L. M. —

L. M. [illegible] 1880.

L. M. [illegible] 1880.

L. M. Ninde & Sons.

REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,

REPORTER.

VOLUME LVI.

CONTAINING A PORTION OF THE REMAINING CASES DECIDED AT THE SEPTEMBER TERM, 1870, AND TWO OMITTED CASES OF THE SEPTEMBER TERM, 1869.

PRINTED FOR THE REPORTER

SPRINGFIELD:
1873.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. CHARLES B. LAWRENCE, CHIEF JUSTICE.

HON. PINKNEY H. WALKER, HON. SIDNEY BREESE,
HON. JOHN M. SCOTT, HON. WILLIAM K. McALLISTER,
HON. ANTHONY THORNTON, HON. BENJAMIN R. SHELDON,
JUSTICES.

ATTORNEY GENERAL,

WASHINGTON BUSHNELL, ESQ.

REPORTER,

NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,

R. A. D. WILBANKS, Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,

WILLIAM A. TURNEY, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,

WOODBURY M. TAYLOR, Ottawa.

TABLE OF CASES

REPORTED IN THIS VOLUME.

D

TABLE OF CASES,

COMPRISING THE FORMER DECISIONS OF THIS COURT,

CITED, COMMENTED UPON, OR EXPLAINED,

IN THIS VOLUME.

G

H

I

J

K

L

M

T

V

W

Y

RULE OF PRACTICE

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS.

Adopted at Ottawa, at the September Term, 1872.

55. The first clause of Rule 50 is to be so construed that the party filing the record shall only be required to advance five dollars on fees when a case is first placed on the docket, and no additional advanced fees shall be required of either party if the case shall be again docketed on any motion, petition for rehearing, or for any other purpose.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1870.

Squire L. Charter *et al.*

v.

Wilson M. Graham.

1. Description in a deed — *in what mode supplied.* Where a deed, which was written on the back of the original patent for the land intended to be conveyed, contained no words of description of the premises except "all that certain tract or parcel of land within mentioned and described," it was *held,* those words of reference to the patent supplied the want, in the deed, of a definite description of the land by metes and bounds or by its proper numbers.

2. Recording act of 1807 — *time of recording deeds.* It was objected to a deed, which was made in the year 1818, that it was void because not recorded within the year, as required by the act of 1802; but waiving a construction of that act, it was held to have been superseded by the act of 1807, and, by the terms of the latter act, if the deed was registered before a second deed for the same premises, it was sufficient.

3. SAME — *of deeds executed out of this State.* The 13th section of the act of 1807 places deeds executed without the State, in the manner therein prescribed, upon the same footing as domestic deeds, in respect to the time within which they should be registered.

4. EVIDENCE — *opinions of witnesses.* In a suit where the question was whether a deed, a certified copy of which was offered in evidence, had been written upon the back of the original patent for the land intended to be conveyed, the object being to supply a deficiency in the description in the deed by reference to the patent, it was held improper for witnesses to give their opinion, from an examination of the records where the instruments were registered, as to whether the deed was written on the back of the patent.

5. DEPOSITIONS — *in suits at law — presumption as to whether there was an affidavit.* On objection that depositions taken in an action of ejectment should have been suppressed because there was no affidavit on file, it was *held,* that inasmuch as the bill of exceptions failed to show whether an affidavit was in fact on the files or not, its absence would not be presumed.

6. ERROR *will not always reverse — admission of improper evidence.* Where the undisputed facts disclosed by the record showed that the verdict was clearly right, the court refused to reverse merely upon the ground that some of the evidence in the record was improperly admitted.

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

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

Messrs. FROST & TUNNICLIFFE, for the appellants.

Mr. C. M. HARRIS, for the appellee.

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

This was an action of ejectment, in which the plaintiff claimed by virtue of a deed from the patentee, Holbrook, to one Hooper, dated July 31, 1818, and the defendant under a deed from the patentee to one Dunn, dated August 3, 1818. The

plaintiff, on the trial, offered a duly authenticated copy of the patent, and then a transcript from the records of the recorder's office of Pike county, showing a registry of the patent, and, as a part of the same instrument, the registry of a deed undoubtedly written on the back of the original patent, running from the patentee to Hooper, and not describing the land by its numbers, but only as "all that certain tract or parcel of land within mentioned and described." The *habendum* clause of the deed declares that the said Hooper is to have and hold said land "in as full and ample a manner as I, the said Edward Holbrook, am entitled to hold the said described tract of land by virtue of the within grant."

The plaintiff also read in evidence the deposition of the recorder of Pike county, to which is attached an exhibit showing the precise mode in which the registry was made. It appears from the testimony of the recorder and from the exhibit, that the patent and the deed were recorded as one instrument. While different deeds upon the record are separated from each other by two lines ruled across the page in black ink, the patent and deed in this case have no such line between them, and no more space than is to be found between any two lines of the patent or deed. It further appears that at the end of the registry of the deed is a memorandum by the recorder showing the date of the registry, and such a memorandum is to be found at the end of every instrument in the books of the office, so far as the recorder has examined, but no such memorandum is to be found at the end of the registry of this patent.

From these different facts there cannot be the slightest doubt that the deed from the patentee to Hooper was written on the back of the patent, and the want in the deed of a definite description of the land by metes and bounds or by its proper numbers, is supplied by the words "all that certain tract or parcel of land within mentioned and described." The registry was also notice to subsequent purchasers, for it is impossible that any person examining it for the purpose of ascertaining the condition of the title should have been in any

doubt that the deed was written on the back of the original patent.

It is further urged that the deed from Holbrook to Hooper was void because not recorded within the year, as required by the statute of 1802, although it was, in fact, recorded before the registry of the deed from the patentee to Dunn. It is, however, unnecessary to construe that act, for the law of 1807 superseded it, and, by the terms of the last named law, if the first deed was registered before the second, it was sufficient. It is suggested that this act applies only to deeds executed within the State, but we are of opinion section 13 places deeds executed without the State, in the manner therein prescribed, upon the same footing as domestic deeds.

It is urged that the court erred in not striking from the depositions those portions in which the witnesses are asked and give their opinion, from an examination of the records, as to whether the deed was on the back of the patent for the land in controversy. This evidence was improper, but its admission was not an error for which we can reverse the judgment. Upon the undisputed facts disclosed by the record, the verdict was clearly right. The case is so plain that, on the facts as now presented, no other verdict could be allowed to stand.

It is suggested that the court erred in refusing to suppress the depositions of Crane and Jones, on the ground that no affidavit was filed in the clerk's office. We find that reason given in the bill of exceptions as one ground for making the motion, but the bill of exceptions does not show whether an affidavit was, in fact, on the files or not. We cannot presume it was not.

As the case is very clear on the evidence, it is unnecessary to examine the instructions.

Judgment affirmed.

DAVID PRATT *et al.*

v.

SAMUEL MYERS *et al.*

1. VOLUNTARY SETTLEMENT — *whether fraudulent as to subsequent creditors.* Where a person, not being in debt, for the purpose of making provision for his wife, contributes of his own money toward the purchase of property in her name, the transaction will be upheld as against a subsequent creditor of the husband, there appearing nothing to show a fraudulent design in respect to subsequent indebtedness.

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

The opinion states the case.

Mr. JOHN LYLE KING, for the appellants.

Mr. JAMES GOGGIN, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court

This was a creditor's bill, brought by appellees in the Superior Court of Chicago against appellants, to subject real estate held in the name of Sarah Pratt to the payment of their claim. It appears David Pratt became indebted to appellees, in the year 1867, in the sum of $264, for which they recovered a judgment, upon which an execution was returned, no property found. The real estate consisted of lots Nos. 28, 29, 30, and 31, in Hamilton's subdivision, and was bought in 1863, and conveyed to Sarah Pratt; and of the purchase money paid, Mrs. Pratt acquired $280 of a son, and $395 was from the earnings in the separate business of each. David Pratt was not indebted to any one until in December, 1866, and then he only owed this debt. In 1864 houses were erected on three of

the lots, valued at $1,500. They were built with money principally raised by mortgaging the property, which was afterward paid from the rents received and the earnings of appellants' separate business, in which the profits were mingled.

In 1868, subsequently to the rendition of the judgment in favor of appellees, houses were erected on lots 30 and 31, with means, as both appellants testify, acquired prior to incurring the debt to appellees. And it is alleged in the answer that this property was purchased, and the title conveyed to Sarah Pratt, to secure her a permanent investment. The master reported that the lots, with the improvements, were worth, at the time of the trial, the sum of $11,250, and without improvements, $6,600; and it was also found that of the $6,750 paid for the houses, David Pratt contributed $2,000, and $3,350 was derived from the rent of the houses, and $1,400 remained unpaid. This was an estimate of the whole property, including the lots and improvements. On these facts, the court below found that the property was owned jointly by David and Sarah Pratt, and that he owned an interest of one undivided half, and decreed that it be sold. To reverse that decree, the record is brought to this court, and various errors are assigned.

In the case of *Sweeney* v. *Damron*, 47 Ill. 450, it was held, that if a husband, not being in debt, for the purpose of making provision for his wife, purchases property with his own means, and has it conveyed to her or to trustees for her use, the transaction will be upheld. And the same rule was announced in the case of *McLaurie* v. *Partlow*, 53 Ill. 340, and these cases but followed the case of *Moritz* v. *Hoffman*, 35 id. 553. The proposition is, of course, subject to the limitation that the transaction is fair, and not with a view to defrauding creditors at the time, or with a view to future fraudulent indebtedness. In this case, a careful examination of the evidence fails to disclose any fraudulent purpose. David Pratt was not in debt when the property was purchased, and, under the well recognized rules of law, he had the right to purchase, and have conveyed to his wife, the property in controversy. He, then, was

under no legal or moral obligation to hold his property in his own hands or name for appellees or any other person, but could dispose of it as he chose. Appellees, then, had no claim on him, and, by contributing a portion of the purchase money to buy and improve this property for his wife, he wronged no person. Appellees' debt was created after the purchase, and after David Pratt's money was paid for the lots, and after all of it was earned which was applied to its improvement.

Appellees' claim could under no known principle of law have a retroactive effect on this purchase so as to become a lien, unless it had been shown that the property was conveyed to Mrs. Pratt, with a view to defraud appellees. And there is no evidence establishing such fraud. To hold this property subject to appellees' debt would be to deny the power to make a settlement on a wife or children in any case, if the donor afterward become indebted; it would be to hold that indebtedness instead of fraud, should avoid all such settlements. That is not, nor has it ever been established as, the law. We are unable to perceive any grounds for sustaining the decree of the court below, and it is reversed and the cause remanded.

Decree reversed.

ANNA BURTON

v.

MARTIN GLEASON.

1. CLOUD UPON TITLE — *remedy of one out of possession.* A party out of possession of land, and claiming to hold the title thereto in fee simple, sought relief in a court of chancery against a deed alleged to have been wrongfully made by one of the grantors in the chain of title to the widow of his grantee, the deed to the latter having been lost without ever having been recorded: *Held,* the complainant being out of possession, had his remedy at law by action of ejectment, and therefore could have no relief in equity.

2. In such case, the fact that the deed was made to the widow of one of the grantees, to supply the place of the lost deed to her husband, would constitute no such equity as to give chancery jurisdiction. The owner of the legal title could recover in ejectment, notwithstanding that deed, upon proving the execution of the original deed and its loss.

WRIT OF ERROR to the County Court of La Salle county; the Hon. P. K. LELAND, Judge, presiding.

This was a suit in chancery, instituted in the court below by Martin Gleason, against Anna Burton. The bill alleges, substantially, that in the year 1835 one McQuon purchased from the United States the south-west quarter of section 35, in town 31, range 3 east, situate in La Salle county; that, in November, 1850, said McQuon conveyed to Charles Hallam a certain part of said quarter section, containing twenty acres, and the deed therefor was duly recorded. The bill further alleges that, about the year 1855, Hallam conveyed to Samuel Burton; in 1857 Burton and wife to Gumm, and through several mesne conveyances from Gumm to complainant, whereby, the bill alleges, the complainant became vested with the full title in fee simple to said twenty acres of land.

The ground upon which relief is sought is, that the deed from Hallam to Samuel Burton never was recorded, and that, in 1863, Samuel Burton having died, Anna Burton, his widow, alleging that she had lost the unrecorded deed to her husband, procured Hallam to convey the premises to herself instead of the heirs of Burton. The bill alleges that the deed to Anna Burton is in fraud of complainant's rights, and prays that she be decreed to convey the title to him. The bill also prayed for an injunction, which was granted, restraining the defendant from conveying or incumbering the premises.

The court overruled a motion to dissolve the injunction and dismiss the bill, and rendered a decree as prayed.

The defendant thereupon sued out this writ of error.

Mr. O. C. GRAY and Messrs. BEATTIE & ROBINSON, for the plaintiff in error.

Mr. J. B. RICE, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Complainant alleges in his bill, that at the time of filing the same and prior thereto, the full title in fee simple to the piece of land described therein, was vested in him. There is no allegation in the bill that complainant was in possession; the inference therefore must be he was not in possession, and being so, his remedy to recover the possession was complete at law, by an action of ejectment, in which he could not fail to recover, on showing a complete legal title in himself. The fact that Mrs. Burton had received of Hallam a deed to herself, to supply the place of a prior deed granted to her husband in his life-time and alleged to be lost, constitutes no such equity as to give chancery jurisdiction. Complainant claims through Burton, and to establish his title at law it would only be necessary to prove the execution of the deed by Hallam to Burton and its subsequent loss. We fail to perceive any equity in complainant's bill. The motion to dissolve the injunction and dismiss the bill should have been allowed. Refusing it was error, and for this error the decree must be reversed and the cause remanded.

Decree reversed.

The Chicago & Northwestern Railway Company

v.

James McCahill.

