

Not bound by their contracts. See INFANTS, 1.

CONTRACT FOR SALE OF CHATTELS. See SALES, 2 to 5.

DURESS.

When sufficient to avoid a contract. See DURESS, 1, 2.

ABUSE OF PROCESS.

Contract made by means thereof, void. See PROCESS, 3.

COMPOUNDING A CRIMINAL OFFENSE. See CRIMINAL LAW, 1, 2.

CONVERSION. See TROVER, 1, 2.

CONVEYANCES.

WHAT WILL PASS BY A DEED FOR LAND.

A conveyance of swamp lands by a county to a third party, will not pass the right of the county to drafts or scrip given by the general government to the State, and by the State to the county, for swamp and overflowed lands sold by the general government after they had been

CONVEYANCES. What will pass by a deed for land. *Continued.*

selected under the act of congress on that subject. *Board of Supervisors of Henry County* v. *Winnebago Swamp Drain. Co. et al.* 299.

Description of land in a deed. See DESCRIPTION, 1, 2.

CORPORATIONS.

Corporations can not plead usury.

Under interest law of 1853. See USURY, 2.

Municipal Corporations.

Injury from defective sidewalks — liability of cities and individuals. See HIGHWAYS, 4.

Vindictive damages not recoverable against municipal corporations. See MEASURE OF DAMAGES, 7.

COSTS.

In suit to set aside fraudulent sale.

What costs should be allowed. See TRUSTS, 11.

CREDITORS.

Of their relations with each other.

1. *Effect of one creditor receiving payment out of property which another creditor had attached.* A person having property of another in his possession as a factor, accepted a draft drawn by the owner of the property in favor of one of his creditors; the draft was made specifically payable out of the property, and it was agreed between the debtor and his creditor that the factor should retain the custody and control of the property, as their mutual agent, for the specific purpose of paying the draft. The debtor, at the same time he made the draft, also gave to the creditor, in whose favor the draft was drawn, a chattel mortgage upon the property, in which it was stipulated that the property should remain in the custody of the factor, as their mutual agent, and that he should sell the same, and after discharging certain other acceptances of his for the debtor, should pay the balance to the mortgagee, to be applied on the draft. Power was given the mortgagee to take possession of and sell the property, in case of default. The mortgage was not recorded. The mortgagee, however, advertised and sold the property, buying it in himself, and afterwards sold it to the factor for the amount of his acceptance, which he paid. It was *held*, although the mortgage might be inoperative as such as against third persons, by reason of not being recorded, yet it was an agreement valid between the parties, and the transaction might be regarded as a voluntary payment of the draft by the acceptor, for which he was liable, and which he was authorized to do out of the property, by virtue of his lien, and there could be no

CREDITORS. Of their relations with each other. *Continued.*

liability in respect thereto on the part of the creditor who thus obtained payment of his draft, to another creditor of the same debtor, who had levied an attachment upon the property after the mortgage and draft were made, but before the sale. *Eaton* v. *Truesdail et al.* 307.

CREDITOR'S BILL.

Creditor of an estate.

Of his remedy in chancery. See ADMINISTRATION OF ESTATES, 9.

Creditor's bill, generally. See CHANCERY, 5 to 9.

CRIMINAL LAW.

Compounding a criminal offense.

1. *What constitutes.* An attorney, having money of his client in his hands, and refusing to pay it over, the client sued out a warrant for his arrest on the charge of larceny for embezzlement, which was shown the attorney, who was told that unless he paid the claim, or secured it, the prosecution would be pushed to a conclusion; the attorney thereupon gave his note for the amount, with security: *Held*, in an action on the note, that it would not be regarded as having been given to compound a criminal offense, inasmuch as the statute allows the injured party to receive from the wrongdoer that which belongs to him. *Ford et al.* v. *Cratty, Admr.* 313.

2. Nor was the character of the transaction, so far as respects the validity of the note, affected by the fact that it would not have been given had the principal maker not been threatened with the criminal prosecution. Ibid. 313.

Inhuman treatment of a child by a parent.

3. *Is punishable.* While the law gives parents a large discretion in the exercise of authority over their children, yet this authority must be exercised within the bounds of reason and humanity; and if the parent commits wanton and needless cruelty upon his child, the law will punish him. *Fletcher et al.* v. *The People*, 395.

4. So, upon an indictment of a parent for false imprisonment of his child, a blind and helpless boy, in a cold and damp cellar, without fire, during several days in mid-winter, he giving as an excuse therefor, that the boy was covered with vermin, it was *held* that such treatment of a child by his parent was wanton, inhuman and needless cruelty, and rendered him subject to indictment and punishment. Ibid. 395.

DAMAGES.

Excessive damages. See NEW TRIALS, 1 to 7.

DAMAGES. *Continued.*

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES, 7, 8.

MEASURE OF DAMAGES. See that title.

DEDICATION.

WHAT CONSTITUTES A DEDICATION.

1. *For a public highway.* Where the owner of land joined in a petition to open a road, which was to run in part through his land, and such owner, as one of the commissioners of highways, acted upon the petition, and granted the order to establish the road, and afterward executed a release of all claim to damages, under seal, and for a valuable consideration, and such road was opened, used and worked, it was *held*, that these acts amount to a dedication of the land for the purposes of this easement, and estop him, and all persons claiming under him, from averring anything against them. *Trickey* v. *Schlader et al.* 78.

2. Nor can it be objected, that all the requirements of the statute were not observed, when the owner himself instituted the proceedings, and every act done was with his knowledge and consent, and the question of the want of power can not arise. Ibid. 78.

DEEDS. See CONVEYANCES.

DEFAULT.

JUDGMENT UPON DEFAULT.

Setting the same aside at a subsequent term. See JUDGMENTS, 4, 5, 6.

DEFEASANCE.

WHAT CONSTITUTES. See MORTGAGES, 1.

DEMURRER. See PLEADING, 11, 12.

DESCENTS.

WIDOW AS HEIR OF HER HUSBAND.

1. *Whether a widow will inherit personal property from her husband, under the 46th section of the statute of wills.* Where a will leaves the property of the testator, which consisted of personalty alone, to be distributed to his heirs at law according to the statute of descents, thereby leaving his estate intestate, and the testator died, leaving a widow, but no child or children, or descendants of a child or children, the widow will take the entire estate, as the heir of her husband, under the 46th section of the statute of wills. *Rawson et al.* v. *Rawson et al. Exrs.* 62.

DESCENTS. Widow as heir of her husband. *Continued.*

2. *Effect of the act of* 1847 *upon the rights of the widow in that respect.* The act of February 11, 1847, entitled, "An act to amend an act concerning wills," was not intended to abridge the rights of the widow as an heir under the statute of descents, but to enlarge her dower rights, and did not operate to repeal the 46th section of the statute of wills, which prescribes the contingencies upon which the widow may become the heir of her husband. *Rawson et al.* v. *Rawson et al. Exrs.* 62.

3. Merely because there may be an inconsistency between the act of 1847, in its provisions respecting the widow, and the statute of descents of 1845, will not authorize the construction that the latter was repealed by the former by implication, inasmuch as the two acts are not on the same subject, the subject of the act of 1847 being the widow's dower, while that of the act of 1845 is not dower, but inheritance. Ibid. 62.

DESCRIPTION.

Description of land in a deed.

1. In describing lands in a conveyance, no set form of words is required, but only such language as clearly designates the lands conveyed. *Bowen et al.* v. *Prout*, 354.

2. A deed described the lands conveyed as follows: "The following tracts or parcels of land, all of which lying and being in the military tract in the State of Illinois, that is to say, the northwest ¼ section 27, 11 S. 2 W." following with the numbers of several other tracts, describing them thus: "N. E. ¼ 17, 15 N. 6 E." without the use of the word "section" preceding the quarters. The description of the tracts succeeding the first one was sufficient; the word "section" would be understood, as though it were expressed, before the numerals representing all the other quarters. Ibid. 354.

In a policy of insurance.

Description of an interest in a trustee. See INSURANCE, 10.

DIRECTORS OF RAILROADS.

Of their compensation. See RAILROADS, 2

DISCRETIONARY.

What matters are discretionary.

1. *To give or refuse an instruction embodying merely abstract principles.* See INSTRUCTIONS, 1.

2. *Entering return on process—discretionary.* See PROCESS, 5.

DISMISSAL OF SUIT.

WHAT AMOUNTS TO A DISMISSAL.

A decree for alimony will operate as dismissal of another suit pending, brought by a *feme covert*, under the act of 1867, for separate maintenance. *Harper et al.* v. *Rooker*, 370. See DIVORCE AND ALIMONY, 1.

DIVORCE AND ALIMONY.

SUIT FOR SEPARATE MAINTENANCE.

1. *Effect of a subsequent decree for alimony.* Where a married woman has commenced a suit against her husband, for separate maintenance, under the act of 1867, and pending such suit obtains, in another suit, a decree for a divorce, and for alimony, the decree for alimony will operate as a dismissal or discontinuance of the former suit, without any formal order disposing of it. Ibid. 370.

ALIMONY.

2. *Out of what fund alimony may be decreed.* So, where the wife, upon commencing her suit for separate maintenance, caused her husband to be arrested under a writ of *ne exeat*, and to give bond, and certain United States securities belonging to the husband were placed in the hands of the surety on the *ne exeat* bond as an indemnity therefor, and to secure the attorney's fees in that suit and a suit for divorce also then pending, it was proper for the court, in decreeing alimony in the latter suit, at the instance of the wife, to direct the surety on the *ne exeat* bond to pay over to her, as a portion of her alimony, the residue of the securities held by him as an indemnity, after deducting the attorney's fees therefrom, although the former suit was not formally disposed of by any order therein, because the surety could not be held liable upon his bond after the decree for alimony, nor could any further proceedings be had in the suit for separate maintenance. Ibid. 370.

DURESS.

WHAT SUFFICIENT TO AVOID A CONTRACT.

1. Where a party having a warrant for an arrest, threatens to execute it unless the person against whom the warrant was issued enters into a certain contract, that has been held sufficient duress to avoid the contract. *Bane et al.* v. *Detrick*, 20.

2. And even though the arrest would have been illegal, because the warrant was issued by a justice of the peace in one State for an offense committed in another State, yet the contract being executed under the threat of an arrest under it, if the threat was of such a character as to terrify a man of ordinary and reasonable firmness, duress would be established and the instrument held void. Ibid. 20.

EASEMENTS.

SURFACE WATERS.

Of an artificial drain as an easement upon adjacent lands. See SURFACE WATERS, 5.

EJECTMENT.

OUTSTANDING TITLE.

1. *Effect of the plaintiff showing an outstanding title, upon his right of recovery.* A defendant may protect his possession, in an action of ejectment, by showing an outstanding title. And so, if a plaintiff introduces proof of title in a third person, with which he fails to connect himself, such proof will be fatal to a recovery. *Ballance* v. *Flood*, 49.

ERROR.

ERROR WILL NOT ALWAYS REVERSE. See PRACTICE IN THE SUPREME COURT, 3, 4.

ESTOPPEL.

DENIAL OF AGENTS' AUTHORITY.

When one dealing with the agent is estopped therefrom. See AGENCY, 5

EVIDENCE.

PAROL EVIDENCE.

1. *To correct a mistake in recording a deed.* In an action of ejectment, a party offered in evidence a certified copy from the record of a deed, which appeared to have been signed by "James H. Turrill," instead of "Samuel H. Turrill:" *Held*, it was competent for him to show by extrinsic evidence, that the deed was in fact executed by Samuel H., and that the error occurring in the christian name in the copy, was the mistake of the recorder in transcribing the original upon the record. *Nixon* v. *Cobleigh*, 387.

2. *Explaining mistake in the execution of a deed.* And had the original deed itself been produced, signed as this purported to have been, it would have been proper to show, by parol evidence, that the grantor executed it by the name of "James," instead of "Samuel," his true name. Ibid. 387.

3. *To explain a written contract.* A vendor of certain lots of land signed a memorandum, in writing, as follows: "Chicago, June 20th, 1868, received of James Redican, to apply on the purchase of lots 14 and 15, block 15; 12 and 13, block 16, bought of B. F. Fowler, one hundred dollars. Price of four lots, $1170.33. If lots are not in location as represented, money to be returned to J. Redican at his option." The purchaser went into possession under the agreement, and made

EVIDENCE. Parol evidence. *Continued.*

valuable improvements: *Held*, in a suit by the vendee to enforce the specific performance of the contract, that from the incompleteness of the memorandum in itself, in expressing all the conditions of the contract, and the location of the lots, it was evidently the intention of the parties to reserve the right to supply its deficiencies by parol proof, and it was, therefore, competent for the vendee to show by parol the character of deed to be made, when the contract was to be executed, and the description and location of the lots, without asking a reformation of the instrument. *Fowler* v. *Redican*, 405.

4. Moreover, as the partial execution of the contract by the purchaser, through his possession and improvements, and payment of part of the purchase money, would have enabled him to enforce its specific execution had it rested entirely in parol, so, this instrument not purporting to express the entire agreement of the parties, could be made complete by parol evidence of those matters which were omitted. Ibid. 405.

5. But it seems, where the contract on its face appears to be complete in itself, but misdescribes the property sold, parol evidence would not be admissible to correct such misdescription, except in a proceeding in equity to reform the instrument. Ibid. 405.

6. *Payment of taxes.* It is the settled rule of this court, that payment of taxes may be proved by parol, and receipts therefor may be explained or contradicted. *Elston et al.* v. *Kennicott et al.* 272.

Secondary evidence.

7. *Certified copy of deed—proper foundation for the same—under the statute.* In an action of ejectment, the plaintiff swore "that he did not have the deed in his possession; that he did not know where it was and had not made search for it:" *Held*, that this proof established either alternative presented under the statute—loss, or want of power over the instrument—and was sufficient, as a foundation, for reading in evidence a certified copy from the record. *Nixon* v. *Cobleigh*, 387.

8. The express object of our statute, was to modify the strictness of the common law rule, as to the admission of certified copies of lost instruments; and to give it a rigid construction, would virtually defeat the design of the legislature. Ibid. 387.

9. *Of a mistake in the record.* And when, in such case, a party offered in evidence a certified copy of a deed, which appeared to have been signed by "James H. Turrill," instead of "Samuel H. Turrill," it was competent for him to show by extrinsic evidence, that the deed was in fact executed by Samuel H. and that the error occurring in the christian name in the copy, was the mistake of the recorder in transcribing the original upon the records. Ibid. 387.

EVIDENCE. SECONDARY EVIDENCE. *Continued.*

10. *To prove contents of lost deed.* The right of a party to prove the contents of a lost deed, can not be questioned; and had the original deed been produced, signed as this purported to have been, it would be proper to show by parol evidence, that he executed it by the name of "James" instead of "Samuel," his true name. *Nixon* v. *Cobleigh.* 387.

11. *Proof of contents of instrument — preliminary proof.* Proof of the fact that a mortgagee surrendered to the mortgagor the mortgage given to secure the purchase money of the chattels embraced therein, under an agreement that the property should be returned, after proving that such a mortgage had been executed, is sufficient to let in parol evidence of the contents of the mortgage, on behalf of the mortgagee, in a suit between him and a third person concerning the title to the mortgaged property. *Huls* v. *Kimball,* 391.

12. *By whom the contents may be proved.* When secondary evidence is admissible to prove the contents of a mortgage, such contents may be proven by any one who can swear he knew them. The mortgagee is quite as competent as the mortgagor for that purpose. Ibid. 391.

13. And it is sufficient to enable a witness to testify to the contents of an instrument, where he states that he saw it signed, had it in his possession more than a year, and knew its contents, without stating that he had read it. Ibid. 391.

BURDEN OF PROOF.

14. *As to title of property—in replevin.* In an action of replevin, under a plea of property in the defendant, or a third person, traversing the plaintiff's right, the burden of proof as to the title to the property is upon the plaintiff. *Chandler* v. *Lincoln,* 74.

15. But where the plea is property in the defendant or a third person, without a traverse of the plaintiff's right, it leaves the burden of proof upon the defendant to establish the truth of his plea. Ibid. 74.

16. *Where a garnishee answers that the note he owed the attachment debtor had been sold—burden of proof as to the good faith of the transfer.* See GARNISHMENT, 2.

ADMISSIONS OF RECORD.

17. *Obviate the necessity of proof.* Whatever is admitted on the record of a cause need not be proved; so where a plea admits the interest of a beneficial plaintiff in the subject matter of the suit, such interest need not be proved, in the event it becomes necessary that the fact should appear. *Boynton* v. *Phelps et al.* 210.

ANSWER IN CHANCERY.

18. *When not evidence.* An answer in chancery not sworn to, or even if sworn to, the oath being waived in the bill, is not evidence. *Hopkins* v. *Granger et al.* 504.

EVIDENCE. *Continued.*

AFFIDAVITS, ON FINAL HEARING IN CHANCERY.

19. *In suit for injunction.* Depositions taken on a motion to dissolve an injunction may, under the 14th section of the statute entitled, "Ne exeat and injunctions," be read on the final hearing of the cause; but affidavits taken in reference to such motion, can not be read on the final hearing. *Hopkins* v. *Granger et al.* 504.

EVIDENCE TO PROVE A PARTNERSHIP.

20. *Of its competency.* The declaration of a purchaser of goods to the vendor, that some other person not present is jointly interested as a partner in the purchase, is no evidence whatever against such person, to establish the partnership. *Gardner* v. *Northwestern Manufac. Co.* 367.

21. Nor is it competent, where the existence of the partnership is the issue on trial, for the court to decide that a partnership has been proven by evidence *aliunde*, and then admit the statements of one of the alleged partners to prove the partnership, on the principle that the statements of one partner are admissible against the other as to partnership matters. Ibid. 367.

22. Where the existence of the partnership is not the issue on trial, however, and the statements are not offered to establish a partnership, but relate to some other question, it may undoubtedly be sometimes the duty of the court to decide, in the first instance, whether a *prima facie* partnership has been proven, and if it has been, to let the statements go to the jury, with proper explanations. Ibid. 367.

PRIVILEGED COMMUNICATIONS.

23. *As between attorney and client.* It is not error to permit an attorney, as a witness, to answer a question, the object of which was merely to ascertain whether the relation of attorney and client actually existed, not what was disclosed to him in that relation. Such question calls for no breach of professional confidence. *Leindecker et al.* v. *Waldron*, 283.

PROOF OF EXECUTION OF INSTRUMENT.

24. *When necessary, and when not.* When an instrument is offered in evidence under the common counts in assumpsit, our statute has not dispensed with the necessity of proving its execution; but where a declaration contained a special count and the common counts, and the instrument was not admissible under the former, by reason of a variance, and was offered under the common counts, notice having been given the defendant that it would be offered under all of the counts and no other claim would be asserted under the declaration, it was *held*, such notice took the case out of the rule, and obviated the necessity of proving the execution of the instrument. *Childs* v. *Fischer* 205.

OF UNSTAMPED INSTRUMENTS.