1. Negligence in railroads—*fire occasioned by sparks from an engine—burden of proof.* In an action against a railroad company to recover for property destroyed by fire emitted from a locomotive of the company, through the alleged negligence of their servants or of the company, under the act of 1869 on that subject, the mere proof of the fact that the fire was caused by sparks from the engine constitutes *prima facie* evidence of negligence on the part of the company, and the burden of proof rests upon them to rebut the *prima facie* case of negligence so made.

2. Same—*as to proof of negligence.* In such a case, proof of the fact that the engine threw out an unusual quantity of fire was held sufficient to overcome any direct evidence given that it was in good order, or, if in good order, that it was skillfully managed by the engineer.

3. Evidence—*refreshing witnesses' recollection.* In an action against a railroad company to recover for loss of property destroyed by fire, resulting from negligence of the company, it was held proper to permit the plaintiff, in giving his testimony, to refresh his recollection from a memorandum he had made of the articles destroyed by the fire.

4. Same—*res gestæ.* In such case, it is not improper to allow witnesses to testify to the loss of articles not included in the declaration, as being part of the *res gestæ;* though the court would doubtless instruct the jury if requested to do so, not to allow for any articles not embraced in the declaration.

5. Rules of Practice—*in what mode they may be questioned.* In order to test the validity of a rule of practice in the court below, which provided that instructions would not be considered by the court unless presented before the commencement of the final argument to the jury, the party objecting to the rule should present his instructions, in writing, to the court, after the time limited by the rule, and if the court should then refuse to consider them, they should be embodied in a bill of exceptions, and then the ruling of the court would be subject to review.

Appeal from the Circuit Court of Kane county; the Hon. Silvanus Wilcox, Judge, presiding.

The opinion states the case.

Mr. A. M. Herrington, for the appellants.

Messrs. Blanchard & Silver and Messrs. Joslyn & Slavin, for the appellee.

Mr. Justice Scott delivered the opinion of the Court:

This was an action on the case, brought in the circuit court of Kane county by the appellee, to recover for the loss of a barn and contents, alleged to have been destroyed by fire communicated from the engine of appellants running on their road through the village of Woodstock.

It is averred in the declaration that at the time the fire occurred the engine of the appellants was not provided with the best and most usual mechanical contrivances to prevent the improvident escape of fire sparks, and, by reason of the neglect in that regard, the appellants were guilty of culpable negligence in running the engine on their road in its then condition.

The evidence preserved in the record is of such a character that it leaves no serious doubt on the mind that the fire, which destroyed the property of the appellee on the 15th day of April, 1869, was occasioned by fire sparks emitted from the locomotive engine passing at the time, and fully justifies the finding of the jury on that issue. A number of witnesses, on whose testimony the jury must have relied, state that, at the time the engine passed the premises of the appellee, it was emitting an unusual volume of fire sparks and that some of them were carried a great distance from the track. The distinct marks left by the fire emitted from the engine were to be seen in many places near the premises of the appellee. The property destroyed stood some sixty feet from the track and not far distant from the depot. While the witnesses do not agree as to the exact hour that the engine passed the premises on the day of the fire, they do, substantially, all agree that the fire occurred soon after the train passed. After a careful consideration of all the evidence, we can reach no other conclusion than that arrived at by the jury, that the fire that caused the destruction of the property in question was occasioned from

fire sparks emitted from the engine of appellants while in use on their road. No other explanation of the origin of the fire is or can be given consistently with the evidence. The fire that occasioned the damage complained of occurred after the passage of the act of 1869. (Gross' Comp., p. 554). And by the provisions of that act, the fact that the fire was occasioned from the engine, is made full *prima facie* evidence of negligence on the part of the company, and of its agents and servants in charge at the time. This primary fact in the case being once established by the evidence, the burden of proving that the engine was in good order at the time, and provided with all the best and most usual mechanical contrivances to prevent the escape of fire sparks, rested on the company. Under the provisions of that act it is the duty of the company to rebut, by affirmative evidence, the *prima facie* case made by proof of the single fact that the fire which caused the injury complained of was occasioned by the engine. The use of steam as a propelling power on the lines of railroad is known to be dangerous to property in the vicinity, even by the most careful use. Notwithstanding the known danger, the legislature has seen fit to invest railway companies with the right to use that kind of power in the exercise of their franchises, yet upon this condition, that such corporations will use all possible precautions by the use of the most approved mechanical contrivances for that purpose, to prevent danger to the property of the citizen along the lines of their roads through the escape of fire from their engines. The reckless use of this power would introduce into our towns and cities and farming communities along the lines of these roads a most dangerous element of destruction, and that fact itself imposes upon the company a high degree of care and skill in the use of the engine and in the application of the best and most effective means to prevent the escape of fire. The law has wisely imposed this duty on all railroad companies, otherwise there would be no security whatever for property on the lines of these great thoroughfares that now traverse the country in every direction. The degree

of care required is always in proportion to the danger, and the greater the danger the higher will be the degree of care required. The rule is a reasonable one. The companies have these engines under their control, and the opportunity of frequent and constant examination. The citizen, whose property is exposed to danger, has no such opportunity, and must rely on the care and vigilance of the companies. In the absence of such degree of care and diligence to prevent injury to property, the courts have always held railway companies to a strict accountability for any loss that may occur. *Ill. Cent. R. R.* v. *Mills*, 47 Ill. 407.

The material questions that arise upon this record and present themselves for consideration are, whether the evidence shows that the company used that degree of care and diligence that the law requires, in the application of mechanical contrivances to prevent the emission of fire sparks from their engine, and whether the engine was in good repair, and whether it was skillfully handled by a prudent and competent engineer.

We learn from the evidence that the engine "Jupiter," that was used by the company on the day the fire occurred, had lately been in the shop for repair, and that a new wire netting was then put in, of the ordinary size, strength and quality. A number of the witnesses testify that the engine was in good repair. It does not appear that any repairs were made on it when it was in the shop, except to put in the new wire netting. If any particular examination was made of the condition of the engine, the witnesses do not state the minutiæ of that examination. We understand that the main contrivance relied on to arrest fire sparks is an inverted iron cone, called, perhaps, a spark deflector, so adjusted that it receives and checks the fire before it reaches the wire netting in the smoke-stack. When the exhaust is very great, the fire is driven out with tremendous force, and one purpose of this cone is to check the great force of the fire sparks, and to prevent them from striking the wire netting with such force as to destroy it. Without this cone, or some other such contrivance, the wire netting

would be practically of very little use. The condition of the spark arrester, in this instance, is not stated by any of the witnesses. If it was out of order, perhaps no wire netting, of the size used in making the repairs, that was ever wrought could have withstood the force of the fire thrown from a coal-burning engine, for a day or for any considerable length of time. In opposition to all the evidence offered by the company, there is the unimpeached testimony of witnesses that the engine, as it passed through the village on the day the fire occurred, threw out unusual quantities of fire, and that it did actually occasion the fire that consumed the property of appellee. Intelligent witnesses, and men of large experience, sworn on behalf of the company, concede the fact, that if it be true that the engine did emit such an unusual volume of fire as stated by the witnesses, it must necessarily have been out of repair at the time. Whether this engine was ever equipped with the best mechanical contrivances to prevent the emission of fire sparks does not very clearly appear; but, if it be admitted that it was originally so constructed, the actual results of what the engine did, in throwing out and emitting fire sparks as it passed along through the village on the day the fire occurred, are sufficient to overcome any direct evidence appearing in this record that it was in good order; or, if in good order, it must have been most unskillfully managed by the engineer.

We are of opinion that the verdict is not against the weight of the evidence, and the jury were fully authorized to find as they did.

It is insisted that the court erred in permitting the appellee to read from a memorandum used by him in giving his evidence.

It appears from the record that the appellee had made a memorandum of the things destroyed by the fire, and had the same in his hand at the time he was testifying, and used it for the purpose of refreshing his recollection. The record states that the court allowed the witness to refresh his recollection from the paper. We see no error in the ruling of the court on that question.

It is further objected that the witness also testified to some small things that were destroyed by the fire that were not included in the declaration. It was a part of the *res gestæ*, and there was no error in the court permitting the witness to testify to all that transpired. If the jury only allowed for the articles described in the declaration, at the prices fixed by the witnesses, the evidence would fully sustain the verdict, and we may therefore presume that the jury did not allow for any articles not included in the declaration. Doubtless the court would have instructed the jury not to allow for any articles not embraced in the declaration, if it had been asked so to do.

In support of the motion for a new trial, the counsel for appellants filed an affidavit, in which he alleges that the interests of his clients were greatly prejudiced by a rule adopted by the circuit court, in which the cause was tried. The rule to which reference is made, required that all instructions should be presented to the court before the commencement of the final argument to the jury, or they would not be examined by the court. We apprehend that the counsel has not pursued the proper course to test the validity of that rule of court. If the counsel desired any further instructions to be given to the jury, he should have presented the same to the court, in writing, and if the court had then refused to examine and mark the same "given" or "refused," as the statute requires, he should have embodied the same in a bill of exceptions, and the ruling of the court would have been subject to review by this court. This was not done, and we cannot consider the question in the manner it is now presented.

We are unable to discover any substantial error in the court in giving and refusing instructions at the trial. Those given in behalf of the appellee embody, in substance, the principles announced in this opinion, and were sufficiently accurate in the statement of the law.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

DANIEL ROBERTS

v.

MARGARET OPP.

1. RESULTING TRUST — *when it arises.* A testator died, having devised his real estate to his widow during her life, and remainder in fee to his two children. This property was sold by the parties in interest, and the proceeds invested in another homestead, the title to which, by consent of the children, was taken in the name of the mother, but neither of the children relinquishing his interest in such proceeds. Subsequently, this new homestead was sold, and the proceeds thereof, together with other funds furnished by one of the children, invested in different pieces of real estate, the title to which, by consent of the children, was also taken in the name of the mother. The latter conveyed a part of this property to one of the children, in consideration of his agreement to support her, and sold the residue to a third person, taking his notes for the purchase money, which came to the hands of her son to whom she had conveyed the other portion: *Held*, the investment of the proceeds of the first sale being by consent of the children, and on the fair understanding that their interests should remain as before, in the proportion that each contributed to the several purchases, there was a resulting trust in their favor in respect to the property last purchased.

2. SAME — *subsequent purchasers.* The conveyance by the mother to one of the children, who knew all the facts, could not prejudice the rights of the other devisee, and, as between the two children, each was entitled to such share in the land so conveyed as represented his share in the purchase price thereof, and a like interest in the notes received on the sale of the other portion, the purchaser of which, having no notice, took free of the trust.

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

This was a suit in chancery, instituted by Margaret Opp against Daniel Roberts, to compel the conveyance to her of one-half interest in certain lands, and a transfer of a like interest in certain promissory notes held by the defendant.

The facts upon which the claim for the relief sought is based, are fully set forth in the opinion of the court.

Upon a hearing, the court below decreed that the complainant was entitled to one-half the land and of the notes, and thereupon the defendant took this appeal.

Messrs. JOHNSON & HOPKINS, and Mr. S. C. CONWELL, for the appellant.

Messrs. COOPER & MOSS, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

In 1813, John Roberts, the father of these parties, being seized of a house and lot situate in Berks county, Penn., died, leaving Margaret Roberts, his widow, and Daniel and Margaret, these parties, his only children, him surviving. By his will he devised this property to his widow during life, remainder in fee to his two children in equal shares. In January, 1837, the widow and these two children joining in the deed, the property was sold for $700. Margaret, the daughter, was then unmarried, but did not relinquish her interest in the proceeds. The family all moved to Ohio, where a purchase was made of another homestead, being a house and six acres of land, for the price of $1,100, upon which the amount realized from the sale of the other property was paid, and to pay the balance and for other purposes, the sum of $450 was borrowed, and secured by mortgage on the place. With the consent of appellant and appellee, the title was taken in the mother's name. In 1840, appellee was married to Opp, and left home a short distance. In 1842, the Ohio property was sold for the same price given for it, the purchaser assuming the mortgage of $450, and paying the balance. Soon after, the lands in question in this suit were purchased for the sum of $650, and all parties moved into this State, Daniel and his mother living together upon one parcel of it, and Margaret and her husband living elsewhere. It appears that at the time of the sale of the Ohio property, there was much depreciated

paper money in use, and the principal part of the amount received from the sale, was in such money; so that the widow had only about half of the amount of the consideration of the last purchase, which she paid from the proceeds of the Ohio property. The balance was paid by appellant. But with the consent of the parties, the title was taken in the mother's name. In April, 1864, when the mother had attained the age of about 83 years, and having the infirmities usually attendant upon so great age, and being, and having for a long time been, very much subject to the influence of appellant, the latter obtained from her a deed of the west ½ of the north-west ¼ of section 21, the deed expressing the consideration of $2,000, no part of which was paid, but really upon the consideration of an agreement entered into to support and maintain her. In October, 1866, the mother, with the advice and co-operation of appellant, sold and conveyed the south-east ¼ of the north-west ¼ of section 3 to one Henry Zappa, for $900, taking his notes for the amount, secured by mortgage on the land, which notes appellant held in his possession at the time of filing this bill.

It is unnecessary, in the view we take of the case, to decide the question of undue influence and fraud, because it is clear that appellant was cognizant of all the facts, and knew that appellee's portion of the property left by her father went, without any relinquishment of her right to it, and by the consent of all parties, into the Ohio purchase, and in the same way into the Illinois purchase, and that the fair understanding was, that the interest of the respective parties should be substantially as it was in the property left by their father. This being so, there was a resulting trust in favor of appellant and appellee, and the deed from the mother to appellant, with knowledge of the trust, would not affect appellee's interest. As there is no evidence of notice of the trust to Zappa, he would take the land divested of the trust, but which will attach to the notes given for the purchase money. As appellant paid one-half the purchase money of the Illinois lands, he was for

that reason entitled, in equity, to one-half, and as his funds, together with appellee's, paid for the other half, he is equally interested with her in that half. Appellant is, therefore, entitled to three-fourths of the land deeded by his mother to him, and the same proportion of the Zappa notes, and appellee to one-fourth of the said land and of the notes.