As evidence in State courts. See STAMP ACT, 1.

OF WILLS EXECUTED AND PROVED IN OTHER STATES.

When admissible in evidence in this State. See WILLS, 4, 5.

EVIDENCE. *Continued.*

SALES UNDER TRUST DEED—PROOF OF NOTICE.

Obviated by recitals in conveyance by trustee. See SALES, 6.

EVIDENCE IN ACTIONS FOR SLANDER. See SLANDER, 3, 4.

EVIDENCE UNDER THE COMMON COUNTS. See PLEADING AND EVIDENCE, 2.

SUFFICIENCY OF EVIDENCE.

As to the payment of taxes. See LIMITATIONS, 18, 19, 20.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

EXCEPTIONS.

1. *When necessary.* An objection to the ruling of the court below in refusing to quash a writ of *certiorari* sued out under the statute, to remove a cause from a county court to the circuit court, will not avail in the appellate court, on error, unless exception was taken to the decision of the circuit court on that subject. *Johnson* v. *Gillett*, 358.

BILLS OF EXCEPTIONS.

2. *Necessity thereof.* When it is alleged, on error, that the court below made remarks to counsel, orally, in violation of the statutory rule that instructions to the jury must be in writing, if it does not appear by the bill of exceptions what the court did say, it will be presumed the oral remarks were not of such character as to come within the rule. Per Mr. JUSTICE WALKER. *O'Hara* v. *King*, 304.

3. *Their requisites.* Where the error assigned is, that the verdict is against the evidence, but the bill of exceptions in the case does not purport to embody all the evidence, this court will not regard such assignment of error as properly before it. *Gallagher et al.* v. *Brandt et al.* 80; *Wilson* v. *McDowell*, 405.

4. *Within what time they should be signed.* While it is for the judge trying a cause to determine, in the first instance, whether the requirements of the law have been so far complied with as to make it his duty to sign a bill of exceptions, yet where that has not been done, the bill should not be signed. In this case, the bill was signed two years after the trial to which it related, and from the memory of the judge, without minutes, and without any exceptions having been taken at the time. The signing of the bill was disapproved. *Dent* v. *Davison*, 109.

EXCESSIVE DAMAGES. See NEW TRIALS, 1 to 7.

EXECUTORS. See ADMINISTRATION OF ESTATES, 6.

FACTOR'S LIEN. See LIEN.

FISH INSPECTION.

CITY ORDINANCE IN RESPECT THERETO.

Construction thereof. See ORDINANCE, 1.

FORCIBLE ENTRY AND DETAINER.

AGAINST WHOM THE ACTION WILL LIE.

1. *A sub-tenant* is, by the express provision of the statute, liable to this action, and it has been so held by this court. *Leindecker et al.* v. *Waldron*, 283.

WHO SUBJECT TO WRIT OF RETORNO HABENDO.

2. *When sub-tenant can not be dispossessed under a judgment against the tenant.* Where a landlord recovers a judgment in an action of forcible entry and detainer against his tenant, a sub-tenant, who was not a party to such judgment, can not be put out of his possession under the writ, unless he entered *pendente lite.* Ibid. 283.

FORM OF ACTION.

WHEN IT CAN NOT BE QUESTIONED. See ACTIONS, 2.

FORMER ADJUDICATION.

WHETHER A BAR TO A SUBSEQUENT SUIT.

1. A party who received an injury, by reason of a hatchway in the sidewalk in a city being left in an unsafe condition, sued the city for damages, and the city recovered judgment; but this was held to be no bar to a subsequent action by the person injured, for the same cause, against the individual through whose negligence the accident occurred. *Severin et al.* v. *Eddy*, 189.

2. *Of notice by the city to the negligent party.* Nor would the fact that the person whose negligence occasioned the injury received notice of the former suit, and that the city would hold him liable for any sum that might be recovered, operate to render the judgment in such suit a bar to the subsequent suit. Ibid. 189.

IN AN APPELLATE COURT.

3. *How far conclusive.* Where a case has been determined in an appellate court, and remanded for further proceedings, upon a second appeal, the former decision will be deemed conclusive of the questions then presented; but if, upon the new trial below, further and material evidence be introduced, a new case is presented, so as to require the appellate court to consider the additional evidence in connection with that previously before the court, and to decide the case upon all the evidence thus appearing in the record. *Elston et al.* v. *Kennicott et al.* 272.

FORMER DECISIONS.

INSURANCE—OMISSIONS BY AGENTS.

1. Where the conditions of a policy of insurance required the interest of the assured to be stated therein, if it was less than an absolute ownership of the premises, the company can not avail of an omission of the agent to state such lesser estate, if he knew the fact in respect thereto at the time he wrote the policy. The case of *The Illinois Mut. Fire Ins. Co.* v. *The Marseilles Manuf'g. Co.* 1 Gilm. 236, is not in conflict with this doctrine. *Commercial Ins. Co.* v. *Spankneble*, 53.

2. Nor is it essential, as was said in 1 Gilm. 236, that the information should be contained in the application, as the case of *Atlantic Ins. Co.* v. *Wright*, 22 Ill. 463, holds that, if the facts were known to the agent who made the survey and filled up the application, and they were omitted by him, the insurer could not avoid paying the loss for that reason. Ibid. 53.

PAYMENT OF TAXES UNDER COLOR OF TITLE.

3. *By whom, so as to be availing to a subsequent purchaser.* The case of *Fell* v. *Cessford*, 26 Ill. 522, is not in conflict with *Hale* v. *Gladfelder et al.* 91. See LIMITATIONS, 26, 27.

LIMITATIONS.

4. *Action of assumpsit on a note made out of the State.* The language of the opinion in the case of *Campbell* v. *Harris*, 30 Ill. 395, is too broad, if it is to be construed as meaning that no promissory note given out of this State, and maturing prior to the act of February, 1849, and since the act of 1827, is barred by any act of limitation in force in this State. *Norton* v. *Colby*, 198. See LIMITATIONS, 5, 6, 7.

FRAUD.

ALLEGATION OF FRAUD.

Of its sufficiency. See CHANCERY, 3, 4.

OBTAINING JURISDICTION OF THE PERSON BY FRAUD.

Of enticing a party into the State by false representations, for the purpose of arresting him upon civil process. See JURISDICTION, 1 to 4.

REDEMPTION BY JUDGMENT CREDITOR

Confession of judgment for the purpose of enabling judgment creditor to redeem—not fraudulent. See REDEMPTION, 1.

RELEASE OBTAINED BY FRAUD.

Will not be given effect. See RELEASE, 2,

FRAUDULENT CONVEYANCES.

MAY CEASE TO BE FRAUDULENT.

1. Although the owner of goods may have placed them in the hands of a third person with the purpose of hindering and delaying the creditors of the former, the owner receiving the note of the other party to

FRAUDULENT CONVEYANCES.

MAY CEASE TO BE FRAUDULENT. *Continued.*

give color to the transaction as a sale, yet, if the debtor afterwards pays his debts, the transfer would cease to be a fraud upon creditors, and a surrender of the note to the maker would constitute a sufficient consideration for an agreement on the part of the latter to hold the property as bailee, and such a change of the character of the arrangement would not, under such circumstances, be deemed fraudulent. *Parker* v. *Tiffany*, 286.

EMPLOYMENT OF VENDOR BY VENDEE, AS AGENT.

2. *How far evidence of fraud.* Where a party sells out his business to another, while it is not a fraud *per se* for the vendor to be employed by the vendee as a clerk to carry on the business, it is a circumstance creating a strong presumption of fraud, and especially so when the former uses and controls the property as he did before the sale. In such a case, it requires clear and satisfactory proof, and the circumstances surrounding the transaction should clearly indicate honesty and good faith, to rebut the presumption. *Rothgerber et al.* v. *Gough*, 436.

OF THE REMEDY TO SET IT ASIDE. See CHANCERY, 7, 8, 9.

GARNISHMENT.

WHETHER GARNISHEE LIABLE.

1. Where a garnishee in an attachment suit answered that he had given the defendant in the attachment his promissory note, had last seen it in his possession prior to the service of the garnishee process, but had since been told by him that he had sold it before the service, and the note had since been presented for payment by another party claiming to own it, it was held *prima facie* that he would not be liable as garnishee. *Wilhelmi* v. *Haffner*, 222.

BURDEN OF PROOF.

2. *In such case.* The garnishee in such case could not be required to prove the validity of the assignment of the note, or to swear to it, as it was not a fact within his knowledge. If the transfer of the note was not in good faith, it would devolve upon the plaintiff in attachment to show that fact by proper proof. Plaintiff could make an issue on that question and the garnishee could notify the holder of the note to appear and defend his title. Ibid. 222.

GUARDIAN AD LITEM.

HOW TO BE DESIGNATED.

1. An order appointing the "clerk of the court" guardian *ad litem*, is sufficient, without designating him by his name. *Hess et al.* v. *Voss et al.* 472.

GUARDIAN AD LITEM. *Continued.*

WHO MAY PREPARE HIS ANSWER.

2. In a chancery proceeding for partition of lands, where there are minor defendants, the fact that the answer of the guardian *ad litem*, the same admitting nothing and waiving nothing, but leaving complainants to prove their bill, was drafted by complainants' solicitor, can be of no avail in a proceeding to reverse the decree granting the partition. *Hess et al.* v. *Voss et al.* 472.

HEIRS.

OF A PRIOR UNRECORDED DEED FROM THE ANCESTOR.

1. *Its effect on the title of the heirs.* An heir cannot hold land as an inheritance from his ancestor, as against a prior unrecorded deed of the latter, because the heir takes as a volunteer. *Bowen et al.* v. *Prout*, 354.

2. *Of a subsequent purchaser from the heir.* But a subsequent purchaser, for a valuable consideration, from the heir, without notice of a prior unrecorded deed from the ancestor, will be protected in his title as against such prior conveyance. Ibid. 354.

3. *Of one of several heirs as such purchaser.* And one of several heirs, in purchasing from his co-heirs, without notice of the prior unrecorded conveyance of their ancestor, will be equally protected in the title to the portion he so purchases. Ibid. 354.

SETTLEMENT OF ESTATES.

Remedy of the heirs in respect thereto. See ADMINISTRATION OF ESTATES, 3.

HIGHWAYS.

WHAT CONSTITUTES.

1. *So as to impose upon the public authorities the duty to keep them in repair.* The third section of article 17, of the township organization law of 1861, which requires the commissioners of highways "to cause such roads, used as highways, as have been laid out but not sufficiently described, and such as have been used for twenty years, but not recorded, to be ascertained, described, and entered of record in the town clerk's office," is construed as referring to roads which have been recognized as highways by the proper authorities, and not to every road which the owner of land may have laid out for his own use, and permitted the public to travel over. *The People, ex rel. Shurtz* v. *Comrs. of Highways of Worth Township*, 498.

2 By such words as "are used as highways," is meant those roads whose character as highways has been established by the consent of the owners of the soil, and of the proper authorities, but of which no accurate survey and record have been made. Ibid. 498.

3. It is not enough, to bind the town or county to repair, that there has been a dedication of a public way by the owner of the soil, and the

HIGHWAYS. What constitutes. *Continued.*

public use of it. To bind the corporate body to this extent, there must be some evidence of acquiescence or adoption by the corporation itself. *The People, ex rel. Shurtz* v. *Comrs. of Highways of Worth Township*, 498.

Defective sidewalks.

4. *Liability of cities and individuals.* If an individual construct a hatchway in a sidewalk, he must respond for any damages resulting from his negligence to render it safe and free from danger. It is also the duty of the city to keep the streets and sidewalks in safe condition, and it will be liable for injury occasioned by its neglect of duty in that respect. But should a recovery be had against the city in such case, the person whose neglect of duty caused the injury will be liable over to the city therefor. *Severin et al.* v. *Eddy*, 190.

Dedication for a public highway.

What constitutes. See DEDICATION, 1, 2.

HOMESTEAD.

In an easement.

1. Where an easement, or right of way, was granted by the owner of premises who occupied them as a homestead, the fee still remaining in the grantor, the question of a homestead right in the land by the surviving widow can not arise. *Trickey* v. *Schlader et al.* 78.

HUSBAND AND WIFE.

Of the ownership of property.

As between husband and wife and creditors of the former. See MARRIED WOMEN, 6.

Right of action in the wife.

Power of the husband to control it. See MARRIED WOMEN, 3.

Husband as agent of the wife. Same title, 4.

Suit for separate maintenance by the wife.

Effect thereon of a subsequent decree for alimony in another suit. See DIVORCE AND ALIMONY, 1.

INFANTS.

Contracts not binding.

1. Where a minor contracted to work nine months, but worked one month and a half, and quit, *it was held*, he was not bound by his contract, and could recover from his employer the value of the services rendered. *Ray* v. *Haines*, 485.

Infant defendants in chancery.

2. *Whether the decree must give them a day in court.* See CHANCERY, 14,

INJUNCTIONS.

EVIDENCE ON FINAL HEARING.

Affidavits not admissible. See EVIDENCE, 19.

INSPECTION OF FISH.

CITY ORDINANCE IN RESPECT THERETO.

Construction thereof. See ORDINANCE, 1.

INSTRUCTIONS.

OF THEIR VARIOUS QUALITIES.

1. *Abstract principles.* It is not erroneous to refuse to instruct a jury that a conversation not reduced to writing, when detailed by a witness after the lapse of six years, is to be received with caution, for the reason, if such an instruction amounts to anything, it is a mere abstraction, which the court has the discretion to give or refuse. *Parker* v. *Fergus*, 419.

2. *Should present the different hypotheses of the parties.* In an action where the question was, whether a special contract existed as to the subject matter of the suit, an instruction was asked, by which it was sought to tell the jury that certain things would constitute a special contract between the parties, by summing up one view of the evidence, without qualification by reference to the opposite hypothesis: *Held*, that this was properly changed, by saying that the matters enumerated would be proper to be considered in determining the question of contract. *Waggeman* v. *Bracken*, 468.

3. *Should embrace all the conditions.* In an action against a railroad company for killing stock, if an instruction for the plaintiff which undertakes to enumerate the facts upon which a recovery may be had, omits the essential fact that the road had been opened six months, a judgment for the plaintiff will be reversed, unless such omitted fact is shown by the evidence. *Chicago & Northwestern Railway Co.* v. *Diehl*, 441.

4. *Should be based upon the evidence.* An instruction, in an action of trespass on the case for injuries to the person, which directs the jury that in fixing the damages the plaintiff ought to recover, if they believe from the evidence he is entitled to recover, they should consider all the circumstances surrounding the case, and then specifically points out the circumstances, is not obnoxious to the objection, that instructions should be based upon the evidence. *Chicago, Rock Island & Pacific Railroad Co.* v. *Otto*, 416.

5. Where an instruction was asked by the defendant, directing the jury that they are to judge of the credibility of the plaintiff as a witness, whether, taking his interest into consideration, he is entitled to belief as against other disinterested testimony which contradicts him: *Held*, there being no disinterested testimony contradicting him, it was

INSTRUCTIONS. Of their various qualities. *Continued.*

properly modified by striking out the words "as against other disinterested testimony which contradicts him." *Chicago, Rock Island & Pacific Railroad Co.* v. *Otto*, 416.

6. In an action to recover damages for the death of a person, occasioned by the negligence of another, brought under the statute, for the benefit of the widow and next of kin, there was no evidence that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training, and for want of such evidence, it was held to be a misdirection to the jury, to instruct them that such training and instruction by the deceased, of his children, were proper elements to consider in ascertaining the pecuniary loss suffered by the children. *Illinois Central Railroad Co.* v. *Weldon, Admr.* 290.

Oral statements of court to counsel.

7. *Construction of the statute in relation to written instructions.* The act of February 25, 1857, which declares that, "Hereafter, no judge of the circuit court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing," should not be construed as prohibiting the court, from confining counsel in their argument, to such points of law as he may suppose control the case, and from stating orally, to the counsel, in the presence of the jury, what those points are. *O'Hara* v. *King*, 304.

INSURANCE.

Insurance agents.

1. *How far companies are bound by the acts and knowledge of their agents.* Where one of several partners made application to an agent of the company insuring, who was informed that it was the interest of the firm, not that of the individual partner alone, which was to be insured, and agreed so to insure it, the agent at the time having full knowledge of the ownership of the property, the company would be bound by the acts and knowledge of the agent in respect thereto, which would form a sufficient basis upon which to require a court of equity to reform the policy issued by the officers of the company to the individual partner alone. *Keith et al.* v. *Globe Insurance Co.* 518.

2. *By the acts and knowledge of what character of agents companies are bound.* The fact that such agent was not a regular agent of the company would not relieve the latter from being bound, he having previously obtained insurance for the company for which they paid him a commission, and having also obtained the particular insurance and received his commission therefor,—holding such relation to the company he would be deemed their agent in respect to the insurance which he negotiated, and they would be bound by his acts and knowledge concerning it. Ibid. 518.

INSURANCE. INSURANCE AGENTS. *Continued.*

3. *Effect of notice to an agent—and of omissions by him.* Notice to an insurance agent who issues a policy, of facts relating to the subject matter of the insurance, is notice to the company, and if he fails to properly state them in the policy when relied upon and trusted to do so, the company should not be permitted to escape liability on that ground. *Commercial Insurance Co.* v. *Spankneble*, 53.

4. So, where the conditions of a policy required the interest of the assured to be stated therein, if it was less than an absolute ownership of the premises, the company can not avail of an omission of the agent to state such lesser estate, if he knew the fact in respect thereto at the time he wrote the policy. The case of *The Illinois Mut. Fire Ins. Co.* v. *The Marseilles Manufg. Co.* 1 Gilm. 236, is not in conflict with this doctrine. Ibid. 53.

5. Nor is it essential, as was said in the case in 1 Gilm. 236, that the information should be contained in the application, as the case of *Atlantic Ins. Co.* v. *Wright*, 22 Ill. 463, holds that if the facts were known to the agent who made the survey and filled up the application, and they were omitted by him, the insurer could not avoid paying the loss for that reason. Ibid. 53.

DISCLOSURE OF FACTS BY THE ASSURED.

6. While it is a general rule, that on an application for insurance, all material facts which directly tend to increase the hazard must be disclosed by the applicant, the fact that he is obnoxious to numerous persons in the vicinity of the property sought to be insured, is not within that rule, and need not be disclosed unless he is interrogated on the subject. *Keith et al.* v. *Globe Insurance Co.* 518.

7. In this case the property sought to be insured, was a lot of cotton in the State of Mississippi, the insurance being effected in Chicago, and it was held not essential to the validity of the policy that the applicant should disclose, unasked, that the guards who were in charge of the cotton smoked pipes, and had fire in the immediate vicinity for the purpose of warming themselves. Ibid. 518.

OMISSION OF ASSURED TO DISCLOSE HIS INTEREST.

8. Upon an application for insurance, the party applying is bound to disclose all facts material to the risk, but, in the absence of a requirement on the subject in the policy, or of any inquiry in respect thereto, it is not essential that he should disclose the nature of his interest in the property sought to be insured. It is sufficient, if he have an insurable interest *Norwich Fire Ins. Co.* v. *Boomer*, 442.

9. So, where a policy issued to a mortgagee of the property insured, contained no provision in respect to the disclosure of the nature of the interest in the property, except that the company would not be liable "for loss for property owned by any other party, unless the interest of

INSURANCE.

OMISSION OF ASSURED TO DISCLOSE HIS INTEREST. *Continued.*

such party be stated in this policy": *Held*, that this condition did not require the assured to disclose his interest when he made the application; on the contrary, by implication, it excused him from so doing. *Norwich Fire Ins. Co.* v. *Boomer*, 442.

DESCRIPTION OF INTEREST OF ASSURED.

10. *Of the description of an interest in a trustee.* A policy issued to the owner of property, contained, in the body of it, this clause: "Loss, if any, payable to Elias Greenebaum, trustee, as his interest may appear." This was held to be a sufficient description of the interest of Greenebaum, who held a deed of trust upon the property, and a compliance with a condition in the policy that an interest in the premises less than an absolute estate must be stated therein. *Commercial Insurance Co.* v. *Spankneble*, 53.

OCCUPANCY OF PROPERTY INSURED.

11. *As to a continued occupancy of the premises insured.* Under a clause in a policy upon a brewery, which provided that if the premises should be vacant or without occupant during the term of insurance, the policy should become void, if the premises were in the same condition in that respect at the time of the loss, they were when the policy was issued, and such condition was known to the agent at the time, the right of recovery by the assured will not be affected by the fact that the premises were without an occupant at the time of the loss. Ibid. 53.

12. But where the building insured was used as a brewery, and was not occupied as a residence when insured, it can not be said it had become vacant, because no one resided in the brewery when it was destroyed. Ibid. 53.

PROHIBITION OF SALE OF PROPERTY INSURED.

13. *Construction thereof.* A policy upon a building occupied as a brewery, covered, also, a steam boiler and connections, vats, tubs, &c., contained in the building, and stated, as one of the conditions, that "in case of any sale, alienation, transfer, conveyance, or change of title in the property insured," the insurance should be void. This was held to relate alone to the real estate, and did not operate as a prohibition of the sale of the articles of personal property covered by the policy. *Commercial Ins. Co.* v. *Spankneble*, 53.

14. But the various articles were separately insured, the risk on each being specified, and if the condition prohibiting the sale did relate to the personalty, it would be a fair and reasonable construction to say, that the sale named in the condition referred to each item of separate insurance, and that the sale of one class separately insured would not affect the others. Ibid. 53.

15. And where the assured was a married woman, a sale of property, even if within the prohibition, made by her husband without her

INSURANCE. Prohibition of sale of property insured. *Continued.*
procurement or consent, would not affect her rights under the policy. *Commercial Ins. Co.* v. *Spankneble*, 53.

16. Nor would a mortgage upon the realty constitute a sale or transfer thereof, within such a prohibitory clause. And in this case, especially, such a construction would be excluded by an explanatory clause in the policy, which was, that "an entry for foreclosure of mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property." Ibid. 53.

Preliminary statement of loss.

17. *Whether conclusive.* It has been held by this court that, where a party, in making an account of his loss under an insurance, to be submitted with the preliminary proofs, omits any article therefrom, even by inadvertence, he will be concluded thereby, if the company settles the loss promptly according to the account exhibited; but if the assured is compelled to resort to his action to obtain justice, he may prove the loss of any article inadvertently omitted from his account. *Commercial Ins. Co. Chicago* v. *Huckberger et al.* 464.

Statement of loss under oath.

18. *Whether conclusive.* Where the assured, besides the preliminary proofs, is required to submit to an examination under oath, touching the condition of his affairs as connected with the insurance, and upon such examination the company withhold his books of account from him, so that he must speak from memory alone, if he make a mistake in his statement he will not be concluded thereby, but it will be open to correction. Ibid. 464.

Seizure of property insured.

19. *By a government officer.* A quantity of cotton, situated in the State of Mississippi, was insured in an office in Chicago. At the time it was insured, the place where it was situated was under military occupation by the United States, and it was *held*, that the mere seizure of the property under the order of a government office, without evidence of its condemnation, or of an act of forfeiture, would not divest the owner's title, or affect his right to recover the insurance. *Keith et al.* v. *Globe Ins. Co.* 518.

Insurance by a mortgagor.

20. *In the name of his mortgagee.* Where a mortgagor, in pursuance of an agreement for further security, pays the premium on a policy of insurance effected on the mortgaged property in the name of the mortgagee, the property being afterwards destroyed, the fact of the mortgagor having paid the debt secured by the mortgage, will not prevent a recovery of the insurance against the company. In such case, the mortgagor is the beneficial party, and has the right to recover the same in the name of the mortgagee. *Norwich Fire Ins. Co.* v. *Boomer*, 442.

INSURANCE. *Continued.*

INSURANCE BY A MORTGAGEE.

21. *In his own name.* But, it seems, where a mortgagee applies for a policy, pays the premium, and effects the insurance in his own name, the company, on the occurrence of loss and payment by them of the insurance to the mortgagee, would be entitled to subrogation, and to an assignment of the mortgage. In such a case, the insurance would be considered as a further security of the debt, and on the principle, that a surety who pays the debt may resort to the principal debtor for payment, the insurer could recover from the mortgagor. *Norwich Fire Ins. Co.* v. *Boomer*, 442.

INSURANCE BY A MARRIED WOMAN.

22. *Whether a married woman is the absolute owner of her own realty.* A married woman may insure a building which she owns, and which is situate upon ground to which she holds the title in fee, and she will be regarded as being the absolute owner of such property, and within the requirement in a policy thereon, which provides that if the interest of the assured be not an absolute ownership, it should be so stated in writing, with the true title of the assured, although her husband may have acquired an estate by the curtesy in the premises before the passage of the married women's act of 1861. *Commercial Ins. Co.* v. *Spankneble*, 53.

REFORMING A MISTAKE IN A POLICY.

23. *As to the persons obtaining the insurance.* Where a member of a partnership firm applied for insurance upon partnership property, and in the name of the firm, and the officers of the company so understood the application, but, by mistake, issued the policy in the name of the individual partner alone, it was *held*, a court of equity would reform the policy so as to make it conform to the intention of the parties. *Keith et al.* v. *Globe Ins. Co.* 518.

INTEREST.

WHEN RECOVERABLE.

1. *In trover.* The owner of a carriage shipped the same by a common carrier, the amount to be charged for the transportation being first agreed upon, and upon the carriage reaching its destination, it was demanded by the owner, he offering to pay the charges as agreed upon, but the agent of the carrier refused to deliver it except upon payment of a larger amount. After the refusal to deliver, the carriage was destroyed by fire: *Held*, in such case, where the owner brought trover against the carrier, the plaintiff was entitled to interest on the value of the property from the time of the demand and refusal. *Northern Trans. Co. of Ohio* v. *Sellick*, 250.

2. *On setting aside a fraudulent sale.* Where a fraudulent sale has been had under a deed of trust, and the sale set aside, interest may be

INTEREST. When recoverable. *Continued.*
properly allowed on a judgment for the debt, which accrued between the time of setting aside the fraudulent sale and a subsequent sale under the deed. *Hopkins* v. *Granger et al.* 505.

INTRUDER.

Public offices.
Right of private persons to enter the same. See PUBLIC OFFICES, 1.

JOINT OBLIGATIONS.

Of an individual with a body of persons.
1. Where an association of persons employ an individual to render a service for them, a third person, not a member of the association, may become jointly bound with them. *Boyd* v. *Merrill*, 151.

JUDGMENTS.

Form of judgment.
1. *In inferior courts.* No particular form is required in the proceedings of an inferior court, to render its order a judgment. It is sufficient if it be final, and the party may be injured. *Johnson* v. *Gillett*, 358.

2. *In a county court, on adjudicating a claim against an estate.* So, where the order of a county court, in respect to a claim presented against an estate, was, "after having taken the matter under advisement, the court this day, after due deliberation, rejects the claim," this was held to be a sufficiently formal judgment from which an appeal or *certiorari* would lie. Ibid. 358.

Where a feme sole plaintiff marries pending suit.
3. Judgment may be rendered in her favor by her original name, unless a change of name be brought, in some way, to the notice of the court. *Wilson et al.* v. *McKenna*, 43.

Vacating judgment after the term.
4. *Power of the court.* The rule is, that the circuit court has no power to set aside a judgment at a term of the court subsequent to that at which the judgment was rendered. *Windett* v. *Hamilton*, 180.

5. *Exception to this rule.* But, where a final judgment is entered upon a default, a motion is made at the same term to vacate the judgment, and set aside the default, and such motion is continued to a subsequent term, the court thereby retains its control over the judgment, and the motion may be allowed at such subsequent term. Ibid. 180.

6. This case differs in this respect from the cases of *Cox* v. *Brackett*, 41 Ill. 222, and *Messervey* v. *Beckwith*, ib. 452. In those cases final judgment had been entered, and no motion to vacate and set aside was made at the term. Ibid. 180.

JURISDICTION.

OBTAINING JURISDICTION OF THE PERSON BY FRAUD.

1. *Illegal arrest—abuse of process.* No court will take jurisdiction of a party, where it is obtained by fraud; nor is a defendant amenable to process unless he is in, or comes voluntarily within, the territorial jurisdiction of the court. Even a valid and lawful act can not be accomplished by such unlawful means as enticing a party, by fraud, to come within the jurisdiction of the court so as to subject him to its process. *Wanzer et al.* v. *Bright*, 35.

2. And where a party has been fraudulently induced to come within the jurisdiction of a court so as to render him or his property amenable to its process, he may have his action therefor. Ibid. 35.

3. So where a person residing in another State was induced to come into this State by certain creditors residing here, by the latter falsely representing to him, through a telegraphic dispatch and a letter, under another name, that the person whose name was so used desired to see him in Chicago, on a certain day, upon business not connected with the real object in view, which was to allure the party into this State for the purpose of arresting him under civil process, to compel the payment or securing of his debts, and when the party came within the jurisdiction of the courts of this State, in compliance with such request, he was arrested at the instance of the creditors, and imprisoned, it was *held*, that the creditors guilty of such fraudulent conduct and abuse of process, not only could not make them availing for the purpose intended, but were liable to an action at the suit of the party injured for the illegal arrest and imprisonment. Ibid. 35.

4. Nor would the fact that the false correspondence, by means of which the party was enticed within the jurisdiction of the court, was dictated by the attorney of the creditors in whose interest the fraud was perpetrated, at all exonerate those creditors from their liability to respond in damages, when they were previously consulted about it, and sanctioned the act, or at least afterwards approved of it, and sought to profit by it. Ibid. 35

ACTION OF ACCOUNT—JUSTICES OF THE PEACE.

5. A justice of the peace has no jurisdiction in an action of account. *Crow* v. *Mark*, 332.

JUSTICE OF THE PEACE.

JURISDICTION.

In an action of account. See JURISDICTION, 5.

LACHES.

DELAY IN PRESENTING CLAIMS AGAINST AN ESTATE.

Should be considered. See ADMINISTRATION OF ESTATES, 2.

LEASEHOLD INTEREST.

WHETHER REAL OR PERSONAL ESTATE. See REAL AND PERSONAL PROPERTY, 1.

LICENSE.

PAROL LICENSE—REVOCATION.

1. A parol license by a lessor to his lessee, to remain in possession after the expiration of the lease, made without consideration, is subject to revocation, and will be considered revoked by a subsequent demand of possession. *Walker* v. *Wilson*, 352.

LIEN.

FACTOR'S LIEN—ATTACHING CREDITOR.

1. *Of a lien as between an attaching creditor and a factor of the debtor.* A person having property of another in his possession as a factor, accepted a draft drawn by the owner of the property in favor of one of his creditors; the draft was made specifically payable out of the property, and it was agreed between the debtor and his creditor that the factor should retain the custody and control of the property, as their mutual agent, for the specific purpose of paying the draft: *Held*, that the effect of the transaction was to give to the factor a lien on the property to secure him against his liability as acceptor of the draft, and while the property thus remained in his possession, no purchaser from the owner, or creditor, could acquire an interest in it paramount to such lien. *Eaton* v. *Truesdail et al.* 307.

ATTORNEY'S LIEN.

2. *For his fees.* An attorney at law has no lien upon a judgment for his fee in the litigation resulting in its recovery. *Forsythe* v. *Beveridge*, 268.

LIFE ESTATE.

WHAT CONSTITUTES. See WILLS, 6.

LIMITATIONS.

BY WHOM THE STATUTE TO BE INVOKED.

1. *And under what circumstances.* A mortgagee obtained a decree of strict foreclosure, a subsequent purchaser from the mortgagor not having been made a party to the suit. Afterwards, the purchaser, who held as trustee for certain creditors of the mortgagor, sought, by bill, to have the premises sold in execution of the trust, and the mortgagee decreed to have no right therein, on the ground that the statute of limitations, if pleaded in the suit to foreclose, would have barred a foreclosure, and was not pleaded: *Held*, that the statute of limitations could not thus be set up to deprive the mortgagee of his rights under

LIMITATIONS. By whom the statute to be invoked. *Continued.*

the decree of foreclosure, which must stand, subject only to the right of the subsequent purchaser to redeem. *Cutter et al.* v. *Jones*, 84.

In equity.

2. Equity follows the law in the application of the statute of limitations. So, where a remedy at law, in case one existed, would not be barred, neither would the remedy in chancery, in respect to the same contract. *Board of Supervisors Henry County* v. *Winnebago Swamp Drain. Co. et al.* 454.

3. But the fact that a statute of limitations is positive in its terms, will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction, and enforce the right for the prevention of a fraud. Ibid. 299.

4. So, where a bill in chancery, by which it was sought to enforce a right in respect to which the defendant had been guilty of fraud, alleged that the complainant had no knowledge of the fraud until within the time prescribed by the statute as a bar, the remedy was enforced, notwithstanding the limit of the statute had expired before the filing of the bill. Ibid. 299.

Note made out of the State.

5. *Assumpsit thereon—whether barred.* An action of assumpsit was brought September 1, 1866, upon a promissory note given out of this State, bearing date February 19, 1835, and falling due in three years from date: *Held*, that the action was barred, under the limitation act of 1827, that act still being in force at the time the action was brought. *Norton* v. *Colby*, 198.

6. *Effect of acts of* 1845 *and* 1849 *upon the act of* 1827. The act of 1827 was not repealed, but was re-enacted, by the Revised Statutes of 1845, and the proviso to the 4th section of the act of November, 1849, directing that in all actions instituted upon causes of action arising during the period in which the act of 1845 was in force, shall be the rule of limitation and adjudication, is construed as meaning the act of 1827; and that proviso is not affected by the act of 1851, except so far as concerns actions which accrued while the act of February, 1849, was in force, and such as accrued before the act of February, 1849, went into operation, and for the barring of which there was no previous statute. Ibid. 198.

7. *Former decisions.* The language of the opinion, in the case of *Campbell* v. *Harris*, 30 Ill. 395, is too broad, if it is to be construed as meaning that no promissory note given out of this State, and maturing prior to the act of February, 1849, and since the act of 1827, is barred by any act of limitation in force in this State. Ibid. 198.

LIMITATIONS. *Continued.*

NEW PROMISE.

8. *What sufficient to take a case out of the statute of limitations.* A party against whom it was claimed some promissory notes were held in another State, was spoken to about them by a person who had been written to on the subject, who was asked by the alleged debtor if he had the notes, and he said he had not. The debtor then said there were no notes against him; that he paid his notes; that if the agent had any notes against him, or anybody, he would pay them. The agent then said, "I will send for the notes." The debtor answered, "You can; if you produce any notes against me I will pay them." In another conversation, the debtor, upon being shown the notes, acknowledged he had executed them; that they had not been paid, and were still due, and when asked what he would do about them, started away and said he could not be detained then: *Held*, that these conversations, taken together or separately, were insufficient to show a new promise, so as to take the case out of the statute of limitations. *Norton* v. *Colby*, 198.

9. The new promise, to be available, must be of such a character as clearly to show a recognition of the debt, and an intention to pay it, thus waiving the protection of the statute; but where the entire language of the debtor rebuts the presumption of an intention to pay, the bar of the statute is not lost. Ibid. 198.

10. A promise by a person to pay all the notes that could be produced against him, accompanied by an averment that he owed none, and none could be produced, does not amount to a promise to pay any particular note, or a recognition of its validity; and the promise or acknowledgment, to be binding, must have special reference to the debt in controversy. Ibid. 198.

11. Moreover, in this case, the agency of the person with whom the debtor had the conversation, did not clearly appear, and if he was then a stranger to the notes, it was immaterial what the debtor said to him; it could not amount to a binding promise. Ibid. 198.

LIMITATION ACT OF 1839.

12. *What constitutes color of title.* A deed of conveyance, which purports to convey title, executed by a purchaser at a sale under a judgment of forclosure of a mortgage upon the premises, will constitute color of title in the grantee, notwithstanding the judgment of foreclosure be void. *Hinkley et al.* v. *Greene*, 223.

13. *In what character of proceeding the statute may be invoked.* The bar of the statute may be invoked as fully in a suit in equity as in an action at law. So, in a suit in chancery by a junior mortgagee against the grantee of the purchaser under foreclosure of the prior mortgage, to redeem from the sale under the prior mortgage, and to foreclose the

LIMITATIONS. Limitation act of 1839. *Continued.*
junior mortgage, the defendant may rely upon the statute to prevent the granting of the relief sought. *Hinkley et al.* v. *Greene*, 223.

14. *Payment of taxes—by whom.* Where a party claiming land under color of title, conveyed the same, and on the next day he paid the taxes for the current year, which had previously been assessed against him, and which he was legally liable to pay, it was *held*, the payment would be regarded as having been made under and subordinate to the title he had conveyed, and would enure to the benefit of his grantee. *Elston et al.* v. *Kennicott et al.* 272.

15. *Payment of taxes by one tenant in common under color of title in himself.* Under the act of 1847, in respect to joint rights and obligations, one tenant in common of land may pay the taxes upon his own interest, without reference to his co-tenant's rights in the premises. *Hinkley et al.* v. *Greene*, 223.

16. And where tenants in common jointly mortgage their land, and upon foreclosure and sale, one of the tenants in common becomes the grantee of the purchaser under the foreclosure, by deed purporting to convey the whole tract, the payment of taxes by such grantee, under claim and color of title thus acquired, the land being vacant and unoccupied, will amount to an ouster of his co-tenant, and will enure to his own benefit under his color of title, under the second section of the act of 1839. Ibid. 223.

17. *Who may become a purchaser.* The fact that the grantee of the purchaser under the foreclosure was a mortgagor, did not place him in such a position as forbade him acquiring the title in that manner; his purchase would not operate as a redemption, but he could rely upon his deed as color of title, which might ripen into a complete bar under the act of 1839, and afford protection to the holder even as against his former co-tenant, or the grantees or mortgagees of the latter. Ibid. 223.