As the decree of the court below is not in conformity with these conclusions, it must be reversed, and the cause remanded, with directions to the court below to declare the interests of the parties, and make division of the property in dispute according to this opinion.

Decree reversed.

CHARLES ROSE

v.

THOMAS SWANN *et al.*

1. RESCISSION OF CONTRACT — *in equity — delay by purchaser in making payment.* In the year 1857, the owner of a lot of land executed a contract of sale for the same at $11,390.62, one-fourth cash, and the residue in one, two and three years. The purchaser paid only $140.62. In October of the same year, an assignee of the purchaser paid one-fourth the purchase money and received a deed from the original vendor for one-fourth the land. The remaining three-fourths of the purchase money was never paid. In 1866 the original vendor filed his bill in chancery, against his vendee and others claiming under him, to enforce the payment of the purchase money, or the cancellation of the contract in the event of non-payment: *Held,* the vendor was entitled, after such *laches,* to have the contract declared forfeited.

2. SPECIFIC PERFORMANCE — *laches.* A purchaser of land, who filed his bill for specific performance, had become the assignee of a contract of purchase of the premises at $400, one-fourth cash, and residue in one, two and three years from May, 1857, and the payment of taxes. The assignee, seeking relief, made only one payment on the contract, that due May, 1858. The payments due in 1859 and 1860, were never paid, nor was any tender made until about the time of filing the bill, in September, 1868,

nor had the complainant paid any taxes: *Held*, the gross delay in not performing the terms of the contract, utterly forbid the interposition of a court of equity.

3. PARTIES — *bill for specific performance, by a vendor.* Subsequent purchasers from one who holds under a contract of purchase of land, are not necessary, although they are proper, parties to a bill by the original vendor for specific performance.

4. ESTOPPEL — *cancellation of a contract of sale — rights of subsequent purchasers.* A decree declaring a contract of sale of land forfeited, on account of *laches* on the part of the vendee in making payment, will bar any relief sought by a subsequent purchaser from such vendee against the original vendor, although such subsequent purchaser was not a party to the suit in which the decree was rendered.

5. SPECIFIC PERFORMANCE — *laches — subsequent purchasers.* Where a purchaser of land has been guilty of such laches, that he could not compel a specific performance as against his vendor, a subsequent purchaser from such vendee, would hold no better position.

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

The opinion states the case.

Messrs. ROGERS & GARNETT, for the appellant.

Mr. MILTON T. PETERS, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This was a suit in chancery, commenced in the court below, on the 18th day of September, 1868.

It is claimed to be either a suit to compel specific performance, or a suit to redeem from a mortgage.

The bill was originally against Swann alone, for specific execution of a contract between Swann and Scanlan for certain real estate. It was afterward amended, making appellees parties.

The admitted facts are, that, in 1857, Lancaster made a contract in writing, for the sale of twenty-five acres of land to

Cleaver, for $11,390.62, one-fourth cash, and the remaining three-fourths in payments in one, two and three years. Cleaver only paid $140.62; and on the 30th of April, 1857, assigned the contract to Swann, one of appellees. In October, 1857, Swann paid to Lancaster one-fourth of the purchase money, and Lancaster conveyed to him one-fourth of the land. The remaining three-fourths of the purchase money have never been paid. Swann subdivided the twenty-five acres into 289 lots, and received a deed for 72 lots, which were accepted as the one-fourth. The lots in controversy are embraced in the list of lots, the legal title to which remained in Lancaster. The contract between Swann and Scanlan, assigned to appellant, was for the sale of four lots for $400, one-fourth cash, and the balance in equal annual payments, on the 11th of May, for three succeeding years, from May, 1857, and the payment of taxes by Scanlan. Appellant made one payment to Swann in May, 1858. Nothing more was paid on this contract; and no tender was made until just before the commencement of this suit; and neither Scanlan nor appellant ever paid any taxes.

Nothing having been paid to Lancaster since 1857, on the contract between him and Cleaver, he filed his bill in chancery, in 1866, against Cleaver, Swann, Scanlan, and other parties who had purchased of Swann, to enforce the payment of the purchase money, or the cancellation of the contract in the event of non-payment; but did not make appellant a party, though the contract, by virtue of which he claims specific performance, with the assignment thereon, was duly recorded on the 9th of June, 1858. The court granted a decree, barring the defendants from all equity of redemption in the premises comprising the lots claimed by appellant, and ordered that the contract between Lancaster and Cleaver be declared void and canceled. Lancaster then sold and conveyed the three-fourths of the twenty-five acres to Blodgett, and Blodgett conveyed to Prout and Coleman. The latter deed was recorded on the 1st of October, 1867. Before the commencement of this suit, Prout and Coleman had made improvements

on some of the lots, and near to lots claimed by appellant, at a cost of more than $38,000. The lots in controversy had, from the time of the purchase by Prout and Coleman to the commencement of the suit, advanced from $150 to $1,000 each.

Lancaster had the unquestioned right to have his contract with Cleaver declared forfeited. Neither Cleaver, nor his assignee, Swann, had attempted to comply, but had neglected, for nine years, either to discharge any part of the payments or to pay any portion of the taxes. Six years had elapsed after the maturity of the last payment before Lancaster instituted his suit. We think that neither Cleaver nor Swann was in position to compel specific performance. How can appellant be in better condition? He derived no right from Lancaster; and Swann, from whom he claims, had been guilty of inexcusable *laches*. If the party contracting with Lancaster, or his assignee, could not enforce the contract, how could this appellant, between whom and Lancaster there was no privity? Appellant was also guilty of too much delay and *laches* to entitle him to relief in a court of equity. The last payment made by him was in May, 1858. Two payments then had to be made, one in May, 1859, and one in May, 1860. The excuse is offered that he made general inquiry, and could not find his creditor. Yet it appears that Swann was a resident of Chicago, with his family, and doing business there, from 1860 to 1868; and appellant also resided in Chicago, and had actual notice of the suit commenced by Lancaster in 1866. It is apparent that, by proper and reasonable effort, Swann might have been seen, and the money paid or tendered, in the course of eight years.

Appellant was, by the terms of the contract, to pay the taxes. This he neglected. True, he says he tried to pay; but some person was always ahead of him. Had he been prompt, as the contract and law required, he certainly could have paid the taxes, once in eight years. The gross delay, in not performing the terms of the contract, utterly forbids the interposition of a court of equity. *Hough* v. *Coughlan*, 41 Ill.

134; *D'Wolf* v. *Pratt*, 42 id. 198; *Thompson* v. *Bruen*, 46 id. 125.

If appellant had not lost all his rights by gross *laches*, still the decree obtained by Lancaster is an estoppel. By that decree the original contract was canceled. The only instrument which gave to appellant a standing in court was annulled. The foundation was removed and the whole edifice fell. We are met with the reply that appellant was not a party to the suit. He was not an indispensable party. He could only be regarded in the same light as subsequent incumbrancers. The rule deducible from the authorities is, that such persons are not necessary, although proper, parties. This court has frequently decided that a mortgagee need not examine the record for subsequent liens, which cannot impair his prior right. This would be too great burden upon him. *Matteson* v. *Thomas*, 41 Ill. 110; *Iglehart* v. *Crane & Wesson*, 42 id. 261. We do not think that the proof shows *actual* notice to Lancaster of appellant's purchase. Lancaster and Prout both testify that they had no knowledge of it. All the equities of appellant were, then, determined by the decree in 1866.

It would be a harsh rule, and not in consonance with the principles of equity, to require a vendor, in a bill for specific performance, to make parties, all subsequent purchasers from his vendee. They have no claim upon him, unless they hold the original contract; and, consequently, there is no privity between them. This parceling of a contract is wrong in principle, and would be oppressive in practice.

The court below decided correctly in dismissing the bill. The decree rendered is affirmed.

Decree affirmed.

JOHN WAGGEMAN

v.

JOSIAH LOMBARD.

NEW TRIAL—*verdict against the evidence.* In this case the verdict being manifestly against the evidence, the judgment is reversed that a new trial may be had.

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.

Messrs. ROBINSON & CALDWELL, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action upon a note for $500 given, together with eighty acres of land, in payment for a quantity of goods purchased by appellant of appellee.

It is deemed unnecessary to consider any other error assigned upon this record, than the one involved in respect to the issue formed under the second amended plea.

The plea sets up, in substance, the contract for the sale and purchase of the goods, the giving of the note and $1,000 for them; that defendant was ignorant of their quality; that, by the express terms of the contract of sale and purchase, the goods were to be good, merchantable stock; that they were old, shop-worn and unsalable; that, by the contract, they were to be put in to defendant at the fair ruling wholesale prices of such description of goods in Chicago; that defendant was ignorant of such prices and plaintiff knew it; that said goods

were fraudulently put down to defendant and were by him purchased at greatly more than the fair, wholesale prices of good, marketable goods of that description, whereby the defendant had sustained $1,000 damages, out of which he offered to set-off sufficient to satisfy the note. Replication — "And the plaintiff, by way of replication to the amended plea of the defendant, by him secondly above pleaded, says, *precludi non*, because he says that the defendant has not sustained damage by reason of any acts or doings or representations of the plaintiff, in manner and form as is in said plea alleged. And this he prays may be inquired of by the country," etc. Issue joined thereon.

The replication admitted the contract set up in the plea and the breach thereof, in accordance with the rule, that every pleading is taken to confess such traversable matter of fact, alleged on the other side, as it does not traverse.

The only issue then, under this plea, was upon the damages. The proof was very clear that the goods were unmerchantable to a great degree, and of largely less value than they would have been, had they been of the quality as contracted for. The jury found for the plaintiff the full amount of the note, allowing no damages.

The verdict was manifestly against the evidence in this respect, and a new trial should have been granted. Judgment reversed and cause remanded.

Judgment reversed.

LINAS W. HALLIDAY
v.
JOHN SHUGART.

APPEAL—*from a justice of the peace — when it will lie.* After a trial in a suit before a justice of the peace, in which the jury failed to agree, the plaintiff dismissed his suit, and the justice thereupon taxed a part of the costs against the defendant: *Held,* the defendant had a right to appeal from the order of the justice as to costs, not perhaps for the purpose of having the costs re-taxed on the transcript of the justice, but for the purpose of a new trial, and after the trial to have the costs taxed by the court.

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

The opinion states the case.

Messrs. FARWELL & HERRON, for the appellant.

Mr. G. G. GIBONS, for the appellee.

PER CURIAM: This was an action brought by Shugart against Halliday, before a justice. After a trial in which the jury did not agree and were discharged, the plaintiff dismissed the suit. The justice thereupon taxed a part of the costs against the defendant, who took an appeal to the circuit court. On motion of the plaintiff the court dismissed the appeal. This was error. Although the court might properly refuse to re-tax the costs on the transcript of the justice, yet the defendant had a right to a trial, and after the trial to have the costs taxed by the court. If the defendant preferred to take the risk of a trial rather than pay the costs taxed against him by the justice, it was his privilege to do so. He had a right to appeal from the order of the justice as to costs.

Judgment reversed.

Syllabus.

THE CITY OF PEORIA
v.
ROBERT JOHNSTON.

1. DEDICATION—*for a public highway—what constitutes.* The owner of land at the terminus of a street in a town, laid off an addition to the town, extending from its original limits along on one side of a public road which run through his land, and was a continuation of the street, in the same general direction, but not so wide as the street. He made a plat of the addition, which was duly recorded, and on which were lines indicating an extension of the street, but specifying no particular width therefor. The other streets in the addition were made of the same width with corresponding streets in the original town. In the year after laying out the addition, he sold and conveyed that portion of his land which lay on the side of the street first mentioned, opposite the addition, his grantee taking immediate possession and erecting a fence on the line of the original highway. This was in 1842, and the city, for a period of twenty-eight years, acquiesced in such assertion of ownership and continued occupancy of the purchaser and his grantees, in 1847 recognizing by ordinance the fence as the true line of the street, and again in 1857 appointing commissioners to assess the damages for condemning a strip of land inside this fence, which were assessed but never paid. After the lapse of twenty-eight years from the time such purchaser took possession, the city claimed the right to appropriate a strip of his land inside the fence for the purposes of the street, alleging a dedication thereof on the plat of the addition, made by the original owner: *Held*, the circumstances connected with the laying off the addition and making of the plat left the question of dedication in doubt; but the doubt was resolved against the city, in view of the additional circumstances that individual ownership was asserted and exclusive possession taken the first year after the alleged dedication, and that the city had for twenty-eight years both positively recognized and passively acquiesced in such a construction of the plat as excluded the idea of dedication.

2. HIGHWAY—*abandonment thereof.* A city claimed the right to appropriate a strip of land inside the inclosure of an individual, as a part of a road adjacent thereto, on the ground that the land so claimed was covered by the plat of the road as established by the county; but it appeared that the road, as it was actually staked by the viewers, was laid out upon the line on which the fence of the inclosure was afterward erected, and the road as so staked and fenced had been the recognized highway for more than twenty years, having the full width called for by the survey: *Held*,

the case fell within the principle of the rule, that the public lose their right to a highway where they have abandoned it and accepted another in its stead for such a length of time, and under such circumstances, as to give them a title to the substituted road.

3. SAME — *non-user — presumption of extinguishment.* Where ground upon which a highway was laid out, or which was dedicated for that purpose, has been in the open and exclusive adverse possession of the owner of the land for twenty years, and a complete non-user of the easement by the public during that time, an extinguishment will be presumed.

4. CHANCERY — *jurisdiction — injunction.* Where a city undertakes, under color of its chartered powers, to take possession of land to which it has no right, on the pretense that it has been dedicated as a public street, thereby inflicting upon the owner a permanent and continuing injury, the proper remedy is by injunction.

5. And in such case the jurisdiction of a court of chancery is not limited merely to the granting of an injunction until the rights of the parties can be settled at law, but, having acquired jurisdiction for the purpose of an injunction, the court may retain the case and administer complete relief.