18. *Proof of payment of taxes—its sufficiency.* On the trial of a cause in which a party relied upon the bar of the limitation act of 1839, a prior owner of the premises testified explicitly that he paid all the taxes thereon every year during the time he owned it, being more than seven years. On a second trial, the same witness testified that he only remembered the amount of the several payments as shown by the receipts, nor did he know otherwise that the entire amount due was paid. But the court considered the testimony given on the second trial, in connection with that on the first trial, when the witness proved the name of the person who paid the taxes, the lot on which they were paid, and that they were paid each and every year during the time. The evidence, taken all together, was sufficient to show the payment. *Elston et al.* v. *Kennicott et al.* 272.

19. Even if a tax receipt is for a less sum than that extended on the collector's warrant against the property, that is not conclusive upon

LIMITATIONS. Limitation act of 1839. *Continued.*

the question whether all the taxes were paid; and when it appears the person to whom the receipt was given called on the collector and offered to pay all the taxes, and did pay all that was claimed to be due, and the receipt states that the full amount had been paid, a jury may reasonably infer that the whole amount assessed was paid, and that a mistake was made in stating the amount in the receipt. *Elston et al.* v. *Kennicott et al.* 272.

20. A mistake in the description of property on the assessment roll, will not invalidate a payment of taxes upon the proper lot, when it is correctly described in the collector's warrant. The property being properly described in the warrant, and the taxes paid according to such description, it will be presumed, for the purposes of the act of 1839, that it was legally assessed, and that the payment conforms to the requirements of the statute. Ibid. 272.

21. *When the bar of the statute can be made availing to recover possession.* When the bar of the statute has become complete, under the second section of the act of 1839, by the concurrence of claim and color of title acquired in good faith, payment of taxes for seven successive years under such color of title, and the actual taking of possession of the premises, such bar can not only be invoked as a shield to protect the holder of such color of title in his possession against every one; but if his possession be invaded, or the premises again become vacant and another shall make entry, even if the latter hold the paramount title, the holder of the color of title may sue, and recover his lost possession. *Hale* v. *Gladfelder et al.* 91.

22. The bar of the statute having become complete, the right of the person entitled to its benefits to have and enjoy the possession is as perfect as though he were actually invested with the title, and, as against him, the holder of the paramount title can not use it for the purpose either of recovery or defense, until he shall have destroyed the bar, by purchase, limitation, or by some other mode equally effectual. Ibid. 91.

23. And as respects the right of the person in whose favor the bar of the statute, under the act of 1839, has accrued, to sue for and recover his lost possession, in an appropriate action, even against the holder of the paramount title, there is no difference in the construction to be given to the first and second sections of that act. Although there may be a difference in the manner of acquiring the bar under the two sections, yet, when acquired under either, the rights resulting therefrom are the same. Ibid. 91.

24. *In whom the elements of the bar of the statute may concur.* It is not essential that the three elements of the bar of the statute, under the second section of the act, as, the color of title, payment of taxes, and taking possession, should all concur through the same person; but, as in this case, one may acquire the color of title and pay the taxes for

LIMITATIONS. LIMITATION ACT OF 1839. *Continued.*

the required period and then make conveyance to another, to whom all the rights of the grantor will pass, and a third person may, under a contract of purchase from such grantee, enter into possession, and thus the bar of the statute will become complete. *Hale* v. *Gladfelder et al.* 91.

25. *Of an abandonment of the possession by a purchaser—rights of his vendor.* Where a person acquires color of title to vacant and unoccupied land, and has paid the taxes for the period required by the statute, and then conveys the premises by deed, neither the grantor nor grantee having yet taken possession, if a third person, under a contract of purchase from such grantee, enter into possession, such possession of the purchaser, for the purposes of the statute, will be deemed to be that of the vendor, and his occupancy subordinate to the title of the vendor, so that if the purchaser subsequently abandons the premises, with the intention not to return, but without the knowledge or consent of his vendor, the rights of the latter, with respect to the bar of the statute, will not be at all affected by such abandonment, and if any one, even the holder of the paramount title, subsequently enters into possession, such vendor, by virtue of the concurrence, in that manner, of all the elements of the bar of the statute, may, by an action of ejectment, recover the possession to which he had become entitled. Ibid. 91.

26. *Who may pay the taxes, so as to be availing to a subsequent grantee.* A person having acquired color of title to vacant and unoccupied land, made conveyance thereof the same year, but continued to pay the taxes even longer than the seven years, and then made another conveyance to a different person, who had no notice of the former conveyance: *Held*, that the second grantee, being an innocent purchaser, would be protected under the statute, and the payment of taxes by his grantor would inure to his benefit as the subsequent holder of the color of title. Ibid. 91.

27. *Former decision.* This ruling is not in conflict with the case of *Fell* v. *Cessford*, 26 Ill. 522. Ibid. 91.

HOW THE STATUTE MAY BE AVAILED OF.

In chancery. See CHANCERY, 1.

PLEADING IN CHANCERY.

To avoid the statute of limitations. See CHANCERY, 2.

SELLING REALTY OF DECEDENT TO PAY DEBTS.

Within what time allowable. See ADMINISTRATION OF ESTATES, 10.

LOCUS IN QUO.

IN TRANSITORY ACTIONS.

Need not be set forth. See PLEADING, 5.

MANDAMUS.

WHETHER THE PEREMPTORY WRIT MAY BE REFUSED.

1. *Where there is a verdict for the petitioner.* The third section of the chapter of the Revised Statutes, entitled "Mandamus," which requires the court to award a peremptory writ in cases where a jury have found a verdict for the petitioner, refers only to cases where the petition makes a *prima facie* case, and the issue found by the verdict is material. The action of the court in denying the peremptory writ, notwithstanding a verdict for the petitioner, is like arresting the judgment in an ordinary action at law. *The People ex rel. Shurtz* v. *Comrs. of Highways of Worth township*, 498.

MARRIED WOMEN.

WHAT IS "PROPERTY."

1. *Within the act of* 1861. The right of action accruing by reason of personal injuries received by a married woman from the negligence of a railroad company, is property, and coming to her from a source other than her husband, and in good faith, it is her separate property, and comes under the operation of the act of 1861. *Chicago, Burlington & Quincy Railroad Co.* v. *Dunn*, 260.

WHEN A MARRIED WOMAN MAY SUE ALONE.

2. *For personal injuries.* The right of action accruing by reason of personal injuries received by a married woman from the negligence of a railroad company, being the separate property of the wife, she may sue alone to recover damages therefor. Ibid. 260.

POWER OF THE HUSBAND IN RESPECT TO WIFE'S RIGHTS.

3. *To compromise or release.* A right of action for personal injuries to the wife, being her separate property, her husband can not, without her consent, adjust it or release it. Ibid. 260.

HUSBAND AS AGENT OF THE WIFE.

4. *May bind her.* But where an action for the same cause had been commenced in the joint names of the husband and wife, and the former compromised the suit, and entered into an agreement to dismiss it, and release the cause of action upon receiving a certain sum from the defendant, it appearing that in so doing the husband acted as the agent of the wife, it was held such release operated as a bar to a subsequent action brought in her own name. Ibid. 260.

CONTRACTS BY THEIR HUSBANDS.

5. *Whether bound by contracts made in their names by their husbands.* Even if a married woman can enter into a contract so as to be bound as a member of an association for business purposes, yet her husband can not, without authority from her, make a binding contract for her by signing her name to the articles of association. *Boyd* v. *Merriell*, 151.

MARRIED WOMEN. *Continued.*

OF THE OWNERSHIP OF PROPERTY.

6. *As between husband and wife and creditors of the former.* A married woman held the legal title to land to place it beyond the reach of her husband's creditors, it not having been bought with her money, and she borrowed money in her own name, giving her own notes therefor, and giving the land as security. It was *held*, that personal property purchased by the wife with a portion of the money so borrowed, would be subject to execution in favor of a creditor of the husband. The property would be regarded as having been purchased with the husband's money. *Hall* v. *Sroufe*, 421.

INSURANCE BY A MARRIED WOMAN.

7. *Whether she is "absolute owner" of her own realty.* See INSURANCE, 22.

MASTER IN CHANCERY. See CHANCERY, 12, 13.

MASTER AND SERVANT.

INJURIES TO SERVANT FROM NEGLIGENCE OF MASTER.

1. *Liability of the master.* A master is responsible to his servant for injuries received from defects in the structures or machinery about which the services were rendered, which defects the master knew, or ought to have known. *Schooner "Norway"* v. *Jensen*, 373.

2. *Liability of company, when occasioned by dangerous structures.* In an action against a railroad company for injuries sustained by the plaintiff, while in the service of the company as a brakeman, the evidence showed that the injury complained of happened while plaintiff was engaged in the discharge of his duties, by collision with a projecting awning from one of the station houses on defendant's line of road, whereby he was knocked off the car, and so injured as to require amputation of his left arm; and that the dangerous position of this awning was well known to the division superintendent and division engineer, whose attention had been called to it a long time prior to the accident: *Held*, that this was negligence of such a character that the company must be held liable for the damages sustained. *Illinois Central Railroad Co.* v. *Welch*, 183.

3. As said by this court in the case of the *Chicago & N. W. R. R. Co.* v. *Swett*, 45 Ill. 201, railroad companies are bound to furnish their servants safe materials and structures, and must, in the first instance, construct their road with all the necessary appurtenances. Ibid. 183.

4. *Must keep in proper repair.* And they must be kept in proper repair; and a person entering the service of a railroad company, has a right to presume that in these respects it has discharged its obligations. Ibid. 183.

MASTER AND SERVANT.

INJURIES TO SERVANT FROM NEGLIGENCE OF MASTER. *Continued.*

5. *Perils of the service—to what extent assumed.* A person engaging in this service assumes the ordinary perils of railroad life; and also special dangers arising from the peculiar condition of the road, so far as he is aware of their existence, and his exposure to them would be his voluntary act. *Illinois Central Railroad Co.* v. *Welch*, 183.

6. But in this case, the danger was of such a character as well might escape the observation of a person who had been in the employ of the defendant for a long period of time; and there is no reason for supposing that the plaintiff had acquired knowledge of the unsafe condition of this awning before his injury, as he had been but two months upon the road, and, except upon two trips, had always passed this station in the night. Ibid. 183.

INJURIES TO SERVANT FROM NEGLIGENCE OF FELLOW SERVANT.

7. *Liability of the common master.* Where a person in the employment of another, in the performance of a specific line of duty only ordinarily hazardous, is commanded by a fellow servant, but to whom he is so subordinate that he is compelled to obey his direction, to do an act in the same general service, but different from the sphere of employment in which he had engaged to serve, and extra hazardous in its character, and in respect to which the servant making the requirement knew he was unskilled and inexperienced, and in doing the same, the servant so directed receives injuries, occasioned by the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured. *Lalor, Admx.* v. *Chicago, Burlington & Quincy Railroad Co.* 401.

8. In an action against a railroad company, to recover, under the statute, for the death of a person, occasioned by the alleged negligence of the company, it was averred that the deceased was employed about the depot grounds, and freight house of the defendants, as a common laborer, specially for the purpose of loading and unloading the freight cars, at monthly wages, and for no other or different purpose; that while he was engaged in loading a freight car with pig iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business and affairs of the company about the depot, to couple and connect a freight car with other cars attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, which fact was well known to the superintendent; and while so engaged, having to go between the cars for the purpose, the engine was so carelessly handled as to bring the cars together with great force, and while he was so between them, by means of which he was crushed to death: *Held*, the deceased using due care and caution while coupling the cars, the company was liable. Ibid. 401.

MEASURE OF DAMAGES.

In actions ex contractu.

1. In actions on contracts, actual or compensatory damages only are recoverable. *Hayes* v. *Moynihan*, 423.

For breach of warranty.

2. In a suit to recover damages for a breach of warranty, the plaintiff is entitled to recover for all damages which are the natural and proximate result of the failure of the warranty. And where a manufacturer has broken his warranty, in the construction and sale of two steam boilers, the necessary expense of repairing them, the loss of time while so engaged, as well as the increased quantity of fuel necessarily consumed to generate steam, would be considered as both natural and proximate damages. *Phelan et al.* v. *Andrews et al.* 487.

In action on penal bond.

3. Where one partner executes a penal bond, conditioned that he will pay the firm debts within a given time, on failure to do so the obligee, his co-partner, not having paid any of the debts himself, can recover only nominal damages. *Dent* v. *Davison*, 109.

In an action for the death of a person.

4. *Under the statute.* In an action to recover damages for the death of a person, occasioned by the negligence of another, the damages can be only for the pecuniary loss to the widow, or next of kin; nothing is to be allowed by way of solace. *Illinois Central Railroad Co.* v. *Weldon, Admr.* 290.

5. *What may be considered as a proper element of damages.* In estimating the pecuniary injury, the jury may, in a proper case, where there is evidence authorizing them to consider the subject, take into consideration the support of the widow of the deceased, and the minor children, and the instruction, and physical, moral and intellectual training of the minor children by the deceased. Ibid. 290.

6. *Of the amount of damages—when excessive.* In an action of this character, it appeared the deceased was a common laboring man, who left a widow and several minor children, but what wages he was receiving or earning was not shown, yet a verdict of $5000 was regarded too much, in view of there being no evidence that he earned, annually, as much even as one half the interest on that sum. Some evidence should be given of the profits of the labor of the deceased, and what he might probably earn for the future support of his family, to justify so large a verdict in such a case. Ibid. 290.

Negligence of municipal corporations.

7. *Of vindictive damages.* In actions against a city to recover damages for injuries occasioned by neglect of the officers or employees to keep the streets or sidewalks in proper repair, compensatory damages only should

MEASURE OF DAMAGES.

NEGLIGENCE OF MUNICIPAL CORPORATIONS. *Continued.*

be given. Vindictive or punitive damages can not be recovered against a municipal corporation.* *City of Chicago* v. *Langlass et ux.* 256.

OF EXEMPLARY DAMAGES.

8. *For an illegal arrest and imprisonment.* Where a party has been enticed within the State by false representations as to the purpose for which his presence was desired, the real purpose being to subject him to an arrest and imprisonment upon civil process, to compel him to pay a debt, or secure it, such a fraudulent and outrageous abuse of the process of the court should be severely punished, and exemplary damages should be given. *Wanzer et al.* v. *Bright*, 36.

MISTAKE.

MISTAKE IN AN INSURANCE POLICY.

May be reformed in chancery. See INSURANCE, 23.

MORTGAGES.

OF A DEFEASANCE.

1. *What constitutes.* A party executed a conveyance, absolute in form, and received from the grantee a writing, in which the latter agreed, in consideration of the deed, to endeavor to sell the property conveyed within one year, and after paying a debt due from the grantor to a person who held a deed of trust upon the same property, and also a debt due to the grantee himself, to repay to the grantor all the surplus arising from the sale, and any rent received by the grantee during the year: *Held*, that this writing did not amount to a defeasance, it not being under seal, nor purporting to defeat the estate conveyed by the deed in any event. It might, perhaps, be called a declaration of trust. *Walsh* v. *Brennan et al.* 193.

REMEDIES UPON MORTGAGE DEBT.

2. A creditor by note and mortgage may obtain judgment on the note and subject other property of his debtor to its payment. *Karnes* v. *Lloyd et al.* 114.

REDEMPTION.

3. *Of its general character.* The right of a mortgagor, or his grantees, to redeem, after condition broken, is a purely equitable right, the creation of courts of chancery. It is a right which can be asserted only in a court of equity, and when its assertion would be plainly inequitable that court will withhold its aid. *Kenyon* v. *Shreck et al.* 383.

MORTGAGOR AND MORTGAGEE.

4. *Whether the relation exists—right of redemption.* At a sale of mortgaged premises, under a power in the mortgage, a third person, a

*See, also, *City of Chicago* v. *Martin et ux.* 49 Ill. 241.

MORTGAGES. Mortgagor and mortgagee. *Continued.*

stranger to the mortgage, became the purchaser. The mortgagor and the purchaser, both being uncertain as to their rights in the premises, owing to some alleged illegality in the sale, and to settle any question in respect thereto, entered into an arrangement by which the mortgagor executed a quit-claim deed to the purchaser, for a nominal consideration, and received in return a written instrument giving him the option to re-purchase within a given time, at a price stated. Upon bill filed by the mortgagor after the time given him to re-purchase had expired, claiming that the sale under the mortgage was illegal and void, and that he still occupied the position of a mortgagor and was entitled to redeem from the purchaser: *Held*, that the transaction between the mortgagor and the purchaser was not a mortgage—the relation of debtor and creditor did not exist between them—and the former had no remaining rights as a mortgagor which would give him any right of redemption. *Ranstead* v. *Otis et al.* 30.

Mortgagee in possession.

5. *Of his relation to the mortgagor.* Although, in a limited sense and for some purposes, a mortgagee in possession for condition broken, and without foreclosure, is a trustee for the mortgagor, yet he is not so in a strict sense and for all purposes, to the extent of disabling him from dealing with the mortgaged property, under any circumstances, for his own benefit. *Griffin et al.* v. *Marine Co. of Chicago et al.* 130.

6. The general rule may be thus stated: If a mortgagee "gets an advantage by being in possession, or 'behind the back' of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust;" subject to this general rule, each case must stand on its own equities. Ibid. 130.

7. So, if the purchase of an outstanding title by the mortgagee has been accomplished by means of a friendly possession derived by him from the mortgagor, and the latter has had no opportunity to purchase for himself, the former should hold his purchase for the benefit of the mortgagor. Ibid. 130.

8. If, on the other hand, his possession is adverse, or his purchase has not been aided by it, or the mortgagor has had the opportunity to buy and has declined, there can be no reason for holding the mortgagee a trustee. Ibid. 130.

9. *Who will be deemed to hold the position of a mortgagee in possession.* A mortgagee of a lease, upon condition broken, took possession, and then, under a power in the mortgage, sold the property mortgaged, and became the purchaser at his own sale without having any right so to do. He afterwards sold and conveyed his interest, his grantee taking possession and leasing the premises to a third person, the latter entering into possession under his lease. This last lessee, while thus in possession,

MORTGAGES. MORTGAGEE IN POSSESSION. *Continued.*

purchased in the outstanding title for his own benefit: *Held*, that he was in no such relation to the mortgagor, the original lessee, as to constitute him the trustee of the latter. He was not a mortgagee, and owed no allegiance, as regarded his possession, to the mortgagor, nor was there any privity between them, but he held the title he had acquired, independently of, and adverse to, the mortgagor. *Griffin et al.* v. *Marine Co. of Chicago et al.* 130.

10. The possession, even of a mortgagee, after an attempt at foreclosure by sale under a power in the mortgage, would be adverse to the mortgagor, although the foreclosure be invalid at the election of the latter, by reason of the mortgagee purchasing at his own sale, and a person holding as tenant under the grantee of such mortgagee would occupy no fiduciary relation to the mortgagor which would prevent him from acquiring an outstanding title for his own benefit. Ibid. 130.

MORTGAGOR OF A LEASE.

11. *Of his rights after an invalid foreclosure, as against a subsequent occupant and owner of the fee.* Nor would the fact that the lease of the mortgagor provided that he might retain possession until his improvements were paid for or secured, give him an interest in the fee, or any right to purchase, or even to be restored to the possession, as against the party who had acquired the fee under the circumstances named. Upon a bill filed by the mortgagor, to determine his rights in the premises, a decree was entered securing to him payment for his improvements by a lien on the ground, and that fully met all his just claims for relief. Ibid. 130.

SUBSEQUENT PURCHASER FROM MORTGAGOR.

12. *Subsequent purchaser from the mortgagor of a part of the premises —only secondarily liable.* Where a mortgagor conveys a portion of the mortgaged premises, retaining a portion himself, as between the mortgagor and his grantee, that portion retained by the mortgagor should be first applied to the payment of the mortgage. *Lock* v. *Fulford*, 166.

13. *Subsequent purchaser of the remaining portion—of his rights in respect to the prior purchaser.* And a subsequent purchaser of the portion thus retained by the mortgagor, with notice of the prior sale of the other portion, simply steps into the shoes of the mortgagor, and will hold his portion subject to be charged primarily with the payment of the mortgage. Ibid. 166.

14. *Assignee of mortgage, with notice of prior sale.* So, where the assignee of a note secured by mortgage took the assignment with notice that a part of the mortgaged premises had been sold and conveyed by the mortgagor, such assignee can hold the portion so conveyed only secondarily liable, and must first exhaust the portion of the premises retained by the mortgagor. It is, therefore, competent for the grantee

MORTGAGES. SUBSEQUENT PURCHASER FROM MORTGAGOR. *Continued.*

of the mortgagor, in a suit by the assignee of the mortgage to foreclose, to prove the fact that he had so purchased a part of the premises after the mortgage became a lien, and that the assignee had notice of that fact. *Lock* v. *Fulford*, 166.

PURCHASER UNDER FORECLOSURE.

15. *May convey to the mortgagor.* Tenants in common jointly mortgaged their land, and upon foreclosure and sale, one of the tenants in common became the grantee of the purchaser under the foreclosure, by deed purporting to convey the whole tract: *Held*, the fact that the grantee of the purchaser under the foreclosure was a mortgagor, did not place him in such a position as forbade him acquiring the title in that manner; his purchase did not operate as a redemption, but he could rely upon his deed as color of title. *Hinkley et al.* v. *Greene*, 223.

MORTGAGEE PURCHASING AT HIS OWN SALE.

16. *Whether allowable.* A mortgagee of real estate, selling under a power, can not become the purchaser at his own sale, unless by consent of the mortgagor. *Griffin et al.* v. *Marine Co. of Chicago et al.* 130.

17. *Construction of a mortgage, on that subject.* A mortgage, with a power of sale in the mortgagee, contained this clause: "It shall be lawful for the said party of the second part, his representative or assigns, to become purchaser at said sale, or any member or members of the firm of H. A. Tucker & Co." (H. A. Tucker being the mortgagee), "may become a purchaser at such sale, provided his or her bid for said property, or any portion thereof:" *Held*, that it was apparent the right of the mortgagee to purchase at the sale was intended to be upon conditions, which were not fully expressed, and the language in that respect being unintelligible, the entire clause must be disregarded. The power to become a purchaser at the sale was not conferred upon the mortgagee. Ibid. 130.

18. *Rule of construction in such cases.* Where it is claimed that a mortgage confers upon the mortgagee the right to purchase at his own sale under a power in the mortgage, the instrument, in that regard, will be strictly construed. Such a privilege the law does not give to the mortgagee, and does not favor, and if claimed under a clause in the mortgage, he must show it has been given in clear and unmistakable terms. Ibid. 130.

19. Such a clause in a mortgage is analogous to one providing that the mortgagee may purchase the equity of redemption at a fixed price, and places the mortgagor substantially at the mercy of the mortgagee. Whether it would be void, as being extorted from the necessities of the mortgagor, or whether the mortgagee, acting under it, would be required to show, against a claim by the mortgagor to redeem, that the sale had been fair, and the property had brought a reasonable price, is not decided, but upon the question whether the language used does confer the

MORTGAGES. Mortgagee purchasing at his own sale. *Continued.*

right, it must receive a strict construction, being regarded with disfavor by the courts. *Griffin et al.* v. *Marine Co. of Chicago et al.* 130.

Of the mode of foreclosure.

20. *As to real estate and personalty.* Where a mortgage of real estate provided, as the mode of foreclosure, that the property should be sold at public sale by the mortgagee, at a specified place, and after advertising for a given time, it was *held*, this cut off the right of private sale by the mortgagee. Ibid. 130.

21. And if such a provision should be contained in a mortgage of personal property, it is not perceived what right the mortgagee would have to disregard it and sell the property at private sale. Ibid. 130.

Junior incumbrancers—not made parties.

22. *Effect of foreclosure upon their right of redemption.* In this State, when the foreclosure is by *scire facias*, subsequent incumbrancers are cut off, though not made direct parties to the proceeding. *Kenyon* v. *Shreck et al.* 383.

23. When the foreclosure is by bill in chancery, they are not absolutely barred unless made parties, but they cannot be permitted to assert their equity of redemption against an equity still stronger. Ibid. 383.

Parties on foreclosure. See PARTIES, 7, 8.

Insurance of mortgaged property.

When effected by the mortgagor or mortgagee—rights of the parties. See INSURANCE, 20, 21.

MOTION.

Variance between writ and declaration.

When it may be availed of by motion. See VARIANCE, 1, 2.

NEGLIGENCE.

Contributory and comparative negligence.

1. In an action to recover damages occasioned by the negligence of the defendant, the plaintiff can not recover when he has been guilty of contributory negligence, unless his negligence is far less in degree than that of the defendant, and then his own negligence is not a bar to his recovery. *Chicago, Burlington & Quincy Railroad Co.* v. *Dunn*, 452.

2. In actions to recover damages resulting from the alleged negligence of the defendant, the doctrine of comparative negligence obtains in this State; so the question of liability does not depend absolutely upon the absence of all negligence upon the part of the plaintiff or the defendant, but upon the relative degree of care, or want of care, as manifested by both parties. *Chicago & Northwestern Railway Co.* v. *Sweeney, Admx.* 325.

NEGLIGENCE.

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE. *Continued.*

3. It is the duty of a person about to go upon a railroad track, to do so cautiously, and ascertain whether there is danger; and especially does this duty devolve upon a person who, from long employment upon the road at the particular place, is familiar with its peculiar dangers, from the numerous tracks there, and their constant use in the switching of cars. *Chicago & Northwestern Railway Co.* v. *Sweeney, Admx.* 325.

4. In an action to recover damages, under the statute, for the death of a person, alleged to have been occasioned by the negligence of a railroad company, it appeared the deceased was a track repairer in the service of another company, with whose road the defendants' track connected at the place where the accident occurred, and with which the deceased was very familiar, having worked about it, or near it, for several years. It was a point where the tracks were numerous, and engines constantly in motion in great numbers. While cars were being pushed by an engine, the deceased stepped upon the track in front of the moving cars, with his back to them, and his cap drawn closely over his ears, not looking about to see if there was danger, which he could easily have discovered, and of which he should have been aware from his long familiarity with the place. The cars overtook him, and he was struck and killed. He was held to have been guilty of such gross negligence, and even recklessness, that there could be no recovery, unless a greater degree of negligence on the part of the company could be shown. Ibid. 325.

5. There seemed to have been no negligence on the part of the company. The switchman walked along the track about sixty feet in advance of the moving train and saw the track was clear. While doing so, the deceased stepped on the track between him and the train, with his back to the train, without noticing its approach, although it was in plain view. So soon as he was seen by the switchman, he shouted to him, but he gave no heed to the warning. The train was moving very slow, and had the usual complement of men about it, who attended to their duties, and the engine bell was ringing continuously. Ibid. 325.

6. There was no watch upon the forward car to give warning, but there was an engineer and fireman, and a switchman and his assistant who was in a favorable position along side of the train to receive signals from the switchman on the track and communicate them to the engineer. But even if a man stationed on the forward car would have been more serviceable in giving warning, his not being there was slight negligence compared with the recklessness of deceased. Ibid. 325.

7. In an action against a railroad company to recover damages for the death of a person, caused by the alleged negligence of the company while the deceased was engaged in unloading a coal car, it was deemed the central question whether the deceased used proper care and caution

NEGLIGENCE.

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE. *Continued.*

in entering upon the car under the circumstances then existing, the company's employees being at the time engaged in switching upon the track where the coal car was standing, in making up a train; for however discreet and careful the deceased may have been when on the car, the question remained, and to be submitted to the jury, was he justified in being there at that time, and under the circumstances? *Illinois Central Railroad Co.* v. *Weldon, Admr.* 290.

NEGLIGENCE IN A RAILROAD.

8. In an action against a railroad company for personal injury received by the plaintiff, by reason of the train in which he was a passenger having struck a cow which suddenly run upon the track, and the cars thrown from the rails, it appeared that cattle were in the habit of resorting to the station where the accident happened, being attracted there by the corn liable to be scattered upon the ground, and that a few days before this accident, a train had run over a cow at that station. There was no watchman there to keep the track clear, and the train was passing the station with more than ordinary speed. With the known liability to such accidents at that place, this was inexcusable negligence. *Chicago, Rock Island & Pacific Railroad Co.* v. *McAra*, 296.

9. *Liability of railroad companies for injury to their servants, occasioned by dangerous structures.* See MASTER AND SERVANT, 2 to 6.

10. *And for injuries to servants from negligence of their fellow servants.* Same title, 7, 8.

INJURY FROM DEFECTIVE SIDEWALKS.

11. *Liability of cities and individuals.* See HIGHWAYS, 4.

NEW PROMISE.

WHAT IS PROOF THEREOF.

1. *By a re-organized railroad corporation.* Where the property and franchises of a railroad corporation have been sold and conveyed under a deed of trust given to secure a debt of the company, and the purchasers re-organize, to prove a new promise by the re-organized company to pay a debt owing by the company as originally organized, there must be shown some action on the part of the directors of the former from which the promise can be clearly inferred. The mere certificate of their secretary, that the amount was due on specified items, would be insufficient to prove a new promise, or to bind the company, unless it appeared he had been empowered to adjust the claim. *American Central Railway Co.* v. *Miles*, 174.

STATUTE OF LIMITATIONS.

2. *Sufficiency of a new promise, to take the case out of the statute.* See LIMITATIONS, 8 to 11.

NEW TRIALS.

Excessive damages.

1. In an action against a railroad company to recover damages for injuries received by the plaintiff by reason of the negligence of the company, it appeared the plaintiff had no bones broken. He stated at the time of the accident that he was not much hurt. On the trial, he stated that he was severely bruised on his left side. His physicians said it was merely a muscular injury. He kept his bed nearly all the time for a month, getting up, however, and walking about the house every day, and claimed to be still lame at the trial, which was about ten months after the accident, though there was some reason for supposing his recovery would have been more rapid if he had had no claim for damages. A verdict for $5000 was considered excessive, and the judgment was reversed for that cause. *Chicago, Rock Island & Pacific Railroad Co.* v. *McAra*, 297.

2. Although there is no fixed criterion for assessing the damages in an action for a personal tort, yet they should be so assessed as to preclude the idea that passion or prejudice controlled the jury, or their sensibilities were worked upon by unworthy appliances. *Walker* v. *Martin*, 347.

3. In an action for malicious prosecution, it appeared the defendant had caused the arrest of the plaintiff on a charge of larceny, the latter being confined in jail for a period of nine days, when he was discharged. The prosecution was malicious and wholly unjustifiable. The defendant was a man of large wealth, while the plaintiff was a poor man, who obtained his living by his labor. On the first trial, the weight of the evidence was, that the plaintiff's character was bad. A verdict of $20,000 was considered excessive, and the judgment was reversed. On a second trial, the evidence in regard to the character of the plaintiff was conflicting, yet, while the greater number of witnesses testified to his good character, the impression was made that he was not in such position, in society or among business men, as to be greatly injured by the wrongful prosecution. On the second trial, a verdict was returned for $25,000, and a remittitur being entered for $5000, a judgment was rendered for $20,000, which was reversed upon the sole ground that the damages were outrageously excessive. Ibid. 347.

4. In an action against a railroad company, for injuries to the plaintiff, caused by the alleged negligence of defendants' servants in blowing the whistle on an engine, at a time and place, however, when and where it was customary to blow it, while too near a team of mules attached to a wagon in which the plaintiff was riding, it was *held*, that compensatory damages only should be given. And the only injury sustained by the plaintiff being a sprained ankle, from which, with proper care, he would have recovered in five or six weeks, a verdict for $1525

NEW TRIALS. EXCESSIVE DAMAGES. *Continued.*
was regarded as excessive. *Chicago, Burlington & Quincy Railroad Co.* v. *Dunn*, 451.

5. In a case sounding in damages, unless the verdict is manifestly so high as to produce the conviction that the jury were actuated by improper motives, it will not be disturbed on the ground of being excessive. *Chicago, Rock Island & Pacific Railroad Co.* v. *Otto*, 416

6. In an action by a brakeman upon a railroad, against the company, for injuries received through the negligence of the defendants, in constructing an awning so near the track that when the plaintiff ascended a freight car in obedience to a signal for brakes, he was thrown from the car by coming in collision with the awning, it appeared his left arm was broken and had to be amputated, and his head was bruised with a scalp wound. He was treated by physicians about two months. His wages had been $40 per month. A verdict for $10,000 was considered excessive, there being no foundation for vindictive damages. *Illinois Central Railroad Co.* v. *Welch*, 184.

7. *In an action under the statute, for the death of a person—what damages were regarded excessive.* See MEASURE OF DAMAGES, 6.

NOTICE.

NOTICE OF SUIT TO DEFENDANT.

1. *Necessity thereof.* A decree rendered upon the default of a party who had no notice of the suit, either actual or constructive, is void as to such party. *Clark et al.* v. *Hogle et al.* 427.

ON ADJOURNMENT OF TRUSTEE'S SALES.

2. *Of the notice required.* It has been held that a trustee in a deed of trust may adjourn a sale in his discretion, but when he does so, he must give a new notice for the same length of time required in the first instance. *Griffin et al.* v. *Marine Co. of Chicago et al.* 130.

3. Nor is this rule in regard to the notice, affected by the fact that the deed contains a clause authorizing an adjournment; such a clause is not material, as the power exists without it. Ibid. 130.

NOTICE OF TAX SALES.

Necessity and requisites of the notice to be given by a tax purchaser. See TAXES AND TAX TITLES, 2, 3.

NOTICE OF SALE IN PARTITION.

Whether proof thereof must be preserved in the record. See PARTITION, 4, 5.

PROOF OF NOTICE OF SALE UNDER TRUST DEED.

Obviated by recitals in the deed given by the trustee. See SALES, 6.

OFFICES.

PUBLIC OFFICES.

Right of private persons to enter the same. See PUBLIC OFFICES, 1.

ORDINANCE.

IN RELATION TO INSPECTION OF FISH.

1. *Construction thereof.* A city ordinance, requiring that all fresh water fish in packages, brought into the city for sale, shall, before being sold, be inspected and branded, and imposing a penalty for its violation, does not render a person liable to the penalty for selling such fish in packages not inspected and branded, when the same are made up from other packages that have been duly inspected and branded. *City of Chicago* v. *Hobson et al.* 482.

OUSTER.

TENANTS IN COMMON.

What constitutes an ouster of one tenant in common by another. See LIMITATIONS, 16

PARENT AND CHILD.

OF INHUMAN TREATMENT OF A CHILD BY A PARENT.

It is punishable by law. See CRIMINAL LAW, 3, 4.

PARTIES.

IN ACTIONS AT LAW, GENERALLY.

1. In a suit against the members of an association for services rendered, the name of a person which was signed to the articles of association without authority, may properly be omitted as a defendant. *Boyd* v. *Merriell*, 151.

TO RECOVER INDEBTEDNESS DUE A FIRM.

2. In all cases of indebtedness to a partnership firm, the action must be brought by the members of the firm,—one of the members can not sue alone, and recover at law for what his co-partners may agree to be his portion of a debt due the firm. *American Central Railway Co.* v. *Miles*, 174.

IN SUIT AGAINST SEVERAL TORT FEASORS.

3. *They may be sued severally.* A plaintiff may maintain several actions against a number of persons who commit a trespass or other tort jointly, and may recover several judgments, though he can have but one satisfaction. *Severin et al.* v. *Eddy*, 189.

IN CHANCERY.

4. Where the board of supervisors of a county entered into a contract to convey the swamp and overflowed lands belonging to the county, for

PARTIES. In chancery. *Continued.*

a certain sum of money, and upon condition the grantees should drain the lands conveyed, such board may maintain a bill in chancery against the grantees, to assert and enforce the rights of the county concerning the subject of such condition, and the trust arising in respect thereto. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 456.

5. And although such grantees may have sold and conveyed a portion of the lands before suit brought, yet the original grantees, or their representatives, are the only necessary parties defendant to such a bill. Ibid. 456.

6. *One of several creditors of an estate may maintain a bill to obtain payment of his claim.* See ADMINISTRATION OF ESTATES, 11.

Parties to a foreclosure.

7. *Of a subsequent purchaser from the mortgagor.* A subsequent purchaser from a mortgagor ought to be made a party to a suit to foreclose the mortgage; but if he be not made a party, the decree of foreclosure will not, for that reason, be void—it will be, as to him, a mere nullity, leaving to him the right which he acquired by his purchase—that of redemption—in full force, and which he may still exercise, even though the decree was for a strict foreclosure. *Cutter et al.* v. *Jones*, 85.

8. *Of the heirs-at-law of a person who had conveyed his title in his life time.* The owner of real estate conveyed the same in fee, and his grantee, simultaneously with such conveyance, made a quit-claim deed to the wife of the first grantor. Subsequently, the wife executed a mortgage upon the property, her husband joining therein. Upon foreclosure of such mortgage, after the death of the husband, the children and heirs-at-law of the latter, having no interest in the property, were not necessary parties to the suit. *Douglas et al.* v. *Soutter*, 154.

Junior incumbrancers—not made parties.

9. *Effect of foreclosure upon their right of redemption.* See MORTGAGES, 22, 23.

Where feme sole plaintiff marries pending suit.

10. Where, pending an action commenced by a *feme sole*, the plaintiff marries, judgment may be rendered in her favor by her original name, unless a change of name be brought, in some way, to the notice of the court. *Wilson et al.* v. *McKenna*, 43.

Whether a married woman may sue alone.

For personal injuries to herself. See MARRIED WOMEN, 2.

In an action of trover.

Joint liability of partners. See TROVER, 3, 4.

PARTITION.

When partition allowable.