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

The opinion states the case.

Messrs. WEAD & JACK, for the appellant.

On the question whether the city was estopped from claiming that the land was dedicated for a public street, by reason of having taken steps to condemn the ground, cited *Owen* v. *Bartholomew*, 9 Pick. 520; *Jackson* v. *Cary*, 16 Johns. 302; *Farrel* v. *Higley*, Hill & Denio (N. Y.), 9. As to the rule in regard to estoppels, *Freeman* v. *Cooke*, 2 Wels. H. & G. Rep. 653; *Brewster* v. *Stryker*, 2 Comst. 19; *Hazelton* v. *Batchelder*, 44 N. H. 40.

However well the acts pleaded by way of estoppel in this case might avail as between individuals acting in their private capacity, the rule is different when applied to their acts as trustees of the public. *State* v. *Graves*, 19 Md. 351; *McCracken* v. *San Francisco*, 16 Cal. 591; *Ex parte Mayor, etc., of Albany*, 23 Wend. 277. Nor is the city estopped by

any admission of its officers or municipal records. *McFarlane* v. *Kerr*, 10 Bosw. 249. Neither can the city forfeit its rights by *non-user*. *City of Alton* v. *Illinois Trans. Co.*, 12 Ill. 38; *Waugh* v. *Leigh*, 18 id. 491; *Trustees* v. *Haven*, 11 id. 555; *Hunter* v. *Middleton*, 13 id. 50; *New Orleans* v. *United States*, 10 Pet. 662, and cases there cited. Laches is not imputable to the public. *Madison County* v. *Bartlett*, 1 Scam. 67; *State Bank of Ill.* v. *Brown*, id. 107; *Belleville* v. *Stookey*, 23 Ill. 444; *Waugh* v. *Leech*, 28 id. 491.

Chancery had no jurisdiction to enjoin a mere trespass. Danl. Ch. Pr. 1742; *Coulson* v. *White*, 3 Atk. 21; 2 Story's Eq. Jur., §§ 925, 926; *Bolster* v. *Catterlin*, 10 Ind. 117; *Jerome* v. *Ross*, 7 Johns. Ch. 334; and generally on this subject, *Spooner* v. *McConnell*, 1 McLean, 328; *Mayor, etc., Rochester* v. *Curtiss*, 1 Clarke, 336; *Waldron* v. *Marsh*, 5 Cal. 119; *Rhea* v. *Forsyth*, 36 Penn. St. 503; *King* v. *McCully*, 38 id. 76; *Coe* v. *Lake Co.*, 37 N. H.; *Storm* v. *Mann*, 4 Johns. Ch. 21; *Stewart* v. *Chew*, 3 Bland, 440; Willard's Eq. Jur. 382; *Hart* v. *Mayor of Albany*, 3 Paige, 213; *Van Bergen* v. *Van Bergen*, 3 Johns. Ch. 282; *Dana* v. *Valentine*, 5 Metc. 8; *Nevitt* v. *Gillespie*, 1 How. (Miss.) 108; *Dunning* v. *City of Peoria*, 40 Ill. 480.

Messrs. McCOY & STEVENS, for the appellee.

The question of dedication is one of intention, but that intention must be clear and unequivocal. *Rees* v. *City of Chicago*, 38 Ill. 336; *Connor* v. *Pres. and Trustees, New Albany*, 1 Blackf. 43; *Ketchum* v. *The State*, 12 Ind. 620; *Haynes* v. *Thomas*, 7 id. 38; *City of Logansport* v. *Dunn*, 8 id. 378; 2 Smith's Lead. Cas. 234, 235; in the case of *Rees* v. *City of Chicago*, 38 Ill. 336. On the question of abandonment by the city, see *Town of Lewiston* v. *Proctor*, 27 id. 418; 3 Kent's Com. 600, 601; *Champlin* v. *Morgan*, 20 Ill. 182.

The court of chancery had jurisdiction. *Smith* v. *Bangs*,

15 Ill. 402; *The Mohawk and Hudson R. R. R. Co.* v. *Archer et al.*, 6 Paige's Ch. 83; *Green* v. *Oakes*, 17 Ill. 249; *Belknap* v. *Belknap*, 2 Johns. Ch. 463; *Baldwin* v. *City of Buffalo*, 29 Barb. 896; *Cenvou* v. *Mayer*, 25 id. 513; Hill'd on Injunc. (2d ed.) 443; *Carpenter* v. *Gwynn*, 35 Barb. 404; *Holdane* v. *Trus. Village of Coldwater*, 21 N. Y. 474.

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

This was a bill in chancery brought by Johnston against the city of Peoria, to enjoin it from taking a strip of land about sixteen feet wide, now forming a part of the inclosure between complainant's house and Main street, in said city, and from making it a part of the street. The city answered, and a replication having been filed and proof taken, the cause came on to a hearing and the court made the injunction perpetual. The strip of land in question is situated in part on the south-east 4, 8 north, 8 east, and in part on the south-west quarter of the same section, and the claim made by the city to the land on each quarter rests upon different grounds.

Main street, it appears, in 1841, ran from the river in a north-west direction to the south line of section 4, having a width of one hundred feet. At that time William Hale owned the south-east of 4, of which a small portion at the south-west corner crossed the line of Main street. In that year he laid out an addition to the city, on so much of the south-east quarter as lay on the north-east side of the line of Main street, and on the 31st of May acknowledged his plat, which was duly recorded. He indicated the course of Main street on his plat but did not fix its width. The other streets in his addition he made of the same width with the corresponding streets in the original town. In 1842, Hale deeded to Hamlin all of the south-east 4 lying south-west of Main street, being the corner above referred to, and Hamlin at once took possession and built the fence, where it has since stood and now stands.

At the time Hale laid out his addition, although Main street proper terminated at the south line of section 4, yet a public highway had been laid out by the county authorities and for several years had been opened and traveled, which was a continuation of Main street, but only sixty-six feet wide.

The only ground upon which the city now claims the right to so much of complainant's inclosure as lies on the south-east of section 4, is that it was dedicated by Hale. The argument is, that, as he caused Main street to be laid down on his plat, and as Main street, from the river to this point, was one hundred feet wide, and as he made the other streets in his addition of the same width with the corresponding streets in the town, he must be presumed to have intended Main street should have the same width, although he indicated no particular width on his plat, but merely showed its line or locality.

If no highway had been established in continuation of Main street when Hale platted his addition, the argument would certainly have great force. But a highway, which was such a continuation, was already there, and extended in a northwesterly direction sixty-six feet in width. This highway was not disturbed by his laying off an addition on one side of it, and we do not perceive how it can be confidently said whether he intended this highway, so far as he owned the land on each side of it, should be of the width of that portion of the highway which extended into the country, or of that portion which extended toward the river. The probability is, he had no settled purpose in regard to this matter, and left it open to be decided in the future, contenting himself for the time being with indicating on his plat that a highway, in the line of Main street, bordered his addition on the south-west side.

Now, as dedication is a question of intention, and the existence of such intention must be shown with reasonable clearness, we should have much difficulty, if the proof stopped here, in affirming the dedication to have been established.

But, conceding the question to be in some doubt, so far as depends upon this evidence, the course of subsequent events

has been such as must compel us to resolve all these doubts against the city, on the ground that, for twenty-eight years prior to the commencement of this suit, the grantees of Hale have been in exclusive and undisturbed possession of the premises, improving and cultivating them as a part of the ornamental grounds lying between the house and the street, this possession commencing the year after Hale made his plat. But there has been, on the part of the city, something more than mere acquiescence. In 1847, the city council passed an ordinance making the line of Main street, on the south-west side, as far down as Perry street, to conform to the fence erected by the grantee of Hale, thus recognizing his fence as the true line of the street. Again, in 1857, the city council appointed commissioners to assess the damages for condemning this land, and they were assessed, though never paid.

So far as relates to this portion of the premises in controversy, we should be inclined to hold, that, when the acts which are relied upon to show the dedication originally are of such doubtful character as in the present case, the additional circumstance that individual ownership was asserted, and exclusive possession taken the first year after the alleged dedication, and that the city has for twenty-eight years both positively recognized and passively acquiesced in such a construction of the plat as excludes the idea of dedication, during which period the premises have several times been sold, must be regarded as settling against the claims of the city whatever doubts attach to the evidence of dedication in the first instance. We may well adopt that construction of the plat which the parties themselves have acted upon for twenty-eight years.

Admitting, however, there was a dedication, there is another view of this case, arising on the question of abandonment or non-user, which we will consider, after stating the facts concerning the other portion of the premises in controversy.

The claim made by the city to that portion of the strip of land, situate on the south-west of section 4, rests on the survey and plat of a road made by the county in 1839. It is

claimed that the plat of the road on file in the county clerk's office covers the premises in question. It is, however, proved that the road, as it was actually staked by the viewers, was laid out so that the south-west side was in a line with the fence as it now stands in front of complainant's premises. The fence in front of this part of the premises was built the same year, and there it has stood to the present time. The road as staked by the viewers, and soon afterward fenced by the then owner of the premises in controversy, has been the recognized highway to the present time, having the full width of sixty-six feet called for by the survey. The case, then, as to this portion of the premises falls within the principle recognized in *Champlin* v. *Morgan*, 20 Ill. 182, and *Town of Lewiston* v. *Proctor*, 27 id. 418, that the public loses its right to a highway where it has abandoned it and accepted another in its stead for such a length of time and under such circumstances as to give it a title to the substituted road.

But, independently of this principle, conceding this highway was laid out as claimed by appellant, and conceding there was an intention to dedicate the premises on the south-east of section 4, we are of opinion that the adverse possession of the appellee, open and exclusive as it has been, and the complete non-user of the easement by the public for more than twenty years, are a sufficient answer to the claim now made by the city. It is said in Kent (vol. 3, marg. page 448, eleventh edition) that mere non-user for twenty years affords a presumption of extinguishment, though not a very strong one, in a case unaided by circumstances, but if there has been, in the mean time, some act done by the owner of the land charged with the easement inconsistent with or adverse to the right, an extinguishment will be presumed. The cases quoted in the notes fully sustain the doctrine of the text and some of them state it more strongly. See *Corning* v. *Gould*, 16 Wend. 531, where the law on this subject is fully reviewed; *Wright* v. *Freeman*, 5 Harr. & Johns. 477; *Emerson* v. *Wiley*, 10 Pick. 310; *Yakle* v. *Nace*, 2 Whart. 123; *Knight* v. *Heaton*, 22

Vt. 480. A case can hardly be presented in which the non-user on the part of the public, and the acts of the private claimant inconsistent with the easement, could be more complete than in the present.

The case of *The City of Alton* v. *Illinois Transportation Co.*, 12 Ill. 38, cited by counsel for appellant, only held that our peculiar seven years' statute of limitation did not apply to the case then before the court, and we are aware of no decision by this court in conflict with the foregoing principle. It is reasonable in itself and fully sustained by the authorities.

It is urged, however, by counsel for appellant, that this is not a proper case for chancery jurisdiction, or that, in any event, the court should merely have enjoined the city until the rights of the parties could have been settled at law.

As to the first point, it is only necessary to say that the complainant was seeking, not merely to enjoin a trespass, but to restrain the city, under color of its chartered powers, from taking absolute possession of property to which it had no right, and inflicting a permanent and continuing injury upon the complainant. In such cases, injunction is a proper remedy. *Smith* v. *Bangs*, 15 Ill. 402.

The answer to the second objection is, that the complainant, having been compelled to come into chancery as the only means by which he could secure himself against the threatened lawless acts of the city, had a right to ask the court to grant him complete relief, and the court, having once acquired jurisdiction on its chancery side, very properly went on to administer complete relief. The city cannot complain. She could have brought her action of ejectment in the first instance, and tried the title at law if she desired. She pursued a different course, and one which compelled the complainant to come to chancery for aid, and she cannot now be permitted to complain that this court has administered complete relief. The court was obliged to hear the entire case in order to determine whether any relief should be given, and, having heard it, why send the parties to a court of law to have the case reheard?

There is little controversy as to the actual facts, and the court acted very properly in settling the rights of the parties.

Decree affirmed.

SAMUEL JANDON *et al.*

v.

JOHN MCDOWELL, JR.

1. LIMITATION ACT OF 1835. The defendant, in an ejectment suit, relying on the limitation act of 1835, and seven years' possession of the premises by actual residence, showed a connected chain of title from the general government to himself by patent, and mesne conveyances purporting to convey the fee: *Held*, such constituted a *prima facie* title in fee at law, although it was only apparently a good title, and was the kind of title contemplated by that statute.

2. And being derived through a patent from the general government, was a title "deduced of record," without regard to whether the deeds of the defendant were recorded or not.

3. SAME — *effect of the recording act.* Nor was it any objection that the deed first made by the patentee, under which, through sundry mesne conveyances, the plaintiff claimed, was on record when the patentee conveyed to the remote grantor of the defendant and charged him with notice. The recording laws have no effect on questions arising under the statute of limitations.

WRIT OF ERROR to the Circuit Court of Knox county; the Hon. JOHN S. THOMPSON, Judge, presiding.

The opinion states the case.

Mr. H. M. WEAD and Mr. AARON TYLER, for the plaintiffs in error.

Mr. A. M. CRAIG, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment by plaintiffs in error, in the Knox circuit court, against defendant in error, to recover the west ½, south-east ¼, section 10, township 12 north, range 3 east, fourth principal meridian. It appears that both parties derive title through Joseph Duncan, plaintiffs in error, by deed dated March 19, 1839, and recorded in the proper office on the 18th of April of the same year, with which they connect themselves by mesne conveyances. Defendant in error claims title through a conveyance from Duncan to Marvin Owen, dated November the 7th, 1840, with which he connects himself by mesne conveyances. It is agreed that Duncan held the land in fee from the United States government before he conveyed it. It appears that defendant moved upon this land in 1844, and has resided on it ever since; his house was built on the land in the spring of 1844, and he occupied it as a farmer. He relied on the statute of limitations of 1835 as a defense, which was allowed by the court, who tried the case without a jury, by consent of the parties, and rendered judgment in favor of defendant, and plaintiffs bring the record to this court on error.