1. *Where there is an estate for life.* One tenant in common may sue out a writ of partition, even though there be a subsisting life estate in another in the premises, notwithstanding the objection of the owner of the life estate; and, in case partition can not be made, he may obtain an order for the sale of the whole of the premises, subject to the life estate. *Hilliard* v. *Scoville et al.* 449.

2. And though the premises may sell for less by reason of the life estate in them, that is no reason why either of the remainder-men should be delayed in proceeding to sever the tenancy, as between themselves. Ibid. 449.

Jurisdiction in chancery.

3. *In partition.* Equity has jurisdiction in case of partition. Nor does the fact that a concurrent remedy exists at the common law, under the writ of partition, or under our statute, in the least affect such jurisdiction. *Hess et al.* v. *Voss et al.* 472.

Proof of notice of sale.

4. *Whether it must appear of record.* It has been held, in a proceeding for partition under the statute, where there was an order of sale, the commissioner appointed to execute the decree must file a copy of the notice of the sale, with an affidavit that it was posted, or if printed, a copy, with a certificate of the publisher. Ibid. 472.

5. But where the partition was sought in chancery, and there was a decree of sale, the master who executed the decree reported that he had given the required notice, and furnished a copy with his report, and it was held not to be essential, as the proceeding was in chancery, that the record should show the notice with an affidavit or publisher's certificate. Ibid. 472.

PARTNERSHIP.

Sale of one partner's interest under execution.

1. *Relations of the purchaser with the other partner.* The interest of one partner in the partnership property may be sold under execution against him for his individual debt, and that interest, whatever it may be, will pass to the purchaser, to be held, however, subject to all the rights of the other partner, so that if, upon a settlement of the partnership affairs, the debtor partner would have been entitled to nothing had no sale taken place, then the purchaser will take nothing by his purchase. *Chandler* v. *Lincoln*, 74.

2. *In what proceedings such rights may be adjusted.* But in an action of replevin, where the title of a part of the property, alleged to be in a third person as a partner, is in issue, no settlement could be made between such partner and a purchaser under execution against his co-partner, and an instruction on that subject would be irrelevant. Ibid. 74.

PARTNERSHIP. *Continued.*

EVIDENCE TO PROVE A PARTNERSHIP.

Whether competent. See EVIDENCE, 20, 21, 22.

PAYMENT.

OF THE TIME OF PAYMENT.

On a sale of chattels. See SALES, 2, 3.

PLEADING.

OF THE DECLARATION.

1. *The inducement.* Mere inducement is not required to be set out with the same degree of particularity as the contract itself. *Phelan et al.* v. *Andrews et al.* 486.

2. So, in an action for a breach of warranty, the terms and conditions of the contract are only stated as inducement to the warranty. Ibid. 486. See PLEADING AND EVIDENCE.

3. *What sufficient averment of consideration.* Where, in an action of assumpsit for goods, wares and merchandize sold and delivered, the declaration averred that the plaintiff sold and delivered to the defendant goods, wares and merchandize, at her instance and request, amounting to a specified sum, "which sum said defendant then and there promised to pay the said plaintiff for such goods, wares and merchandise:" *Held*, a sufficient averment of consideration. *Read* v. *Walker*, 333.

4. *Averment of time.* So an allegation in the declaration, that goods, wares and merchandize were sold and delivered at divers times between specified dates, where the transaction runs through a long space of time, is a sufficient averment of time, and, in such case, it is not necessary to aver that the transaction occurred on a single specified day. Ibid. 333.

5. *Venue—locus in quo.* In transitory actions, it is only necessary to state a venue, and the county alone is a sufficient venue, without stating the city. Ibid. 333.

6. *Construction of a count as to time of payment.* Upon a contract for the sale of ten thousand bushels of barley, to be delivered in such manner that one thousand bushels should be delivered each week, in an action, by the buyer, for non-delivery of the grain, it was alleged in the declaration that the plaintiff had "promised the defendant to accept and receive the said goods, and to pay him for the same at the price aforesaid," "and although said time for the delivery of said goods as aforesaid, hath long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said goods, and to pay for the same at the rate or price aforesaid," yet the defendant had not, within the time stipulated, or at any time, delivered the grain, except a certain portion of it: *Held*, that the true meaning and legal effect of the count was, that payment was to be made on the delivery of the whole ten

PLEADING. Of the declaration. *Continued.*

thousand bushels, and not on the delivery of each weekly installment. *Metz et al.* v. *Albrecht*, 492.

7. *In an action against a railroad for injury to stock.* In an action against a railroad company for killing stock, the declaration averred that the company had failed to fence the road at the place where the animal was killed, or where it got upon the track, and that it was not killed, nor did it get upon the track, at any of the excepted places. Upon the objection, that it was not directly averred that the injury was the result of the company's failure to fence, it was *held*, the facts averred would raise a *prima facie* presumption that the injury resulted from that cause, and at least after verdict, on motion in arrest, the declaration would be held sufficient. *Toledo, Peoria & Warsaw Railway Co.* v. *Darst*, 89.

8. *In an action against a railroad company for personal injuries from negligence of fellow servants.* In an action against a railroad company to recover damages for the death of a person, an employee of the company, occasioned by the negligence of his fellow servants, it was alleged the injury was received while the deceased was in the act of coupling cars, a service he was commanded to do, but which was not within the scope of his employment, and his death was caused by the improper manner of handling the engine to which the cars were attached: *Held*, the declaration should contain an averment that deceased, while coupling the cars, used due care and caution. *Lalor, Admx.* v. *Chicago, Burlington & Quincy Railroad Co.* 401.

Action on penal bond.

9. *Of assigning successive breaches.* The 18th section of the practice act, which provides that in actions upon penal bonds, successive breaches may be assigned and recovery had, after a trial and judgment in the same action, is not confined in its operation to actions on official bonds, but applies as well to other penal bonds, conditioned for the performance of covenants, where the non-performance of the condition is not necessarily embraced in a single breach. *Dent* v. *Davison*, 109.

10. So where one partner purchased his co-partner's interest in the firm, agreeing to pay the partnership debts, and gave a penal bond conditioned for their payment within a specified time, upon a breach of such condition by the neglect of the obligor to pay the firm debts, as he had agreed, a right of action upon the bond accrued to the obligee, but if the latter had not himself paid the debts, or some portion of them, he could recover only nominal damages, and the judgment for the penalty would stand as security for such other breaches as might afterwards happen by reason of the obligee paying the debts, or any portion of them. Ibid. 109.

PLEADING. *Continued.*

DEMURRER.

11. *When the proper mode of raising a question.* Where a plea of the statute of limitations is interposed, the question, whether there is any statute barring the action, should be raised by demurrer to the plea. *Norton* v. *Colby*, 198.

SPECIAL DEMURRER.

12. On special demurrer, no objection to pleading, not specifically pointed out, will be considered. *Read* v. *Walker*, 333.

CLAIMING A STATUTORY BENEFIT OR REMEDY.

13. A party claiming a benefit or remedy given by statute, must bring himself, by proper averments and pleadings, within its provisions. *Schooner "Norway"* v. *Jensen*, 373.

PLEA OF FRAUD.

14. *Generally*, a plea of fraud, to be sufficient, must aver that the defendant relied upon the fraudulent representation. *Wisdom et al.* v. *Becker*, 342.

15. *As to the consideration of a note.* In an action upon a promissory note, the defendant averred in a special plea that the note was given for a leasehold estate, to which the plaintiff falsely and fraudulently represented he held title, and that all taxes were paid, and that the defendant was obliged to surrender the premises. The plea was bad, as it did not aver that defendant had not enjoyed the benefit of the term, or that the plaintiff did not subsequently acquire title to the same. For aught that appeared, the surrender may have been on the last day of the term, or to a person not entitled to the premises. Ibid. 342.

16. The plea was defective, also, in not stating the manner in which or why the title failed. Ibid. 342.

PLEA OF FAILURE OF CONSIDERATION.

17. *Of its sufficiency.* A plea in an action upon a note which avers that the note was given in consideration of a leasehold estate purchased by the defendant from the plaintiff, to which the latter had no title, is not good as a plea of failure of consideration, in the absence of an averment that the defendant did not enter upon and enjoy the term. Ibid. 342.

PLEADING IN ACTIONS FOR SLANDER. See SLANDER, 1, 2.

PLEADING IN CHANCERY. See CHANCERY, 1, 2, 3.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS.

1. *Must correspond.* In every case, a party suing must recover on his allegations and proofs. So, in an action to recover damages for non-

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS. *Continued.*

delivery of grain purchased by the plaintiff, where the contract provided for the delivery of the grain in installments at different times, if the declaration was framed on the theory that payment was to be made only on the delivery of the whole quantity bought, the plaintiff can not recover upon a contract under which payment was to be made on the delivery of each installment of the grain. *Metz et al.* v. *Albrecht*, 492.

EVIDENCE UNDER THE COMMON COUNTS.

2. An instrument was made as follows: "$2400. Value received, in seven-thirty United States bonds, to the amount of twenty-four hundred dollars, with interest coupons due the fifteenth of February next, and the bonds due or convertible into five-twenty-bonds on the fifteenth of August next, we jointly and severally promise to pay Frederick J. Fischer, or order, twenty-four hundred dollars in United States bonds, or the equal value of the above described bonds at maturity, with the interest accrued on the same to this date. To be paid in five-twenty or ten-forty bonds or money, at the election of said Frederick J. Fischer, one year from date, with interest at the rate of ten per cent per annum:" *Held*, such an instrument is admissible in evidence under the common counts, as it is either a promissory note or a contract fully executed by the party to whom the promise is made, and nothing left to be done by the maker but to pay the money. *Childs* v. *Fischer*, 205.

VARIANCE BETWEEN DECLARATION AND CONTRACT SUED ON.

3. *In a suit for breach of warranty*, where the declaration sets out the contract only in substance, and not in *hæc verba*, a variance, to be fatal, between the contract, as declared on, and the one offered in evidence, must be in some material matter. *Phelan et al.* v. *Andrews et al.* 486.

4. In a suit to recover damages for an alleged breach of warranty, in the manufacture of two steam boilers, the declaration alleged they "were intended for driving a grist mill, at Annawa, in the county of Henry, and State of Illinois," while the contract was silent as to their purpose, or place where they were to be used: *Held*, there being no averment that the contract stated they were to be so used, and the declaration only purporting to set out the contract in substance, this was not a variance. Ibid. 486.

5. Nor is there any substantial difference between the averment that the boilers "should be built and manufactured in a first class manner," and that "the work should be done in a first class manner." Ibid. 486.

6. *Implied warranty.* So, where the declaration alleged that, "in consideration of the manufacture, sale and warranty of the boilers, plaintiffs agreed to pay $2400," while the contract read, "defendants were to build two steam boilers with a mud-receiver, for $2400:" *Held*,

PLEADING AND EVIDENCE.

VARIANCE BETWEEN DECLARATION AND CONTRACT SUED ON. *Continued.*

this was not a variance, as the pleader, in averring the warranty, only stated the substance of the agreement, and a mud-receiver constituted a part and necessary portion of the boilers—it being a well recognized rule of law that when a manufacturer furnishes his wares, he impliedly warrants them to be reasonably suited to the purpose for which such articles are designed, and to be skillfully and properly constructed. *Phelan et al.* v. *Andrews et al.* 486.

7. Nor is there a variance when the declaration avers that plaintiffs were to pay $2000, on the completion of the boilers, and $400 on June the 1st, 1867, with ten per cent interest, and, by the contract, plaintiffs were to pay $2000 cash at the shop of defendants on completion of the work, "and give a lien note for $400, payable June 1st, 1867, with ten per cent interest, payable at Second National Bank, Peoria"—the terms and conditions of the contract being only stated as inducement to the warranty, upon which the action is based, and mere inducement is not required to be set out with the same degree of particularity as the contract itself. Ibid. 486.

POSSESSION.

OF THE EXTENT OF POSSESSION.

1. *Whether it extends to newly purchased adjoining lands.* The principle that when a party purchases land adjoining a tract of which he was already in the occupancy, he will be considered as at once, in point of law, in possession of the newly acquired tract, is true only when the latter tract is vacant, or at least not held under an adverse possession. *Ballance* v. *Flood.* 49.

ADVERSE POSSESSION.

2. *When possession will be adverse, as against a mortgagor.* See MORTGAGES, 9, 10.

POWERS.

WHETHER LIMITED.

1. A party executed a conveyance of land, absolute in form, and received from the grantee a writing as follows: "I hereby agree, in consideration of receiving a special warranty deed from Patrick Walsh for N. 25 feet, lot 2, block 5, in Brainard and Evans' addition, that I will endeavor to sell said lot within one year from the date hereof, and that, after paying all moneys due to Daniel Brainard, and also to myself, with any interest accruing thereon, then I will repay to said Patrick Walsh all the surplus arising from said sale, and for any rent received by me during said year:" *Held*, the power given to the grantee, under the conveyance to him, and the writing mentioned, to sell the property, was not a limited power; the property was not to revert

POWERS. WHETHER LIMITED. *Continued.*

to the grantor, and his only claim was for an account from the grantee of the proceeds of the sale, and for the payment of any surplus there might be. *Walsh* v. *Brennan et al.* 193.

2. So the title of a *bona fide* purchaser from such grantee, having no notice of the trust relations between the latter and his grantor, would not be affected thereby, and such grantor would not be entitled to a reconveyance of the property upon payment of the amount secured. Ibid. 193.

PRACTICE.

WHO ENTITLED TO THE OPENING OF A CAUSE.

1. Upon an appeal, by the heirs of an estate, to the circuit court, from an order of the county court approving the settlement of the estate and discharging the administrators, the latter, alleging they had fully administered, held the affirmative, and were entitled to the opening to the jury. *Heward* v. *Slagle et al. Admrs.* 336.

GOING TO TRIAL WITHOUT ISSUE ON ALL THE PLEADINGS.

2. If a defendant voluntarily goes to trial upon issues made up on a part of the pleadings in a cause, leaving, however, some of the replications of the plaintiff without rejoinders and without issues upon them, a judgment for the plaintiff will not be reversed at the instance of the defendant because of such omission on his part to plead. If the defendant choose to go to trial with the pleadings in that condition it is his right to do so, although the plaintiff might put him under a rule to rejoin to all the replications. *Barnett* v. *Graff*, 170.

TIME TO OBJECT.

3. *Time within which to object to admissibility or sufficiency of evidence.* While it is the rule that the admissibility of evidence can not be questioned, for the first time, in the appellate court, yet the sufficiency of the evidence to prove the issues may be questioned at any time and in all courts. *Elston et al.* v. *Kennicott et al.* 272.

OF ASSIGNING SUCCESSIVE BREACHES.

In action on penal bond. See PLEADING, 9, 10.

EXISTENCE OF A LIMITATION LAW.

Question raised by demurrer to plea of the statute. See PLEADING, 11

VARIANCE BETWEEN WRIT AND DECLARATION.

How availed of. See VARIANCE, 1, 2.

PRACTICE IN THE SUPREME COURT.

WHO MAY ASSIGN ERRORS.

1. The owner of real estate conveyed the same in fee, and his grantee, simultaneously with such conveyance, made a quit claim deed to

PRACTICE IN THE SUPREME COURT.

WHO MAY ASSIGN ERRORS. *Continued.*

the wife of the first grantor. Subsequently, the wife executed a mortgage upon the property, her husband joining therein. Upon foreclosure of the mortgage after the death of her husband, though the minor heirs of the husband were made defendants in the suit to foreclose, together with his widow, in whom the fee had become vested before the mortgage was made, yet, the infant defendants, having no rights to be affected by the decree, can not maintain a writ of error alone, the rule being, that a party can not assign for error an erroneous decision which does not prejudice his rights. *Douglas et al.* v. *Soutter*, 155.

2. Where there are infant and adult defendants, and the adults alone prosecute a writ of error, they can not assign for error the proceedings which only affect the interests of the infants; and the converse must be true, when infants alone prosecute the writ. Ibid. 155.

ERROR WILL NOT ALWAYS REVERSE.

3. *Of erroneous instructions.* The giving of erroneous instructions will not be ground for reversal where the evidence clearly shows the verdict was right. *Hall* v. *Sroufe*, 421.

4. *Where a witness ruled to be incompetent is rendered competent by a release.* Where a witness was improperly ruled to be incompetent on the ground of interest, and was afterwards rendered competent, under the common law, by means of a release, and allowed to testify, such erroneous ruling will not avail the party against whom it was made, as he had the full benefit of the witness' testimony. *Illinois Central Railroad Co.* v. *Weldon, Admr.* 290.

PRINCIPAL AND AGENT. See AGENCY.

PRIVILEGED COMMUNICATIONS.

AS BETWEEN ATTORNEY AND CLIENT. See EVIDENCE, 23.

PROCESS.

WANT OF NOTICE OF SUIT.

1. *Effect thereof.* A decree rendered upon the default of a party who had no notice of the suit, either actual or constructive, is void as to such party. *Clark et al.* v. *Hogle et al.* 427.

WARRANT FOR CONTEMPT.

2. *To whom it should be addressed.* A proceeding for a contempt is in the nature of a criminal proceeding, and when a person is guilty of contempt in open court, before a justice of the peace, the justice may direct his warrant for the arrest of the offender to the sheriff of the county. *Hill* v. *Crandall*, 70.

PROCESS. *Continued.*

ABUSE OF PROCESS—CONTRACTS.

3. *Of contracts obtained by an improper use of process.* Where a chattel mortgage was procured to be executed under a threat of arrest under a warrant, the instrument was held void, not only because it was given under duress, but because it is against public policy to permit such an abuse of process, and no person should have the aid of a court to profit by it. *Bane et al.* v. *Detrick*, 20.

ILLEGAL ARREST—ABUSE OF PROCESS.

4. *Where a party is enticed within the jurisdiction of the court by fraud, so as to procure his arrest on civil process.* See JURISDICTION, 1 to 4.

ENTERING RETURN ON PROCESS.

5. *Discretionary.* Where an original summons had been issued, upon which no return was made, and an *alias* summons issued which was returned served, upon which a default was entered, a motion made for leave to the sheriff to enter his return, "not found," upon the original summons, and not supported by affidavit, was so far addressed to the discretion of the court that its action thereon can not be assigned for error. *Windett* v. *Hamilton*, 180.

PUBLIC OFFICES.

RIGHT OF PRIVATE PERSONS TO ENTER THE SAME.

1. Every person has a right to enter and remain in a public office, such as the office of a clerk of a court, even from motives of curiosity, merely, during such hours as the same may be open for the transaction of public business, so long as he conducts himself properly, and in no way interferes with, or impedes the business being transacted. *O'Hara* v. *King*, 303.

PURCHASERS.

WHO MAY BECOME A PURCHASER.

1. *So as to avail of the limitation act of* 1839. See LIMITATIONS, 17.

OF AN ATTORNEY AS A PURCHASER.