We are of opinion that the judgment of the court below, on the facts contained in the record, is correct. The statute of 1835 (Gross' Comp., § 8, p. 429) declares that "every real, possessory, ancestral or mixed action, or writ of right brought for the recovery of any lands, tenements or hereditaments of which any person shall be possessed by actual residence thereon, having connected title in law or equity deducible of record, from this State or the United States, etc., shall be brought within seven years next after possession being taken as aforesaid."

The ninth section declares, that the possession, to bar the rights, actions and suits mentioned in the eighth section, shall have been continued in manner aforesaid, for the term of seven years next preceding the time of asserting the right of entry

or the commencement of any suit or action. The eleventh section declares, that the entry shall be tolled after seven years, if there shall be an adverse possession for seven years by actual residence thereon, under a connected title in law or equity, deducible of record from this State or the United States, etc.

Defendant in error has shown a connected chain of title from the general government to himself, by patent and mesne conveyances. This is *prima facie* a title in fee at law, and is the kind of title contemplated by the statute of 1835. It would be unreasonable to suppose the legislature only intended to embrace perfect titles, as they could always be successfully asserted in the courts, and hence require no aid from the statute of limitations. Had defendant in error held the first deed from Duncan, then his title would have been amply good without the bar of the statute. But only being apparently the better title, and being connected by deeds purporting to convey the fee, it is the legal title contemplated by the statute, and is entitled to its protection. See *Lender* v. *Kidder*, 23 Ill. 49.

It does not appear from the agreement whether the deeds of defendant in error were or not recorded. But this we regard as immaterial. It was held not to prevent the bar of the statute in the case of *Collins* v. *Smith*, 18 Ill. 160, and that, if derived through a patent from the general government, the title was deduced of record; on that question this authority is conclusive.

Nor is it any objection that the deed first made was on record when Duncan conveyed to Owen, and that he was charged with notice by the record. In the cases of *Woodward* v. *Blanchard*, 16 Ill. 433, and *Dickenson* v. *Breeden*, 30 id. 280, it was held, that the recording laws had no effect on questions arising under the statute of limitations. And the rule has been recognized and applied to other cases by this court. Defendant, then, having the character of title required by the act of 1835, and more than seven years' possession of the land under the title, by actual residence thereon, the statute became

operative and presented a complete bar to a recovery by plaintiffs in error, and the judgment of the court below must be affirmed.

Judgment affirmed.

ROBERT A. KINZIE
v.
FREDERICK H. WINSTON.

BANKRUPTCY — *what rights of the bankrupt passed to his assignee under the act of* 1841. Where the fee in a public street in a city is in an individual, subject only to the public easement, the right of the owner therein, upon his being declared a bankrupt, would pass to his assignee, under the provisions of the bankrupt law of 1841, and become fully vested in the purchaser from the assignee.

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

The opinion states the case.

Mr. R. C. HURD and Messrs. SCRIBNER & HURD, for the appellant.

The mere naked fee in a public street, owned by an individual, subject to a perpetual right of user in the public, counsel contended, was not "property," or a "right of property," in the sense in which those terms are used in the bankrupt act of 1841, comparing with that act the various English statutes, and citing the following cases as showing what did not pass to the assignee in bankruptcy in England: *Benson* v. *Flowers*, Sir T. Jones, 215; 1 Com. Dig. 520 (D. 19); *Bennet* v. *Davis*, 2 P. Wms. 316; *Winch* v. *Keeley*, 1 Term R. 619; *Carpenter*

v. *Marnell*, 3 Bos. & Pul. 40; *Moth* v. *Frome*, Ambler, 394; *Carleton* v. *Leighton*, 3 Meriv. 667; Chan. Ca. 71; 2 Vern. 97, S. C., cited; *Twopenny* v. *Payton*, 10 Sim. 487; *Godden* v. *Crowhurst*, id. 642; *Townshend* v. *Windham*, 2 Ves. Sr. 3; *Gayner* v. *Wilkinson*, Dick. 491; *Ex parte Kensington*, 2 Ves. & B. 79; *Jacobson* v. *Williams*, 1 P. Wms. 382. The following American cases were cited: *Shoemaker* v. *Keeley*, 1 Yeates, 245; S. C., 2 Dall. 213; *Sommer* v. *Wilt*, 4 S. & R. 19, 28; *North* v. *Turner*, 9 id. 248; *Sullivan* v. *Bridge*, 1 Mass. 511; *Streeter* v. *Sumner*, 11 Fost. 542; *Bird* v. *Clark*, 3 Day, 272; *Kip* v. *Bank of N. Y.*, 10 Johns. 65; *Ontario Bank* v. *Mumford*, 2 Barb. Ch. 596; *In re J. D. Crockett*, (N. Y. S. D.) 2 B. R. 75; 3 Am. Law Rev. 496; *Nichols* v. *Bellows*, 22 Vt. 581; *Oakey* v. *Bennett*, 11 How. (U. S.) 33; *Barnett* v. *Pool*, 23 Tex. 517; *White* v. *Creer*, 16 Ga. 416; *Shay* v. *Lessaman*, 10 Barr, 432; *Ex parte Snow*, 1 N. Y. Leg. Obs. 264; S. C., 4 Law Rep. 369; *Ex parte Tebbets*, 5 Law Rep. 503; *Ex parte Beardsley*, Bank Reg. 121; *Ex parte Ely*, 1 N. Y. Leg. Obs. 131; 2 Wash. C. C. 406; *Vasse* v. *Comegys et al.*, 4 id. 570. But in the last case the supreme court of the United States took a different view, by a divided court. *Comegys* v. *Vasse*, 1 Pet. 193.

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

We insist that the interest or right, which the owner of the fee in a public street holds, subject to the public easement, passes to his assignee in bankruptcy, under the bankrupt act of 1841.

In *French* v. *Carr*, 2 Gilm. 664, this court held the language of that act was sufficiently comprehensive to embrace the most minute and temporary interest in property. See, also, *Holbrook* v. *Coney*, 25 Ill. 543.

"The general rule is, that the assignment passes the whole of the bankrupt's property, or all that might be conveyed; in other words, the assignee stands precisely in the situation of

the bankrupt himself. Hilliard on Bankruptcy and Insolvency, 107. The Federal courts, which have peculiar power and jurisdiction to construe the acts of Congress, have often decided that the bankrupt act of 1841 means what it says. *Ex parte Newhall*, 2 Story, 360; *Ex parte Fuller*, id. 327; *Carr* v. *Hilton*, 1 Curtis, 231; *Carr* v. *Gale*, 3 Woodbury & M. 38; *In re Grant*, 2 Story, 312."

"Under the bankrupt law, the entire property and interests of the bankrupt were vested in the assignee." *Cook et al.* v. *Lansing*, 3 McLean, 571.

"While the act does not extend to rights of a mere personal nature, as claims for damages, arising out of a breach of promise to marry, or out of personal torts and injuries, it comprehends *every right and interest, and every right of action founded in, or growing out of property.*" *Moore* v. *Jones et al.*, 23 Vt. 744, in district court of the United States.

All these cases arose and were decided, under the act of 1841, and, if there had been any doubt of their correctness, they would have been carried to the supreme court of the United States for further consideration. They show with how much ingenuity that section was sought to be evaded, and how uniformly the courts of the United States decided that "all" means the whole of the bankrupt's estate, and every right of action growing out of property, which belonged to him.

It was decided under the Bankrupt law of April 4, 1800, that possibilities coupled with an interest, passed to the assignee. *Comegys et al.* v. *Vasse*, 1 Pet. 193-220.

In delivering the opinion of the court in that case, Judge STORY said, quoting the words of the law: "'All the estate, real and personal, of every nature and description, in law and equity,' are broad enough to cover every description of vested right and interest attached to, and growing out of, property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing, by such words." P. 218.

The words of the act of August 19, 1841, are more comprehensive than those of the former act, as will be seen by comparison of the two laws.

Mr. GEORGE C. CAMPBELL, also for the appellee, argued that the words of the bankrupt act of 1841, "all property and rights of property of every kind, name and nature," were comprehensive enough to pass to the assignee the title of the owner of the fee in a public street, which was vested in the bankrupt.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of ejectment, brought to the September term, 1869, of the Cook circuit court, by Robert A. Kinzie against Frederick H. Winston, to recover the possession of lots one, two, three, sixteen, seventeen and eighteen in Kinzie's addition to Chicago. The cause was tried by the court without the intervention of a jury, resulting in a judgment for the defendant.

To reverse this judgment the plaintiff appeals, assigning the usual errors.

The ground of the plaintiff's claim to recover, as is shown by the record, was this: Kinzie, being the owner, by purchase from the United States, of the north fraction of section 10 in township 39 north, range 14 east of the third principal meridian, in February, 1833, made a subdivision of it, which he called "Kinzie's addition to Chicago." The plat was acknowledged and filed for record on the 22d of February, 1833, and recorded 18th February, 1834. As the act providing for recording town plats, by force of which the fee in the streets therein designated was vested in the public, did not become a law until the 27th day of February, 1833, it is not denied the fee in these streets remained in Kinzie, subject only to the public easement.

The land so subdivided lies immediately north of the original town of Chicago, and is bounded on the east by Lake Michigan; the street running north and south, nearest the lake, was called "Sand street," and the one running east and

west, nearest the north line of the fraction, was called "Superior street." The waters of the lake limited Sand street on the north by an oblique line extending from a point on its eastern side about one hundred feet below, to a point on its western side about one hundred feet above, "Superior street." The north-western block of this subdivision was numbered fifty-four (54), and was bounded on its eastern side by "Sand street" in part, and in part by the lake. Sand street, therefore, north of Superior street, formed a small triangular piece of land between the lake and block fifty-four, which was less than thirty-three feet wide at its lower or southern end, and diminished to a point at its northern extremity. Upon this triangle new land was subsequently formed by accretion, which, at the date of the commencement of this action, extended eastwardly four hundred and fifty feet, more or less. The premises in controversy form a portion of this new land.

The plaintiff claimed that this formation commenced after the decree in bankruptcy against him, rendered March 18, 1842, and as late as 1844 or 1845, and that the bare, naked, legal title which he held to that part of Sand street, east of block fifty-four, burdened with an easement in the public, which might be perpetual, and which is the triangular piece above described, did not pass to his assignee under the decree in bankruptcy, and therefore he was not divested of his title to the accretion which had subsequently formed, by the sale and conveyance of the assignee.

The defendant claimed, that the legal title to Sand street was in the bankrupt at the time of the decree, and was "property," within the meaning of the bankrupt act of 1841, and passed to the assignee under the decree, and the circuit court so held.

To this question alone have we directed our attention, and we here take occasion to express our gratification for the able and lucid manner in which counsel have presented it to us, thereby aiding us and enlightening us in our investigation.

Counsel for appellant, in their very able argument, have insti-

tuted a comparison of the English statutes of bankruptcy and the decisions made thereunder, with the provisions of the several acts of congress on the same subject.

He quotes a part of the second section of 13 Eliz., chapter 7, but not as it is found in the English Statutes at Large, vol. 4, 298; that portion of it he has assumed to quote is as follows: "As also with all his or her lands, tenements, hereditaments, as well copy or customary hold as freehold, which he or she shall have in his or her own right before he or she became bankrupt; and also with all such lands, tenements and hereditaments, as such person shall have purchased, or obtained for money or other recompense, jointly with his wife, children or child, to the only use of such offender or offenders; or of or for such use, interest, right or title as such offender or offenders then shall have in the same, which he or she may lawfully depart *withal*."

He also quotes a part of section 8, which is in the original a part of section 11. Id. 302. Section 8 has reference alone to the bestowal of forfeitures after the bankrupt's debts are paid. Section 11 provides, "that any lands, tenements, hereditaments, free or copy, offices, fees, goods or chattels, shall descend, revert, or by any means come to any such person, being bankrupt as is aforesaid, before such time as their debts, due to their creditors shall be fully satisfied and paid, or otherwise agreed for, that then the said lands, etc., shall be sold, extended and delivered by the commissioners, for the payment of the creditors in like manner and form as other lands, etc., which they had when they were declared first to be bankrupt.

Quotations are also made from the statute 21 James I, chapter 19. That statute is entitled "An act for the further exemption of a bankrupt, and relief of creditors against such as shall become bankrupt, and for inflicting of corporal punishment upon the bankrupt in some special cases."

The twelfth section authorizes the commissioners in bankruptcy to sell estates in tail, in possession, reversion or remainder to any person or persons for the relief and benefit of the

creditors of all such bankrupts, and which sale and conveyance shall be available to such persons, their heirs, etc., against the bankrupt and against all and every the issues of the body of such bankrupt, and against all persons claiming any estate under the bankrupt, after such time as he shall become bankrupt, and against all persons whom the bankrupt, by common recovery, or other ways or means, might cut off or debar, from any remainder, etc. Id. 761.

The next statute quoted from, is the statute 5 George II, chapter 30. That act is entitled "An act to prevent the committing of frauds by bankrupts," and consists of forty-nine sections. This act was limited to three years, continued in force by the act 24 George II, chapter 57, and by many other acts, and made perpetual by the act of 37 George III, chapter 124. It does not purport to be an act enlarging and consolidating the system of bankruptcy, nor are its provisions correctly quoted in the note to *Higden* v. *Williamson*, cited by counsel. The statute is section 1, in relation to the examination of bankrupts; that upon such examination, he shall fully and truly disclose and discover all his, her or their effects, and real estate, and personal, and how, to whom, when, and what consideration, he has disposed of, assigned or transferred any of his goods, etc., or other estate and effects of which he was possessed, or in which he was interested or entitled, or which any person had in trust for him, or for his use, at any time before or after the issuing of the commission, or whereby such person or persons, or his, her or their family or families, hath or have, or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, etc. Id. vol. 9, 281.

The next quotation is from the statute 12 and 13 Victoria, chapter 106, which is not at hand. This statute, it is said, repealed the preceding bankrupt acts, and section 141 thereof has this provision: "Whenever any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, whenever the same may be found or known, and all property which he may purchase, or which may revert,

descend, be demised or bequeathed, or come to him before he shall have obtained his certificate, and all debts, etc., shall become absolutely vested in the assignee for the time being, etc.

Two decisions are cited by appellant's counsel, one by Lord COWPER, in *Jacobson et al.* v. *Williams*, 1 P. Wms. 382, in which it was held, as counsel insist, that a bare possibility did not pass to the assignee of a bankrupt. But the best foundation for the decision in that case is, as stated in the note, because the bankrupt husband could not have come at his wife's portion without the assistance of a court of equity, which would not have decreed it to him but on his making some provision for his wife; since, as the annotator says, a possibility or contingent interest is certainly assignable, referring to the case of *Higden* v. *Williamson*, first heard at the rolls, and afterward affirmed by Lord Ch. KING and reported in 3 P. Wms. 132, and cited by appellant's counsel. The case, in effect, was, an estate was devised to be sold and the moneys arising from such sale to be divided among such of the children of A as should be living at A 's death; A had several children, one of whom, B, becoming bankrupt, gets his certificate allowed, after which A dies; this contingent interest was held liable to the bankruptcy, for the reason that the son, in his mother's life-time, might have released it, and the opinion was grounded on the words of the statute, Eliz. chapter 7, section 2, that the commissioners should be empowered to assign over all that the bankrupt might "depart withal."

The chancellor, in this case, evidently puts the decision in *Jacobson* v. *Williams*, on the ground that, as the bankrupt husband could not come at his wife's portion, except by the aid of equity, without making some provision for her, it was not reasonable the assignees, standing in his place, and deriving their claim from him, should be more favored.

Counsel also cite 1 Preston on Estates, 76. That writer says, at page 75: "A contingent interest does not give any *certain* nor any *immediate* right, or any estate in the land; it gives a

mere possibility,— a possibility which is coupled with an interest, when the person is fixed and ascertained; and such possibility, coupled with an interest, is devisable by will; may be released; may pass by the bargain and sale of commissioners of bankrupt; may be barred or extinguished by estoppel; but it cannot be granted or transferred by the ordinary rules of the common law, though it may be bound in equity, by contract." Then follows the quotation made by appellant's counsel, on page 76, in which an apprehension is entertained that mere possibilities to persons not ascertained, as to the survivor of several persons, etc., are not coupled with an interest, are not transferable to assignees under a commission of bankruptcy. Yet the case from P. Wms. decides they are.

The later English case cited, *In re Vizard's Trusts*, is not within our reach, and we cannot determine to what extent it reaches.

Counsel next quote the act of congress of 1800, the eleventh section of which is not unlike section 12 of the statute of James I, and section 18 like that of section 1, 5 Geo. II. No decisions under this act are referred to, except *Krumbaar* v. *Burt et al.*, 2 Wash. C. C. 406, in which it was said that the decisions of the English courts, that a possibility, whether belonging to the husband or wife, would pass to the assignees of the bankrupt husband, would not have been made, were it not for the strong language of their statute of bankruptcy, and no language so strong was found in our bankrupt act of 1800. Mr. Justice WASHINGTON delivered an able opinion in the case, and it went no further. In the subsequent case, however, of *Vasse* v. *Comegys* and *Pettit*, 4 id. 570, the same question, in a different shape, was before the court, and decided in harmony with *Krumbaar* v. *Burt*, *supra*. The record in that cause was taken by writ of error to the supreme court of the United States, and the judgment of the circuit court was reversed (*Comegys* and *Pettit* v. *Vasse*, 1 Pet. 193), that court holding that mere personal torts, which die with the party and do not survive to his personal representatives, are incapable of passing

by assignment, yet that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of, and adhering to, property, may pass by assignment in bankruptcy.

This decision was made in 1828, and under the eighteenth section of the act of 1800, which being omitted in the act of 1841, under which this plaintiff became a bankrupt, counsel infer was so omitted for the express purpose, so to shape the new statute as to conform to the views of Justice WASHINGTON on the point upon which the supreme court was divided. We omitted to remark in its proper place, that the decision on the point of assignability of the claim in question, was by a majority of the court, but how small or large the majority, or who were the dissenting judges, the report of the case gives us no information. We take it as the decision of the court, to which full effect must and should be given. We doubt very much if the majority of the congress which passed the act of 1841, ever read the decision of Justice WASHINGTON. All this is mere speculation.

But now to the act of congress of 1841. What are its provisions? That act was approved August 19, 1841, and it is declared by the third section, that all the property and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal, such court may exercise at its discretion, *toties quoties;* and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the order and direction of such court, as fully, to all intents and purposes, as if

the same were vested in, or might be exercised by, such bankrupt, before or at the time of his bankruptcy declared as aforesaid.

"All the property and rights of property, of every name and nature, and whether real, personal or mixed," are certainly very general and comprehensive words, and broad enough to cover every description of vested right or interest attached to and growing out of property. Under such words it cannot be doubted, the whole property of a testator would pass. These terms are broader and more comprehensive than any found in the English statutes or in the act of congress of 1800.

In *French* v. *Carr*, 2 Gilm. 664, this court held this language sufficiently comprehensive to embrace the most minute and temporary interest in property. That was a case where a party making an improvement on the public lands had taken the benefit of this bankrupt act; his interest, though uncertain and liable to be defeated, passed to his assignee in bankruptcy.

In *Strong et al.* v. *Clawson*, 5 Gilm. 346, it was held the assignee succeeds immediately to all the rights and interest of the bankrupt, precisely to the same extent the bankrupt himself had.

In *Holbrook* v. *Coney et al.*, 25 Ill. 543, the court say, "how more comprehensive language, to vest the title in the assignee, could have been employed, it is impossible to conceive. But lest a doubt might remain, the succeeding clause of the same section has, if possible, made it still more explicit, by providing that the assignee" shall be vested with all the rights, powers and authorities to sell, manage and dispose of the same, etc., as fully as the bankrupt himself before, or at the time of his bankruptcy.

As argued in 1 Peters, *supra*, it seems to us, under this act, the moment a man becomes a bankrupt the line is at once drawn between what is his and what is subject to claims of creditors, though there is no provision in the act, as in the English statute of 21 James I, that it shall in all things be largely and beneficially expounded for the relief of creditors.

That was one of the great objects of the act. The natural faculties and capacity for exertion of mind and body, are the bankrupt's own inalienably, of which no power but death can deprive him; but as to his estate, his property of every kind and nature, whatsoever, this law does deprive him and pass it to his assignee. Of this there can be no doubt. There may be some exceptions to this, as the expectations of an heir apparent, who may die before the party who holds the estate, torts which require an action in a personal form, and kindred cases.

But it is useless to extend these remarks, as it is not denied the fee in Sand street was in Kinzie at the time of the decree in bankruptcy. That title and all its incidents passed to the assignee, and is wholly unlike the cases cited by appellant. Here the fee was vested, which Kinzie, before his bankruptcy, could have sold and conveyed. There was a present subsisting interest in him, and, as the facts show, of value at the time of the decree. Three years prior to March, 1842, in 1839, Sand street had been swept into the lake by the encroachments of its waters. In 1840, 1841 and 1842, slight accretions had commenced forming, and, by building the piers into the lake, there was an almost certain assurance they would rapidly and largely increase, and, if we are to believe Mr. Lill, who appears to know more about the condition of the shore than any other witness, they made very fast in those years, and in 1843 and 1844. This fact gave to the owner of the fee in land there a valuable property, but whether or not, Kinzie had an actual, subsisting estate in the street, depending upon no contingency. It then existed, and under the bankrupt act, it passed to his assignee.

Owning the fee in this street, Kinzie had a right to its undisturbed use until such time as the public should assert a right of easement. This right was never asserted by the public. The triangle was never used as a street, and, if acceptance be necessary to a dedication, as this court has said it is, then there was no dedication to the public use at any time. *Marcy*

v. *Taylor*, 19 Ill. 634; *Daniels* v. *The People*, 21 id. 442; *Proctor* v. *The Town of Lewiston*, 25 id. 153; *Rees* v. *City of Chicago*, 38 id. 332. Before a street, marked on a town plat, is accepted by the public by using it, the party intending to dedicate it may resume possession. *Proctor* v. *Town of Lewiston*, *supra*.

But it matters not when these accretions commenced. The fee in the street passing to the assignee, became the fee of the purchaser, and as Sand street, whether dedicated or not, was vacated in 1869, the use and enjoyment of the fee, with all its incidents, of which accretion was one, became the absolute and unqualified property of the purchaser. If Kinzie had not become bankrupt and assigned his estate in this land, it would have been in him, there is no question. The theory of all bankrupt laws is, to place the assignee in the same position the bankrupt occupied, or might occupy, in regard to his estate.

On the best consideration we are able to give this case we think it a plain one for the defendant, and the court did right in rendering a judgment in his favor, and the judgment must be affirmed.

Judgment affirmed.

MARVIN A. LAWRENCE

v.

HORATIO N. HAGERMAN.

1. ACTION ON THE CASE—*for maliciously suing out a writ of attachment.* An action on the case for maliciously, and without probable cause, suing out a writ of attachment, is maintainable for the injury resulting therefrom to the business, credit and reputation of the defendant therein, notwithstanding the statute requires the plaintiff in the attachment suit to give a bond conditioned to pay all damages that may be occasioned by the

Syllabus.

wrongful suing out of the writ. It is a more complete remedy, of which a party may avail independent of the statutory remedy.

2. The remedies by an action on the case, and upon the bond, may be concurrent, to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law.

3. EVIDENCE — *in action for malicious prosecution.* In an action on the case, for maliciously, and without probable cause, suing out a writ of attachment, evidence was offered by the plaintiff which tended to show, negatively at least, that there was no probable cause for suing out the writ, and such evidence was held to be legitimate and proper.

4. ALLEGATIONS AND PROOFS — *in such case.* In an action on the case for maliciously, and without probable cause, suing out a writ of attachment, and causing the same to be levied upon the goods and chattels of the plaintiff, it was averred that, by reason of such wrongful act, the plaintiff sustained special damage in the depreciation of the value of the property levied on, and the expenditure of large sums of money in the defense of the action, and as general damages, that his business was broken up, and his credit and reputation impaired and destroyed. It was *held,* the averments were broad enough to admit of proof of all the injuries sustained in consequence of the wrongful act, including loss of character, credit and business.

5. MEASURE OF DAMAGES — *in suit for maliciously suing out writ of attachment.* In such action it appeared the defendant in the attachment was engaged in the grain and produce business, and, while shipping produce to market, the attachment was sued out and levied upon the same. It was *held,* that in the action for maliciously, and without probable cause, suing out the attachment and procuring the same to be levied, the nature, character and amount of business transacted by the plaintiff, at and before the date of the wrongful levy, its complete destruction thereby, and the extent to which his credit and financial reputation were impaired, as well as the actual loss upon the stock levied on, and the expenses of the defense of the attachment suit, were all matters which constitute proper elements to be considered in estimating the damages.

6. In such a case the jury are not confined to the actual damages, if the wrongful act was wantonly and maliciously committed, but they may give exemplary damages.

7. The plaintiff cannot recover his taxable costs incurred in the attachment suit, for which he already has judgment, but he may recover counsel fees therein, and other expenses incident to the defense of the attachment.

8. INSTRUCTIONS. The rule is, that instructions given for the plaintiff and defendant must be construed together, and, when so considered, if they state the law correctly as a whole, an error which may appear in one series will be deemed corrected by the other.

9. NEW TRIAL — *verdict against the evidence.* The finding of a jury will not be disturbed in the appellate court, unless it is clearly against the weight of the evidence.

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

This was an action on the case, brought by Hagerman against Lawrence and others, to recover damages for the wrongful and malicious suing out by the defendants of a writ of attachment, without probable cause, and causing the same to be levied upon the goods and chattels of the plaintiff.

In the first count of the plaintiff's declaration, which is substantially like the others, it is alleged that the plaintiff was engaged in the business of buying and selling grain, stock and other products, and was constantly shipping the same to Chicago for sale, which was his main market therefor, his business being large and constantly increasing. Averring that the plaintiff had shipped to Chicago four car loads of hogs, of great value, to wit, of the value of $3,500, and which were lawfully in the possession of and the property of the plaintiff, in which all his capital for the conducting of his said business had been invested; that the defendants, well knowing the premises, but contriving and wrongfully, maliciously and injuriously intending to injure the plaintiff, and to deprive him of the profits he otherwise would have derived from conducting his said business, and from the sale of his said produce, and to break up his said business and employment, and cause him to be greatly aggrieved and injured in the premises in that behalf, wrongfully, unjustly and maliciously and without probable cause therefor, caused and procured to be issued out of the superior court of Chicago, a writ of attachment, etc., and wrongfully, injuriously and maliciously caused the same to be levied on the prop-

erty of the plaintiff, to wit, two hundred and forty-nine hogs, of great value, to wit, of the value of $3,500, and caused and procured the said hogs, by virtue of said writ, to be kept and detained in the custody of the sheriff for a long space of time, etc.