2. There is no rule of law which prohibits an attorney in a cause from becoming a purchaser at the master's sale under the decree therein, even of land belonging to his client; though in such case his conduct will be closely scrutinized, and if he has not acted with strict fairness the purchase will be held to have been made for his client. *Hess et al.* v. *Voss et al.* 473.

AGENT AS A PURCHASER.

3. An agent employed to sell land, can not himself become the purchaser. *Kerfoot et al.* v. *Hyman*, 512.

PURCHASERS. *Continued.*

MORTGAGEE PURCHASING AT HIS OWN SALE.

4. *Whether allowable.* See MORTGAGES, 16 to 19.

SUBSEQUENT PURCHASER FROM AN HEIR.

5. *Whether he will hold as against a prior unrecorded deed from the ancestor.* A subsequent purchaser, for a valuable consideration, from an heir, without notice of a prior unrecorded conveyance from the ancestor, will be protected in his title as against such prior conveyance. *Bowen et al.* v. *Prout*, 354.

6. *Of one of the heirs as a bona fide purchaser.* And where one of several heirs exchanges, for the interest of his co-heirs in a certain tract of land which they all inherited from their father, his interest in other parcels of land which descended to them in the same way, he will be protected, as a purchaser for a valuable consideration, in his title to the portion so acquired from his co-heirs, as against a prior unrecorded deed for the same from his ancestor, of which he had no notice. Ibid. 354.

7. But he could not hold the portion claimed by inheritance, as against such prior unrecorded deed of the ancestor, as he would take such interest as a volunteer. Ibid. 354.

PURCHASER WITHOUT NOTICE.

8. *How far protected.* Where a party conveyed land, by deed absolute in form, receiving from his grantee a writing by which a trust was declared, it was *held*, that a *bona fide* purchaser from such grantee, having no notice of the trust relations between the latter and his grantor, would not be affected thereby. *Walsh* v. *Brennan et al.* 193.

SUBSEQUENT PURCHASER FROM A MORTGAGOR.

9. *Only secondarily liable for the mortgage debt.* See MORTGAGES, 12, 13.

SALE OF ONE PARTNER'S INTEREST UNDER EXECUTION.

10. *Relation of the purchaser with the other partner.* See PARTNERSHIP, 1.

PURCHASER FROM A MORTGAGOR.

11. *Should be a party to a foreclosure.* See PARTIES, 7.

RAILROADS.

DELIVERY OF FREIGHT BEYOND THEIR OWN LINES.

1. *Liability in respect thereto—construction of bill of lading.* A box of goods was delivered to a railroad company, marked to a point beyond their own line of road. The bill of lading given therefor was called by the company their "through freight contract," acknowledged the receipt of the goods, and proceeded thus: "Which we promise to transport over the line of this railway to the company's freight station

RAILROADS.

Delivery of freight beyond their own lines. *Continued.*

at its terminus, and deliver to the consignee or owner, or to such company (if the same are to be forwarded beyond the limits of this railway,) whose line may be considered a part of the route to the place of destination of said goods, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such persons or carrier." And among the conditions printed in the bill of lading was this: "The responsibility of this company as a common carrier, under this bill of lading to commence on the removal of the goods from the depot on the cars of the company, and to terminate when unloaded from the cars at the place of delivery." It appeared that freight received by this company as through freight, was never unloaded or delivered at their terminus, but proceeded on to its place of destination in the cars in which it was received: *Held*, that this was a "through freight contract," and the company were liable beyond the terminus of their own road. *Toledo, Peoria & Warsaw Railway Co.* v. *Merriman*, 123.

Railroad directors—compensation.

2. The law does not imply a promise on the part of railroad companies to pay their directors for services as such, and to enable a director to recover for such services, a by-law, or resolution, must have been adopted by the board to compensate him therefor. *American Central Railway Co.* v. *Miles*, 174.

Liability for baggage of passengers. See BAGGAGE.

REAL AND PERSONAL PROPERTY.

Of a leasehold interest.

1. *What constitutes.* A lessee of a lot of ground erected a building thereon, under an agreement with the lessor that the former might remove all the improvements placed by him on the premises, or the lessor should pay for them at their appraised value; and in case of removal, rent was to be paid upon an appraisement to be made at certain intervals, without regard to the improvements. The lessee and owner of the improvements executed a mortgage upon his interest in the premises, including the improvements, and it was *held*, the property mortgaged was an actual interest in real estate, a chattel-real at the common law, falling under the definition of "real estate," given in the first section of our statute of judgments and executions, and, because immovable, possessing none of those attributes as personal property which have shaped the law in regard to the mortgage of such property. *Griffin et al.* v. *Marine Co. of Chicago et al.* 130.

RECORDER'S COURT OF CHICAGO.

TRANSFERRING CAUSES THEREFROM.

1. *Under act of February* 15, 1855. Under the act of 1855, requiring causes commenced in the recorder's court of the city of Chicago, where the amount in controversy shall exceed one hundred dollars, to be transferred, on the written request of the defendant, to the circuit court of Cook county, or the Cook county court of common pleas, the amount in controversy is to be determined by the specific sum claimed in the declaration, whether claimed as debt or damages. *Wilson et al.* v. *McKenna*, 43.

2. So, on an application for the transfer of an action of ejectment commenced in the recorder's court, the right to such transfer depends, not upon the *value* in controversy, but upon the *amount* in controversy, which is determined by the damages claimed in the declaration. Ibid. 43.

REDEMPTION.

REDEMPTION BY JUDGMENT CREDITOR.

1. *Confession of judgment for the purpose of enabling a creditor to redeem—not fraudulent as against purchaser.* The fact that a judgment debtor confesses judgment in favor of a creditor for the *express purpose* of enabling such creditor to redeem from a sale under a prior judgment, in no wise invalidates it, there being no fraud as to the consideration for the judgment. Such confession is not fraudulent as against the purchaser. *Karnes* v. *Lloyd et al.* 113.

2. *Redemptions encouraged.* It is the policy of the law to encourage redemptions, in order that the property of the debtor may discharge as many of his liabilities as possible. Ibid. 113.

PAYMENT OF LESS THAN IS DUE.

3. *Effect upon the redemption.* The objection, that the amount of money paid to the sheriff for the purpose of redemption was less than the actual sum due, comes too late when made after the amount so paid has been accepted from the officer. A party, to avail himself of such objection, must urge it at the time the deficient sum is tendered him. Ibid. 113.

OF A PURCHASER AT A MORTGAGE SALE.

4. *Whether a re-sale to the mortgagor gives the latter a right of redemption.* See MORTGAGES, 15.

REDEMPTION FROM MORTGAGE.

5. *General character of the right.* See MORTGAGES, 3.

FROM A SALE UNDER FORECLOSURE.

6. *Whether a conveyance by a purchaser under foreclosure, to the mortgagor will operate as a redemption.* See MORTGAGES, 15.

RELEASE.

What constitutes.

1. In an action by an employee of a railroad company, to recover damages for injuries received by reason of negligence of the company in the character of their structures connected with the road, the following was held to be a release of the cause of action: "Received of the Illinois Central Railroad Company $40, in full payment and satisfaction for *one month's time, in April, while laid up with injuries received while braking*, and in full satisfaction of all claims, demands, damages and causes of action against said company, hereby forever releasing said company therefrom, as witness my hand and seal, upon this 5th day of *June*, A. D. 1866. [Seal.] W. F. WELCH." *Illinois Central Railroad Co.* v. *Welch*, 184.

Release fraudulently obtained.

2. *Not a bar.* But if the plaintiff was induced to sign such release, by representations that it covered merely a month's time or wages, or if he signed it under such a belief, induced by the words or acts of defendants' agents, it would not operate as a bar, and this question should be left to the jury. Ibid. 184.

Release of surety.

3. *By acts between the principal debtor and the creditor.* If the principal debtor does any act, or makes any agreement, for a valuable consideration, without the consent of the surety, express or implied, and which tends to his injury, or which delays or suspends the right to coerce payment, to the prejudice of the surety, or which shall put the surety in a worse condition, or increase his risk, or impair the ultimate liability over of the principal to him, the surety will be discharged. *Boynton* v. *Phelps et al.* 210.

4. *Dismissal of a bill for an injunction by the complainant.* A judgment debtor obtained an injunction, restraining the collection of the judgment, and executed the usual injunction bond, with sureties. Pending the suit, the complainant, without the consent of his sureties, agreed with the owner of the judgment enjoined, a person to whom it had been assigned, that a decree might be entered such as should be deemed necessary to protect the rights of the owner of the judgment, and enable him to collect it, together with interest and costs; but it was stipulated that all claim for damages in consequence of the issuing of the injunction should be waived: *Held*, there being no fraud or collusion shown as between the complainant and the assignee of the judgment, this agreement did not operate to discharge the sureties on the injunction bond. Ibid. 210.

5. *Where the creditor omits to avail of a levy on personal property.* An execution issued upon a judgment was levied upon personal property sufficient to satisfy the judgment, and a forthcoming bond was given to the officer. Afterwards the judgment debtor obtained an

RELEASE. RELEASE OF SURETY. *Continued.*
injunction restraining the collection of the judgment, giving the usual injunction bond. Pending the suit for injunction, the judgment debtor, by stipulation with the owner of the judgment, dismissed the bill on condition no damages should be allowed: *Held*, that the judgment creditor could elect, either to sue upon the injunction bond, or to obtain satisfaction under the levy of his execution, and in choosing the former remedy, omitting to avail of the levy upon the personal property, he would not release the sureties in the injunction bond. *Boynton* v. *Phelps et al.* 210.

REMEDIES.

DEBT SECURED BY MORTGAGE.

1. A creditor by note and mortgage may obtain a judgment on the note, and subject property other than that embraced in the mortgage, to its payment. *Karnes* v. *Lloyd et al.* 114.

INJURY FROM DEFECTIVE SIDEWALKS.

2. *Liability of cities and individuals, and of the remedy of the city over against the individual who occasioned the injury.* See HIGHWAYS, 4.

CREDITOR OF AN ESTATE.

3. *When he has a remedy in chancery.* See ADMINISTRATION OF ESTATES, 9.

SETTLEMENT OF ESTATES.

4. *Remedy of the heirs in respect thereto.* See ADMINISTRATION OF ESTATES, 3.

AGAINST SEVERAL TORT FEASORS.

5. *They may be sued severally.* See PARTIES, 3.

MISAPPLICATION OF TRUST FUNDS.

6. *Remedy in chancery.* See TRUSTS, 8.

OF TENANTS IN COMMON.

7. *Remedies as between themselves.* See TENANTS IN COMMON, 1.

REPEAL OF STATUTES.

BY IMPLICATION. See STATUTES, 1.

REPLEVIN.

OF A RETURN OF THE PROPERTY.

1. *Of the pleadings—to authorize a return of the property.* In replevin, neither the plea of *non cepit* nor *non detinet* denies property in the plaintiff, and though the defendant succeed on either of them, he will not be entitled to a return of the property. To entitle the defendant to a return, he must, by a proper mode of pleading, contest the plaintiff's right. *Chandler* v. *Lincoln*, 74.

REPLEVIN. *Continued.*

PLEADING TO PUT THE TITLE IN ISSUE.

2. The right of the plaintiff can only be put in issue by formally traversing his allegation of title, or by specially pleading that the right of property is in some other person than the plaintiff. If the defendant succeed upon such a state of pleading, he will be entitled to a return of the property. *Chandler* v. *Lincoln*, 74.

3. Where the defendant pleads property in himself or a third person, and traverses the plaintiff's right, the averment of property in the defendant or third person is only inducement to the traverse, and the plaintiff must take issue on the traverse and not on the inducement. Ibid. 74.

BURDEN OF PROOF—AS TO TITLE. See EVIDENCE, 14, 15.

OF THE QUESTIONS PROPERLY ARISING.

4. In an action of replevin, where the title of a part of the property, alleged to be in a third person as a partner, is in issue, no settlement can be made between such partner and a purchaser under execution against his co-partner, and an instruction on that subject would be irrelevant. Ibid. 74.

RESCISSION OF CONTRACTS. See CONTRACTS, 5 to 8.

RESPONDEAT SUPERIOR. See MASTER AND SERVANT.

RETURN ON PROCESS.

PERMITTING THE SAME TO BE ENTERED.

Discretionary. See PROCESS, 5.

REVOCATION.

PAROL LICENSE.

May be revoked. See LICENSE, 1.

SALES.

WHAT CONSTITUTES A SALE.

1. *Within a clause in an insurance policy, prohibiting "any sale, alienation, transfer, conveyance or change of title, in the property insured."* See INSURANCE, 13 to 16.

TIME OF PAYMENT.

2. Under a contract for the sale and delivery of chattels, which is silent as to the time of payment, the inference is, the money is to be paid on delivery of the property sold. *Metz et al.* v. *Albrecht*, 491.

3. *Construction of a contract, in that regard.* A contract was as follows: "I, the undersigned, Jacob Albrecht, of Ohio Town, have to-day

SALES. TIME OF PAYMENT. *Continued.*

sold 10,000 bushels good barley, according to samples Nos. 1 and 2, to Metz & Stege, in Chicago, at one dollar per bushel. I promise to deliver the above quantity in such a manner that one thousand bushels shall be delivered each week:" *Held*, there being no time specified when the money should be paid, the proper construction is, the delivery of the grain and the payment of the money were concurrent. *Metz et al.* v. *Albrecht*, 491.

READINESS OF BUYER TO PAY.

4. In case of a sale of goods to be paid for on delivery, in order that the buyer may recover damages for non-delivery, it is incumbent on him to prove he was ready to receive and pay for the goods as delivered, and upon request for payment. This is the doctrine applicable to all cash sales. Ibid. 491.

WHERE TWO QUALITIES OF GOODS ARE SOLD.

5. *And the quantity of each not specified.* Where a party sold and agreed to deliver "ten thousand bushels barley, according to samples Nos. 1 and 2," it was *held*, Nos. one and two barley, the copulative conjunction being used, is the kind spoken of, and the quantity of each not being specified, it was at the option of the seller how much of each kind he would deliver. Ibid. 491.

SALE UNDER TRUST DEED.

6. *Proof of notice of the sale obviated by recitals in the conveyance made by the trustee.* An objection to the introduction in evidence of a trust deed, that there is not sufficient proof that notice of the sale had been given as required by the deed, is unavailing, it appearing from recitals in the deed, that the notice required had been given, and that the sale was made at the time and place named in the notice, which was at the door of the court house in the city of Pekin. Although neither the date of the notice, nor the name of the newspaper is given in the deed, it recites that due notice was given, and that the trustee duly advertised the premises, and these recitals, as to strangers and third persons, are sufficient. *Nixon* v. *Cobleigh*, 387.

7. *Who may question the mode of sale.* And the objection, that the sale was voidable because the deed declared that the property should be sold *on the premises*, and it was sold at the *court house door*, is one which can not be raised by a party who is a stranger to the deed, and for whose benefit the mode of sale was not inserted. Ibid. 387.

ADJOURNMENT OF TRUSTEE'S SALES.

Of the notice required. See NOTICE, 2, 3.

SELF-DEFENSE. See ASSAULT AND BATTERY.

SET OFF.

When allowable.

1. The individual indebtedness of an executor or administrator can not be set off against a debt due the estate. *Wisdom et al.* v. *Becker*, *Admx.* 342.

SLANDER.

Pleading in this action.

1. *Sufficiency of declaration, upon motion in arrest of judgment.* In an action for slander, the declaration averred that the plaintiff was a trader, and that defendant falsely said of and concerning him in his trade and business as a merchant, that he was a villain, a rascal and a cheater, meaning the plaintiff was then and there a villain, a rascal and a cheater in his said business as a merchant: *Held*, that, upon a motion in arrest of judgment, the declaration was sufficient in substance. *Nelson et ux.* v. *Borchenius*, 236.

Words not actionable per se.

2. *May become actionable when spoken in reference to one in his business.* Although the words alleged to have been spoken are not actionable *per se*, yet they are of such a character that when spoken in reference to a person in his business, are actionable, without the averment of any other extrinsic circumstance to explain them. Ibid. 236.

Evidence in slander.

3. *Proof as to the sense in which the hearers understood the words—admissible.* In actions for slander, the testimony of the hearers as to the sense in which they understood the words spoken, is admissible. Ibid. 236.

4. But such testimony is not conclusive upon the jnry. It is admissible as tending to show what meaning hearers of common understanding would and did ascribe to them. Ibid. 236.

SLAVERY.

Of contracts in respect thereto.

Whether enforcible in this State. See CONFLICT OF LAWS, 1, 2.

SPECIFIC PERFORMANCE. See CHANCERY, 10.

STAMP ACT.

Of its application to State courts.

1. *Unstamped instruments as evidence.* The act of congress rendering invalid as evidence instruments not stamped, is applicable only when such instruments are offered as evidence in the courts of the United States; an instrument made evidence by our State laws in the courts of the State can not be invalidated for such purpose by an act of congress. *Wilson et al.* v. *McKenna*, 43.

STATUTES.

REPEAL OF STATUTES.

1. *By implication.* If the rule be, as it undoubtedly is, that a subsequent act on the same subject will not be held to repeal a former act by implication, unless the new act contains provisions contrary to, or irreconcilable with, those of the former act, with much more force and propriety may it be argued that a subsequent act, not on the same subject, shall not be construed to repeal a former act by mere implication. *Rawson et al.* v. *Rawson et al. Exrs.* 63.

CONSTRUCTION OF STATUTES.

2. *Remedial Statutes.* The rule in construing a remedial statute, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it. *Chicago, Burlington & Quincy Railroad Co.* v. *Dunn*, 260.

STATUTES CONSTRUED.

3. *Mandamus—whether the peremptory writ may be refused, where there has been a verdict for the petitioner.* The third section of the Revised Statutes, entitled "Mandamus," construed in *The People ex rel.* v. *Comrs. of Highways*, 498. See MANDAMUS, 1.

4. *Whether a widow will inherit personal property from her husband.* The 46th section of the statute of wills, and the act of 1847, entitled, "*An act to amend an act concerning wills*," construed in *Rawson et al.* v. *Rawson et al. Exrs.* 62. See DESCENTS, 1, 2, 3.

5. *Witnesses—competency*, under act of 1867. *Boynton* v. *Phelps et al.* 210. See WITNESSES, 1, 2.

6. *Married women—what is "property," within the act of* 1861. *Chicago, Burlington & Quincy Railroad Co.* v. *Dunn*, 260. See MARRIED WOMEN, 1.

7. *Evidence on final hearing in chancery, in suit for injunction—whether affidavits admissible*, under the 14th section of the statute entitled, "*Ne exeat* and injunctions." *Hopkins* v. *Granger et al.* 504. See EVIDENCE, 19.

8. *Attachment—when it will lie, under the amendatory attachment law of* 1865. *Laflin et al.* v. *The Central Publishing House et al.* 432. See ATTACHMENT, 1 to 4.

9. *Attachment of boats and vessels.* Act of 1857, on that subject, construed in *Schooner "Norway"* v. *Jensen*, 373. See ATTACHMENT OF BOATS AND VESSELS, 1, 2, 3.