In reference to the injury thereby occasioned, it is alleged "that the said plaintiff, in order to get possession of said goods, or the proceeds of the same, was forced and obliged to pay out a large amount of money, to wit, the sum of $1,200, in attorney's fees and costs, and charges and other expenses in the litigation which said defendants forced upon said plaintiff in the said court and in the supreme court of the State of Illinois, and the said plaintiff has been and is by means of the premises greatly injured and damnified in his credit and circumstances. * * * * And plaintiff says, that by means of the premises aforesaid, and the wrongful and injurious acts of the said defendants toward him, his business aforementioned was broken up and destroyed, and the profits that would have otherwise accrued to said plaintiff from the prosecution of and conducting of said business were wholly lost, and the profits that would otherwise have accrued to said plaintiff from the sale of said property of plaintiff, so seized and attached as aforesaid, was wholly lost to said plaintiff, and the said property so attached as aforesaid by means of the premises was greatly depreciated in value, and in order that the same might not be rendered totally valueless, the plaintiff was forced and obliged to consent to a sale of said property by the sheriff at a rate and price greatly below the real value of said hogs, and that such sale was attended with great expense which was taken from the proceeds of such sale and the balance of the proceeds detained and kept in possession by the sheriff of said county. And the plaintiff says, that by reason of the premises aforesaid, he lost a large amount of money, to wit, the sum of $1,000, on the sale of said hogs. And he further says, that by reason of the wrongful and injurious acts of the defendants aforesaid, he was unable to meet his engagements or conduct his business,

whereby he was greatly injured in his credit and circumstances and reputation. And he states that by reason of such injurious acts by said defendants aforesaid, his business was broken up and his means of obtaining a livelihood taken away. And by means of the false and malicious averments in the said affidavit of said Lawrence, and upon which said writ of attachment was founded, his business reputation, and credit were greatly injured, to wit, at the county of Cook aforesaid, to the damage of said plaintiff of $6,000."

And in another count, the plaintiff averred, as a consequence of such wrongful acts of the defendants, "that his reputation as a business man was greatly injured by the false and malicious affidavit upon which said writ was based, and which was made by said Marvin A. Lawrence, charging the said plaintiff with fraud."

The trial in the court below resulted in a verdict against Lawrence for $2,000, upon which judgment was rendered. Thereupon the latter took this appeal.

Mr. M. F. TULEY, Mr. J. N. BARKER, Mr. WILLIAM HOPKINS and Mr. T. J. TULEY for the appellant.

An action on the case will not lie for malicious prosecution, in the wrongful suing out of a writ of attachment, without probable cause.

At common law no action will lie for a *malicious* prosecution of a *civil* suit, without cause, where there is no arrest. *Savil* v. *Roberts*, 1 Salk. 14; *Gorton* v. *Brown*, 27 Ill. 499.

A different rule is laid down in Drake on Attachments, chapter 39, section 726, but the authorities cited in support of the rule do not seem to justify the conclusion of the author.

Messrs. SPAFFORD, MCDAID & WILSON, for the appellee.

An action on the case will lie for maliciously suing out a writ of attachment without probable cause.

In *Chapman* v. *Pickersgill*, 2 Wils. 145, an action on the case was sustained for falsely and maliciously suing out a commission of bankruptcy, wherein the court cited 5 Mod. 407, 8, 10; id. 218; 12 id. 210, 273; Bulwer's Case, 7 Rep. 1; 1 Ro. Abr. 101; 1 Ven. 86; 1 Sid. 464.

This case furnishes a complete answer to the position taken by appellant against the maintenance of this action. But we are not without precedents in our own country, in States having statutes authorizing attachments and requiring the creditor to give bond. *Fortman* v. *Rottier*, 8 Ohio N. S. 548; *Tomlinson* v. *Warner*, 9 Ohio, 103; *Spengler* v. *Davy*, 15 Gratt. (Va.) 381; *McLaren* v. *Birdsong*, 24 Ga. 265; 29 Cal. 644; *Hill* v. *Palron*, 38 Mo. 258; *Bump* v. *Belts*, 19 Wend. 421; *Pierce* v. *Thompson*, 6 Pick. 192; *Robinson* v. *Kellum*, 6 Cal. 399.

These cases are in addition to those cited in Drake on Attachments, which have already been commented upon by appellant in his brief.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The questions presented by this record, upon which appellant relies to reverse the judgment, arise mainly upon the errors assigned which question the rulings of the court in the admission and rejection of evidence, and in the giving and refusing of instructions. Upon the errors assigned the appellant makes three other distinct points. First, that the rule for ascertaining the measure of damages was incorrectly stated, Second, that the verdict is wholly unsupported by the evidence and is excessive, and Third, that the action will not lie.

The objections to the admission of evidence are too numerous to be noticed in detail, but they may all be grouped under one general objection, viz.: that the evidence to show the extent of the injury by the wrongful act complained of, to the business, credit and reputation of the appellee, was inadmissible under the averments of the declaration. There are some minor

objections to the form of the questions propounded to the witnesses, and the order in which the testimony was presented, which we do not deem material to be considered.

The general objection to the instructions given for the appellee raise the same question as that taken to the admission of improper evidence, and they may properly be considered together.

The action is founded in tort, for maliciously suing out the process of a court. The averment in the declaration is, that the appellant "wrongfully, unjustly and maliciously, and without probable cause therefor," sued out a writ of attachment under the attachment act, and with a malicious and wrongful purpose caused the same to be levied on the goods and chattels of the appellee. It is alleged that, by reason of the premises, the appellee sustained special damage in the depreciation of the value of the property levied on, and in the expenditure of large sums of money in the defense of the action, and, as general damage, that his business was broken up, his credit and reputation impaired and destroyed.

The testimony offered to which objections were interposed tended to show, negatively at least, that there was no probable cause for suing out the writ. This was a material averment and it was necessary to be proven. The evidence offered for that purpose was legitimate and proper.

The main objection taken is to the evidence offered to establish the measure of damages. It seems to us that the averments in the declaration are broad and comprehensive enough to admit of evidence of all the injuries sustained in consequence of the wrongful act alleged. For the purpose of estimating the extent and magnitude of the injury, the court permitted the appellee to introduce evidence of the nature, character, and amount of business transacted at and before the date of the wrongful levy, and also evidence of the complete destruction of that business, and of the extent to which the credit and financial reputation of the appellee were impaired, and also evidence of the actual loss of the stock levied on, and of

the expenses incurred in and about the defense of the suit. No reason is perceived why these facts do not constitute proper elements for the consideration of a jury in estimating the damages occasioned by the tortious act of the appellant. The evidence was pertinent to the issue made by the pleadings and the issue stated was broad enough to admit the proof.

In actions on the case the party injured may recover from the guilty party for all the direct and actual damages of the wrongful act and the consequential damages flowing therefrom. The injured party is entitled to recover the actual damages and such as are the direct and natural consequence of the tortious act.

In this instance the amount of money actually paid out in and about the defense of the suit, and the depreciation of the value of the stock on which the wrongful levy is alleged to have been made, are not the only damages sustained, if the appellant wrongfully, unjustly and maliciously and without probable cause sued out the writ of attachment and caused the same to be levied in the manner charged. The business of the appellee had hitherto been prosperous, his credit and financial reputation good, and all were destroyed by the malicious acts of the appellant, if it be conceded that he was guilty as alleged. It cannot be said that the law will afford no redress for the destruction of financial credit and reputation, or mete out no measure of punishment to the guilty party who wantonly and maliciously destroys them. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business, credit and reputation of the appellee, the law will require him to make good the loss sustained. *Chapman* v. *Kirby*, 49 Ill. 211.

The instructions given for the appellee announce these principles with sufficient accuracy. The jury were correctly told that in estimating the damages they might take into consideration any injury shown by the evidence that the appellee sus-

tained in his business and reputation, together with the losses actually sustained by the wrongful suing out of the writ of attachment. The jury were also instructed that they were not confined to the actual damages, if the wrongful acts were wantonly and maliciously committed, but they might give exemplary damages. Such is the well established rule of the law.

It is objected that the jury were not told in the instructions given for the appellee that he could not recover for his taxable costs in the former suit, in this form of action.

The rule is, that the instructions given for the plaintiff and the defendant must be construed together, and when so considered, if they state the law correctly as a whole, the error that may appear in one series will be deemed corrected by the other. In this instance the jury were distinctly told, in an instruction given on behalf of the appellant, that the appellee could not recover his taxable costs in the attachment suit, in this form of action, and this instruction must be held to have modified the appellee's instruction to that extent.

The principle of awarding damages seems to be the same whether the prosecution is by indictment or by civil proceedings, and if the prosecution in either case is malicious and without probable cause, the jury are not confined to the actual damages proved, in estimating the damages, but they may, in the exercise of a sound discretion, give exemplary damages, and although the party may not recover taxable costs, if he has judgment for the same, yet he may recover counsel fees and other expenses incident to the defense of the suit. 2 Greenlf. Ev., § 456.

The instructions considered together state the true rule for ascertaining the measure of damages, and no error that would mislead the jury on the facts involved appears, and they must therefore be held to be substantially correct.

It is insisted that an action on the case for maliciously suing out a writ of attachment cannot be maintained. The objection proceeds on the ground that, inasmuch as the statute

requires the plaintiff in attachment to give bond, with security, conditioned to pay all damages in case the writ is wrongfully issued, before obtaining the process, the remedy is confined to an action on the bond. We think the objection taken is not tenable, certainly not to the extent insisted upon by the counsel. The remedies by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law.

In *Bump* v. *Wight*, 14 Ill. 301, it was held, that such an action could be maintained for wrongfully suing out a writ of *ne exeat*, notwithstanding the party suing out the writ was required to give bond before instituting the proceeding.

Mr. Drake, in his work on Attachments (§ 754), says: "It has been uniformly held in this country that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiff having, at the institution of the suit, given bond with security to pay all damages the defendant may sustain by reason of the attachment having been wrongfully sued out."

We have examined the cases referred to in support of the text, and find the doctrine fully sustained. *Sanders* v. *Hughes*, 2 Brevard, 495; *Bonnell* v. *Jones*, 13 Ala. 490; *Smith* v. *Story*, 4 Humph. 169; *Pettit* v. *Mercer*, 8 B. Monr. 51; *Senecal* v. *Smith*, 9 Rob. 418.

The case of *Chapman* v. *Pickersgill*, 2 Wils. 145, was an action brought for falsely and maliciously suing out a commission of bankruptcy. An objection, like the one taken in this case, was urged, that the action would not lie, there being a remedy given by the statute. It was held that the action

was maintainable at common law, independent of the statute, which provided a remedy. There is great force in the reasoning of the Lord Chief Justice who delivered the opinion of the court, where he said: "This is an action for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief, and this of suing out a commission of bankruptcy, falsely and maliciously, is of the most injurious consequences in a trading community." This brief paragraph embodies the true philosophy of the law. The law has wisely provided a remedy, ample in its scope, for all the consequences that may naturally flow from every wrongful act.

In this instance the grounds of the action are, that the writ was falsely and maliciously, and without probable cause, sued out, and by reason of the premises, the appellee's business was broken up, and his credit and financial reputation impaired. The remedy by action on the bond, would not afford complete indemnity, and would not extend to the consequential damages sustained, and hence resort must be had to the common law action on the case for malicious prosecution. If such an action can not be maintained, it necessarily follows that there are injuries flowing from wanton and malicious acts, for which the law would afford no redress. Our remedial laws will bear no such narrow and illiberal construction. For every injury to property, credit or reputation, the law has provided an appropriate remedy.

In *Gorton* v. *Brown*, 27 Ill. 499, it was said by this court, that the action will lie, for it is reasonable that, when an injury is done to a person, either in reputation, property, credit, or in his profession or trade, he ought to have an action of some kind to repair himself.

We perceive no reason for making a distinction in cases of malicious prosecution instituted on criminal charges or in civil actions. The consequences may be ruinous in either case. A man's business, credit and reputation may be as effectually

destroyed by a malicious prosecution in a civil action as upon a criminal charge.

We entertain no doubt, upon principle and upon authority, that an action on the case for maliciously and without probable cause, suing out a writ of attachment, is maintainable for the injury of the business, credit and reputation of the defendant, notwithstanding the statute has required the plaintiff to give a bond, conditioned to pay all damages that may be occasioned by the wrongful suing out of the writ. It is a more complete remedy of which a party may avail, independent of the statutory remedy. *Chapman* v. *Pickersgill*, 2 Wils. 145; *Fortman* v. *Rottier*, 8 Ohio, 548; *Bump* v. *Betts*, 19 Wend. 421.

It is insisted that the verdict is not only unsupported, but that it is against the weight of the evidence, and that it is excessive and oppressive in its amount.

We have carefully considered the evidence, and find that there is testimony from which the jury could properly find that the writ was sued out and the levy made without any probable cause, and that there were no grounds, whatever, that would justify the appellant in resorting to such violent measures to enforce the collection of his debt. The evidence negatives the inference that the appellant, as a reasonable man, could have entertained the belief that the appellee was about to leave the State, with a view to remove his property, or that he was about to incumber or dispose of his property, with a view to hinder or delay his creditors in the collection of their just debts. We must, in all such cases, rely largely upon the verdict of the jury, as presenting the truth. It was a question of fact, submitted to the jury for their determination, and we can not say that their conclusion is not warranted by the evidence. It has been repeatedly held, by this court, that where the jury have passed on the questions of fact involved, under proper directions from the court, their finding will not be disturbed in the appellate court, unless it is clearly against the weight of the evidence.

We can not regard the verdict as being excessive, in view of

all the consequences that followed from the suing out of the writ, if it was, in fact, malicious and without probable cause, as the jury have found. The loss on the stock, and the money actually paid out in the defense of the suit in the circuit and supreme courts, amounted, according to the version of the appellee's testimony, to between $700 and $1,000. The evidence is uncontradicted, that, at and before the date of the levy under the attachment writ, the appellee was doing a prosperous business, with a good and advantageous credit. His business was utterly broken up, and his credit impaired, by the ill-advised and inconsiderate act of the appellant. The act of the appellant was hasty and inconsiderate, to say the least of it. There is evidence, if the jury gave full credence to it, from which they could find that he acted with express malice. The law, however, would imply malice from the want of probable cause.