10. *Of written instructions—Oral statements by the court to counsel.* Construction of act of 1857, requiring all instructions to juries to be in writing. *O'Hara* v. *King*, 303. See INSTRUCTIONS, 7.

11. *Corporations can not plead usury, under act of* 1853. *American Central Railway Co.* v. *Miles*, 174.

STATUTES. STATUTES CONSTRUED. *Continued.*

12. *Compounding a criminal offense—what constitutes.* The statute on that subject construed in *Ford et al.* v. *Cratty*, 313. See CRIMINAL LAW, 1, 2.

13. *Limitations—action of assumpsit on a note made out of the State.* Limitation acts of 1827, 1845 and 1849, construed in *Norton* v. *Colby*, 198. See LIMITATIONS, 5, 6, 7.

14. *Highways—what constitute, so as to impose upon public authorities the duty to keep them in repair.* The third section of article 17, of the township organization law of 1861, construed in *The People ex rel.* v. *Comrs. of Highways*, 498. See HIGHWAYS, 1, 2, 3.

15. *Creditor's bill—what constitutes*, within the meaning of sections thirty-six and thirty-seven of chancery code. *Newman et al.* v. *Willetts*, 99. See CHANCERY, 8.

16. *Action on penal bond—of assigning successive breaches.* The 18th section of the practice act construed in *Dent* v. *Davison*, 109. See PLEADING, 9, 10.

17. *Recorder's Court of Chicago—of transferring causes therefrom to the circuit court of Cook county, or the Cook county court of common pleas.* Act of February 15, 1855, construed in *Wilson et al.* v. *McKenna*, 43. See RECORDER'S COURT OF CHICAGO, 1.

CONSTITUTIONALITY.

18. *Of the revenue law of* 1845, *requiring that a person shall have paid all taxes due upon lands before he can question a tax title thereto.* See TAXES AND TAX TITLES, 4.

SURETY.

WHEN LIABLE.

1. A party gave to another this instrument: "To whom it may concern: The bearer wants a sewing machine. Let him have it, and I will see it paid for, or the machine when called for." The person receiving the instrument presented it to a sewing machine agent, who sold him a machine on time, the price to be paid in installments. The party executing the instrument was notified of the sale the day after it was made. He knew the machine was not paid for, and knew the circumstances called for action against the purchaser, and yet did not notify the vendor to sue, or endeavor to secure himself. He was held liable to the vendor for the price of the machine. *Andrus* v. *Carpenter*, 171.

2. *Delay by the creditor.* The mere delay of the vendor to bring suit until the expiration of eleven days after the last installment became due, in the absence of any request by the party giving the instrument to sue, could not operate to release the latter from liability. Ibid. 171.

RELEASE OF SURETY. See RELEASE, 3, 4, 5.

SURFACE WATERS.

RIGHTS OF THE SERVIENT AND DOMINANT HERITAGES.

1. The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. *Gormley* v. *Sanford*, 158.

2. And it is not perceived that it would follow, as a result of this doctrine, that the owner of the inferior heritage must allow such surface waters to drain, and that he would have no right to use and exhaust them for his own benefit, or to drain them in a different direction. Ibid. 158.

3. *Application of the rule in cities.* The rule forbidding the owner of the servient heritage to obstruct the natural flow of surface waters, applies as well to city lots as to agricultural lands; though where a city has established an artificial grade, and provided an artificial sewerage, of which property owners can reasonably avail themselves, it would probably be held to be their duty to do so. Ibid. 158.

4. *Rights of one whose land does not occupy the position of a servient heritage.* Where adjacent lands, owned by different proprietors, are upon a common level, there being no natural drainage from one to the other by a surface channel, then the land of neither proprietor will occupy the position of a servient heritage, and if an artificial channel should be dug upon one of the lots by the occupant thereof, for his own convenience, by means of which the surface water from the adjacent lot was being carried away, a subsequent owner of the former lot would have the right not only to fill such artificial channel, but to raise his lot above its natural level, if by so doing he does not throw the surface water of his own lot on that of the adjacent proprietor. Ibid. 158.

5. *Of an artificial drain as an easement upon adjacent land.* Where one of two lots of ground belonging to the same owner, is being occupied by a tenant who dug a ditch thereon for his own convenience, but not at the request or even with the knowledge of the owner, and which incidentally acted as a drain for the surface water of such adjacent lot, a subsequent owner of the latter lot can not claim such artificial drain as an easement appurtenant to his lot, so as to prevent a subsequent purchaser of the lot upon which it was dug from closing it. Ibid. 158.

SURVIVING PARTNER.

ADMINISTRATOR OF DECEASED PARTNER.

Surviving partner should not be appointed. See ADMINISTRATION OF ESTATES, 1.

SWAMP AND OVERFLOWED LANDS.

OF CONTRACTS IN RELATION THERETO. See TRUSTS, 2 to 6.

TAXES AND TAX TITLES.

TAXATION OF UNITED STATES BONDS.

1. *When held by private bankers.* Several persons associated together as partners, and doing business as private bankers, may invest their capital in bonds and negotiable securities of the United States, for the sole purpose of re-selling the same, and thus making a profit, and re-purchasing like securities to be sold in like manner, such capital being kept constantly absorbed in some form of such securities, and still be entitled to that immunity from State and municipal taxation which would be accorded to an individual holding the same securities. *City of Chicago* v. *Lunt, Preston & Kean*, 414.

OF NOTICE BY TAX PURCHASER.

2. *Necessity and requisites of the notice to be given by the purchaser.* The notice required by section 4 of article 9, of the constitution of 1848, to be given by a purchaser at a tax sale, is a condition precedent to his right to have a deed, and when he seeks to rely upon his tax deed, as paramount title, he must show a compliance with the requirements of that section. *Wilson et al.* v. *McKenna*, 43.

3. The notice in such case should correctly state when the time of redemption will expire; so where a notice stated the day on which the right of redemption would expire to be the same as that on which it alleged the sale was made, the notice was held void. Ibid. 43.

WHO MAY QUESTION A TAX TITLE.

4. It is not essential that a party should show he has paid all the taxes due and assessed upon land, in order that he may question a tax title which is sought to be set up against him. The provision of the general revenue law requiring such payment (Rev. Stat. 1845, 448, sec. 73) has long remained a dead letter upon the statute book, and is not considered of any validity, the effect of it being to compel a man to buy justice. Ibid. 43.

PAYMENT OF TAXES UNDER COLOR OF TITLE.

5. *May be proven by parol.* See EVIDENCE, 6.

6. *Evidence of payment—of its sufficiency.* See LIMITATIONS, 18, 19, 20.

7. *By whom, so as to be availing to a subsequent purchaser.* See LIMITATIONS, 14.

8. *Payment of taxes by one tenant in common under color of title in himself.* See LIMITATIONS, 15.

TENANTS IN COMMON.

OF REMEDIES AS BETWEEN THEMSELVES.

1. One tenant in common of realty can not maintain an action of assumpsit against his co-tenant for his proportion of the rents, the latter having had exclusive possession. His only remedy is by an action of account under the statute, or by a bill in chancery. *Crow* v. *Mark*, 332.

TENANTS IN COMMON. *Continued.*

PAYMENT OF TAXES BY ONE.

2. *Under color of title in himself.* See LIMITATIONS, 15.

OUSTER.

3. *Ouster of one tenant in common by another —what constitutes.* See LIMITATIONS, 16.

TROVER.

CONVERSION.

1. *What constitutes.* If one person has the property of another in his possession, and the owner makes demand of it, and the party in possession, without right, refuses to deliver it, that will constitute a conversion of the property by the latter to his own use. *Northern Trans. Co. of Ohio* v. *Sellick*, 249. See CARRIERS.

2. The owner of a stock of goods, which he kept for merchandizing purposes, for certain reasons left his home for parts unknown, leaving his store in charge of another person, but with no authority to dispose of the stock in any other way than as an ordinary clerk employed to sell goods. The owner not returning at the time he had appointed, the person left in charge sent for another party with whom the owner had a business connection, but entirely distinct from that of the store, and on the arrival of such third party, he was informed, by the person left in charge by the owner, of all the facts, and thereupon he took possession of the goods, the two claiming the owner was indebted to them, separately, in considerable sums. The third party so assuming possession, sold from the stock for some time, collected accounts due the store, and finally closed out the concern by selling the balance of the stock to the person left in charge by the owner. This was *held*, to be a tortious conversion of the goods by the person so disposing of them, such as would support an action of trover by the owner. *Bane et al.* v. *Detrick*, 19.

PARTIES IN TROVER.

3. *Joint liability of partners.* Partners may be sued in an action of trover, though there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the acts of his co-partners. *Bane et al.* v. *Detrick*, 20.

4. In this case, one of two partners went to a distant place, and, under claim of securing a debt due the firm, took possession of a stock of goods belonging to the alleged debtor, and sold them. The other partner, who remained at home, had promised to go there. The proceeds of the goods so sold were credited by him on the account of the firm against the debtor, and on the return home of the partner who had taken the goods, he told his copartner what he had done, who approved of it, and at no time expressed any dissent. It was considered they

TROVER. PARTIES IN TROVER. *Continued.*
acted as one in the whole matter, which was designed for their joint benefit as partners, and they were jointly liable in trover. *Bane et al.* v. *Detrick*, 20.

TRUSTS AND TRUSTEES.

WHETHER A TRUST EXISTS.

1. The mere fact that a person who obtained the discharge from a soldier, and procured a land warrant to be issued thereon, purchased the warrant before it was issued, contrary to the act of congress on that subject, will not constitute such purchaser a trustee of the soldier as respects the land entered under such warrant. *Adsit et al.* v. *Smith*, 412.

2. *In respect to swamp and overflowed lands.* Where swamp and overflowed lands, granted by the general government to the State, and by the State to the several counties, are conveyed by a county to an incorporated company, on the condition that the grantees shall drain the lands, the latter take the lands burdened with the trust arising under such condition, and a court of equity may enforce its execution. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 455.

EXECUTING A TRUST CY PRES.

3. The court of chancery will, in a class of public charities and trusts, rather than permit the trust to fail, and in furtherance of the object contemplated in creating the trust, devise a plan for its execution, in the absence of any mode being prescribed by the party declaring the trust. Ibid. 455.

4. But such jurisdiction will not be exercised in all cases; it is only when the trust can be executed by the employment of the ordinary agencies to which the court can readily and practically resort, that it will undertake to execute the trust *cy pres.* Ibid. 455.

5. So, where a board of supervisors of a county conveyed the swamp lands of the county, one of the conditions of the conveyance being, that the grantee should drain the lands, so far as the same might be practicable, notwithstanding the vagueness and uncertainty as to the mode in which the grantee should execute the trust arising from such condition, a court of chancery would not devise a plan for executing the trust, by reason of the impracticability of the court employing the necessary agencies required in the accomplishment of the object of the trust. Ibid. 455.

FAILURE TO EXECUTE TRUST—RESCISSION.

6. But in such case, the court will not permit the trust fund to be wasted and misapplied. The trust remaining unexecuted by the grantees, and they having sold a portion of the lands, and divided the residue among themselves, the court will take the trust in charge and

TRUSTS AND TRUSTEES.

FAILURE TO EXECUTE TRUST—RESCISSION. *Continued.*

restore the fund to the former trustees, the county authorities, to be by them applied in the execution of the trust. The grantees having violated their contract in respect to the trust, it should be rescinded, and they required to account for the fund. *Board of Supervisors of Henry Co.* v. *Winnebago Swamp Drain. Co. et al.* 455.

JURISDICTION IN CHANCERY.

7. *In matters of trust.* It is one of the oldest heads of chancery jurisdiction, to execute and control trusts and trust funds. *Hopkins* v. *Granger et al.* 504.

8. So, where a deed of trust was given by one of several makers of a promissory note, to secure the same, and he afterwards sold and conveyed the property embraced in the trust deed to another of the makers, the latter has his remedy in chancery in case of a misapplication of the money realized by a sale under the trust deed, by there being a less sum credited upon the debt than the property was sold for. Ibid. 504.

OF EXPENSES ATTENDING EXECUTION OF TRUSTS.

9. *Fraud.* Where the trustee under a deed of trust, and the creditor, procure a fraudulent sale to be made of the land, for the purpose of defeating the title of a subsequent purchaser thereof, the expenses and charges for making such sale will not be allowed in a suit by such purchaser to adjust the equities of the parties in respect to such trust fund. Ibid. 504.

10. *Of the expense of setting aside such sale.* And where the creditor for whose security the trust deed was given, in the execution of the fraudulent design under the sale, placed the title to the land in a third person, and beyond his control, and, in order to the proper application of the trust fund, a suit was instituted to set aside such fraudulent sale, the creditor, upon his promise so to do, would be required to pay the costs of that suit, occasioned by his fraudulent conduct. Ibid. 504.

11. *What costs should be allowed in such case.* In ascertaining the costs of such suit, the subsequent purchaser, to defraud whom the sale was made, and in whose name the suit was brought, would be allowed his reasonable expenses incurred in its prosecution, but not for his time in attending to it. Ibid. 504.

MORTGAGEE IN POSSESSION.

12. *To what extent he is a trustee of a mortgagor.* See MORTGAGES, 5 to 10.

TRUSTEES' SALES.

PROOF OF NOTICE OF SALE.

Obviated by recitals in the deed given by the trustee. See SALES, 6.

Who may question the mode of sale. Same title, 7.

OF NOTICE, ON THEIR ADJOURNMENT. See NOTICE, 2, 3.

USURY.

WHAT CONSTITUTES.

1. A note executed in this State, payable in New York, renewable at intervals of sixty or ninety days, the maker paying the exchange, is not usurious. *Griffin et al.* v. *Marine Co. of Chicago et al.* 132.

BY WHOM PLEADABLE.

2. *Whether pleadable by a corporation.* Under the interest law of 1853, a corporation can not interpose the defense of usury in any action. *American Central Railway Co.* v. *Miles*, 174.

VACATING JUDGMENT.

AFTER THE TERM. See JUDGMENTS, 4, 5, 6.

VARIANCE.

VARIANCE BETWEEN WRIT AND DECLARATION.

1. *Effect thereof.* Upon quashing the summons for a variance between the writ and the declaration, in respect to the amount of damages claimed, it is proper, in the absence of a motion for leave to amend, to dismiss the suit. *Windett* v. *Hamilton*, 180.

2. *How such variance may be reached.* Such a variance may be reached by plea in abatement, or by motion, the defect appearing upon the face of the papers. Ibid. 180.

VARIANCE BETWEEN DECLARATION AND CONTRACT SUED ON.

3. *Whether it exists.* See PLEADING AND EVIDENCE, 3 to 7.

VENDOR AND PURCHASER,

ABANDONMENT BY PURCHASER.

Of premises purchased from one claiming under color of title—right of the vendor to recover possession. See LIMITATIONS, 25.

VERDICT.

MAY BE PUT IN FORM BY THE COURT.

1. In an action of debt on a penal bond, it was stipulated the jury might sign and seal their verdict, and leave it with the clerk, and if it should not be in proper form, the court might put it in form without the presence of the jury. The verdict, on being opened, was found to read thus: "We, the jury, find the issues joined for the plaintiffs, and assess the damages at $2408.14." The court directed it to be put in this form: "We, the jury, find the issues in favor of the plaintiffs, and find the debt $2700, and the damages $2408.14:" *Held*, there was no error in the action of the court. *Boynton* v. *Phelps et al.* 210.

WAREHOUSEMEN.

BAGGAGE OF PASSENGERS.

Liability of railroads as warehousemen for baggage of passengers. See BAGGAGE, 4, 5.

WARRANTY.

IMPLIED WARRANTY.

By a manufacturer. When a manufacturer furnishes his wares, he impliedly warrants them to be reasonably suited to the purpose for which such articles are designed, and to be skillfully and properly constructed. *Phelan et al.* v. *Andrews et al.* 486. See PLEADING AND EVIDENCE.

WIDOW.

AS AN HEIR OF HER HUSBAND.

In respect to personal property. See DESCENTS, 1, 2, 3.

WILLS.

DEVISE "TO MY HEIRS AT LAW ACCORDING TO THE STATUTE."

1. *Who shall take under the will.* A will containing no specific devises or bequests, but simply appointing the executors to administer the estate, and directing the payment of the debts of the testator, provided as follows: "And the remainder or balance of my interest of every kind whatsoever, may be distributed to my heirs at law according to the statute of Illinois for such case made and provided:" *Held*, that such a direction is equivalent to a devise or bequest to those who would take the estate under our statute of distributions if the estate were intestate. *Rawson et al.* v. *Rawson et al. Exrs.* 62.

2. The rule is, if there be no words in any part of a will to control, the words or terms used must be interpreted according to their strict and technical import. So construing them, the persons appointed by law to succeed to an estate, as in case of intestacy, are the persons designated. Ibid. 62.

3. An estate left in such a condition, as to the disposition of it, is to all intents and purposes an intestate estate. Ibid. 62.

OF WILLS EXECUTED AND PROVED IN OTHER STATES.

4. *When admissible in evidence in this State.* Where a will executed in another State, and probated there, and the record and proceedings in respect thereto are authenticated in conformity with the act of congress of May 26, 1790, providing for the authentication of the public acts, records and judicial proceedings in each State so as to take effect in every other State, such will is admissible in evidence in the courts of this State without having been probated here. *Newman et al.* v. *Willetts*, 99.

WILLS.

OF WILLS EXECUTED AND PROVED IN OTHER STATES. *Continued.*

5. Nor is it essential, to support a title to land lying in this State, claimed under such a will, that the will should be recorded in the county where the land is situate. *Newman et al.* v. *Willetts*, 99.

OF AN ESTATE FOR LIFE.

6. The owner in fee of a tract of land in this State devised his property as follows: "I leave and bequeath all the property, movable and immovable, of which I may die possessed, to my said wife; this legacy is made in *usufruct* and during the lifetime of my said wife, at her death the whole of which will revert to the children, which I have or may have from said marriage." *Held*, that on the death of the testator, the widow took under this devise a life estate in the land—a freehold, and, under our statute, subject to execution. Ibid. 99.

WITNESSES.

COMPETENCY.

1. *Under act of* 1867. Where a suit is brought in the name of one person for the use of another, the latter is a "party" to the suit, within the meaning of the second section of the act of 1867, concerning the competency of witnesses, and if such beneficial party be dead at the time of the trial, the opposite party will not be a competent witness to testify on his own behalf, in respect to acts and declarations made by such deceased party in his life time. *Boynton* v. *Phelps et al.* 210.

2. In an action against a railroad company to recover damages for the death of a person, caused by the alleged negligence of an employee of the company, such employee is a competent witness, under the act of 1867, in behalf of the company, notwithstanding his interest in the result of the suit by reason of his liability over to the company. *Illinois Central Railroad Co.* v. *Weldon, Admr.* 290.

WRIT OF RETORNO HABENDO.

WHO SUBJECT THERETO. See FORCIBLE ENTRY AND DETAINER, 2.