We think that the case was fairly presented to the jury, and their finding can not be disturbed. Many of the errors complained of in the rejection of evidence were cured in a subsequent part of the trial, by the admission of the evidence objected to. That some slight errors may appear in the record, is more than probable; but we are unable to detect any substantial error for which the judgment ought to be reversed.

The instructions, taken and considered together, state the law with sufficient accuracy, and could not have misled the jury on the controverted facts.

We are satisfied that substantial justice has been done, and that, if a new trial should be awarded, and the trivial errors that appear in the record corrected, the result in the end would be the same. It would avail the appellant nothing to award a new trial on the evidence presented in the record. It appears, affirmatively as well as negatively, that there was no probable cause for suing out the writ of attachment, and the consequences to the appellee were most disastrous, and the appellant cannot escape liability for the injuries occasioned by

his unwarrantable acts. A verdict that would hold him guiltless, under any view that we have been able to take of the case, could not be permitted to stand. There is but little in the record, under the most favorable view, that palliates the conduct of the appellant.

The judgment must be affirmed.

Judgment affirmed.

NICHOLAS P. IGLEHART

v.

DAVID GIBSON *et al.*

1. FORFEITURE OF CONTRACT—*waiver of right thereto.* Where a series of promissory notes was given for the purchase price of land, and the contract of sale reserved to the vendor the right to declare a forfeiture thereof in case of default in the payment of any one of the notes within a specified time after its maturity, a transfer by the vendor of the last note in the series to a *bona fide* holder, after default in respect to one of the prior notes, and knowledge thereof, would operate as a waiver of the right to declare a forfeiture for such default.

2. By the transfer of the note last in the series, the vendor was debarred the right of rescinding the contract of sale on account of default in the payment of any of those still remaining in his hands, either under the power given in it or otherwise, because, by such transfer, he had put it out of his power to terminate the contract as to the whole extent to which it remained executory on the part of the vendee.

3. SAME—*right of vendee to treat the contract as rescinded.* An attempt by a vendor to declare a forfeiture of the contract of sale, under a power therein given, in case of default on the part of the vendee, when the vendor has, by his acts, waived his right so to do, would be wrongful, and put him in fault, so that the vendee would be at liberty to treat the contract as rescinded, stop short in its performance, and when he paid the note which had been assigned, he could sue the vendor in an action at law, and recover back all that he had paid under the contract, although, by the terms of the contract, if the forfeiture had been rightfully declared, all that had been paid by the vendee would have become forfeited to the vendor.

4. NOTICE — *who chargeable therewith.* Where a note, payable at the office of a particular banker, was placed in his hands, before maturity, for collection, by an agent of the payee, that would constitute the banker the agent of the owner, in respect to the note, and the latter would be chargeable with knowledge of a default in its payment at its maturity.

5. SPECIFIC PERFORMANCE — *in favor of vendee — waiver of default by vendor.* While the transfer, by a vendor of land, of the last of the series of notes given for the purchase money, would debar him of the right of rescinding the contract by reason of default in payment of any of the other notes, because he would thereby be disabled from surrendering up all the unpaid notes, such transfer would not operate as a waiver of any default on the part of the vendee in regard to any of the notes maturing after such transfer, so far as such default might affect the right of the vendee to a specific performance.

6. SAME — *effect of payment to the assignee.* The transfer itself, in such case, would be no waiver of subsequent defaults, nor would payment to the assignee after such defaults operate as a waiver of them, because he was a stranger to the contract.

7. SAME — *effect of payment of the last of the series.* Nor would the payment of the note transferred, although it was the last of the series given for the purchase money, so far excuse the default of the vendee in respect to other notes of the series, maturing after the transfer and before such payment, as to entitle him to a specific performance.

8. SAME — *acquiescence of vendee in declaration of forfeiture.* As a part of the purchase price of the land, the vendee was to pay certain notes given by a former owner to a third person, and secured by mortgage on the premises, and made default in respect thereto after the vendor had improperly declared a forfeiture of the contract for prior defaults, and a sale was made under a power in the mortgage: *Held,* from such default on the part of the vendee, after the declaration of forfeiture by the vendor, the former would be presumed to have acquiesced in such repudiation of the contract by the latter.

9. The vendee being able to pay, and refusing payment of his own notes maturing after the vendor had declared a forfeiture, in the absence of explanation, would justify the inference that he considered the contract at an end, especially when he had brought suit to recover back the money he had paid.

10. SAME — *the general rule.* In general, the rule may be stated, that to entitle a party to specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all necessary steps toward the performance on his part. If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed.

Statement of the case.

11. SAME — *of laches, and excuse therefor.* After a lapse of twelve years a vendee of land filed a bill for specific performance, and the only basis of an explanation of the delay was, that after various defaults on the part of the vendee, and among them, suffering a sale of the premises under a prior mortgage which he had agreed to pay as part of the purchase price, he wrote to the vendor, insisting it was his duty to reclaim the title, the property having been purchased in the name of a third person, and the vendor replied that he had no claim or interest in it, and this representation, which the vendee alleged was not true, he said, had misled him, causing him to bring his action to recover the money back which he had paid, and delayed him in resorting to his remedy for specific performance. But it was held to be no sufficient explanation for the delay, as the vendor was under no obligation, under the circumstances, to disclose his interest, if he had any; moreover, the vendee had notice long prior to the filing of his bill of the circumstances of the sale under the mortgage.

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

On the 24th of March, 1856, appellee Gibson, being the owner in fee, of the west ½ of the west ½ of south-east quarter of section 24, township 39 north, range east, situate in Cook county, subject to a mortgage made by one Asa Vail and wife, to Denny and Delano, to secure two notes made by Vail, amounting to $2,120, due September 16, 1856, entered into a contract, of that date, with C. W. Clayton and appellant, though Clayton's name alone was used as vendee, for the sale and conveyance of said premises by Gibson to Clayton, upon the latter paying the former the full sum of $11,386.66, as follows: $1,266.66 in cash; eight notes of appellant, of even date, payable at the office of E. I. Tinkham & Co., Chicago, in one, two, three, four, five, six, seven and eight months from date, for the sum of $1,000 each, and the two notes of Vail, above mentioned, then in the hands of Ogden, Jones & Co., as purchase money for said land to be paid as above set forth.

The prompt performance of which payments and covenants, on the part of the vendee, was expressly made a condition pre-

cedent to Gibson's covenant to give a deed, and time being of the essence of the contract.

The contract also provided, that in case default should be made in any of the payments of principal or interest at the time, or any of the times above specified for the payment thereof and for three days thereafter, the agreement and all the provisions thereof should be null and void at the election of the party of the first part, and all the payments which should then have been made thereon or in pursuance thereof should be absolutely and forever forfeited to the party of the first part.

The cash payment was made and Iglehart's notes delivered to Gibson at the execution of the contract, of which notes four only were paid, viz.: that due in one month from date, and those due in two, in five and in eight months from date. The Vail notes due September 16, 1856, were in no part paid, nor Iglehart's notes, due in three, four, six and seven months from date.

The mortgage from Vail to Denny & Delano contained a power of sale, and default having been made in the payment of the notes for $2,120 due September 16, 1856, which Clayton was to pay, the mortgagees, on the 11th of October, 1856, advertised the premises for sale on the 10th November, 1856, under the power, at which day they were sold, and one Allen Robbins became the purchaser, for $2,210, which was paid and he received a deed.

It appears in evidence that on the 28th of June, 1856, Gibson assigned, for value, to E. De Witt Robinson, the Iglehart note due in eight months from 24th March, 1856, to whom it was paid on the 27th November, 1856; that on the twenty-seventh of August, the notes due in three and four months, having been presented at the place where payable, and not paid, were again presented to Clayton, but not paid, though the note due the twenty-fourth of August was; that thereupon Gibson, on the twenty-seventh August, repudiated the contract and gave vendee notice in writing of a forfeiture. The Vail notes due September 16th, were not paid; but the Iglehart note due twenty-fourth of that month,

not having been paid at Tinkhams, was presented to Clayton, which he declined to pay, whereupon, on the 27th September, 1856, Gibson made another formal declaration of forfeiture.

On the 8th of July, 1857, Iglehart prepared a letter in Clayton's name and sent it by mail to Gibson, in which, after referring to the contract in question, and speaking of the fact of a sale under the Vail mortgage, the writer claimed that it was Gibson's duty to get the premises released from that sale; that his articles of agreement would require him to do so, or pay damages; also, that Clayton had made full payment of the entire purchase money by cash and notes; that nothing was left for him to pay, as his name was not connected with the notes and it was incumbent on Gibson to collect the notes unpaid. Yet he proposed to advance the money, at once, to take up the paper then unpaid and take a deed. That Gibson could not avail himself of the forfeiture clause in the contract for three good reasons, at least: First, there was nothing in the contract that bound him for any thing except the first cash payment, which was made at the time of its execution. Secondly, he was not bound to pay the notes; then, in order to a forfeiture, for non-payment, a demand should have been made on the day a payment was due, and notice to him of Gibson's intention to forfeit, fully given. Thirdly, if there had been a nominal forfeiture, the payment of the last note was a waiver; that such was the law of Illinois. That he could have demanded a deed as soon as the contract was executed; but, to avoid unpleasant actions, he proposed to pay the amount due, with interest, by buying the notes, and close it up amicably. If Gibson did not choose to do so he should resort to legal proceedings, to save which he made that friendly communication, not waiving any of his rights.

Gibson received this letter at Cincinnati, Ohio, where he lived, and on the twenty-fourth of the same month replied, as follows:

"In regard to the forty acres you speak of, I have no claim or interest in it. If you have allowed the land to be sold

under a mortgage which you promised to pay, it is no fault of mine, and you certainly would not expect me to re-purchase it to repay you for your own neglect of duty."

On the 19th of November, 1859, Clayton assigned the said contract, and all his right, title and interest therein, to Iglehart, who, on the 26th July, 1861, instituted an action of assumpsit in the Superior Court of Chicago, in Clayton's name, to recover back the money paid under the contract.

It appears that March 7, 1859, Robbins, by an arrangement made between him and Zenas Cobb, who had acted as agent for Gibson, in respect to making the contract with Clayton and presentation of the notes, conveyed the premises in question to one Wm. C. Vanderbilt, who was formerly a partner of Gibson, Cobb paying the consideration, by turning over to Robbins a mortgage in his favor against one Parker, for $2,500, and an interest in land estimated at $2,000, but which deed was left unrecorded until January 23, 1869. That on the 26th January, 1869, one William T. Miller purchased the premises for $26,000, and on the 9th March, same year, received a deed from Vanderbilt and wife and Gibson and wife.

On the 30th January, 1869, Iglehart, having taken no steps in his suit at law since its commencement, dismissed it, and filed the bill herein for specific performance of said contract. The bill alleges no excuse for the non-payment of the four Iglehart notes, or of the Vail notes, the payment of which was part of the purchase money agreed to be paid.

It seeks to avoid the effect of the suit at law, by alleging that Gibson, although he had an interest in the premises, after Robbins purchased, represented by the letter of 24th July, 1857, that he had none, and that appellant was ignorant of the facts until January, 1869; alleges the want of sufficient notice in the mortgage sale, of which he was likewise ignorant, and claims that the sale was void.

Gibson, among other things, in his answer, sets up as ground of resistance to specific performance, Clayton and Iglehart's

default in making payment of the four Iglehart notes, and default as to the Vail notes, *laches* and bad faith.

Miller relies in his answer upon the same grounds, and the defense of *bona fide* purchaser for valuable consideration without notice.

Replication was filed. On the hearing upon the pleadings and proofs, the court below dismissed the bill.

Messrs. DENT & BLACK, for the appellant.

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

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

At the time of the making and maturity of the Iglehart notes in question, no days of grace were allowable by the laws of this State, upon promissory notes. *Rees* v. *Mitchell*, 41 Ill. 365. Consequently, the note dated the 24th March, 1856, and payable three months after date, became due on the 24th of June. By the provisions of the contract in reference to forfeiture, that right accrued upon a default continuing three days after any note became due. On the 28th of June, Cobb, who acted as the general agent of appellee Gibson in the premises, and all of whose acts and doings were approved by him, transferred by indorsement, in the name of his principal, the note due in eight months from the 24th of March, 1856, to Robinson, for a valuable consideration, the latter becoming, so far as this record shows, a *bona fide* holder thereof. This act of dealing with the purchase, if done with knowledge of the fact of default in the payment of the three months' note, would amount to a waiver of any right of forfeiture of the contract, for such default.

Gibson was chargeable with such knowledge. The notes were made specifically payable at the office of E. I. Tinkham & Co., Chicago; and besides, Cobb had put them, before

maturity, into the hands of that firm for collection. They, therefore, were the agents of Gibson, and must have known of the default. Cobb was also living and doing business in Chicago, and evidently keeping close watch in the premises.

Default was also made, under the same circumstances, as to the four months' note, due July 24, 1856; but the five months' note, due at the same time in August, was paid by Iglehart on the 27th of that month, and payment received by Gibson's agents.

But, notwithstanding all these circumstances, Gibson, by his agent, on the 27th August, 1856, repudiated the contract, and declared it forfeited.

By the transfer of the eight months' note to a *bona fide* holder, as above stated, Gibson was debarred the right of rescinding the contract either under the power given in it, or otherwise, because he had put it out of his power to terminate it as to the whole extent to which it remained executory on the part of the vendee. *Murphy* v. *Lockwood*, 21 Ill. 615; *Chrisman* v. *Miller*, id. 236.

The six months' note, due on the 24th September, 1856, was, notwithstanding the previous acts, presented at the office of Tinkham & Co., for payment, at the time of its maturity, and payment demanded, but which was refused. Then on the 27th of the same month it was presented to Clayton, and payment demanded, which was expressly refused, and on that day the contract was again repudiated on behalf of Gibson, and declaration of forfeiture again made. In each case the declaration of forfeiture was made in writing, in a formal manner, and served personally upon Clayton. Under these circumstances, Gibson had no right to repudiate the contract, the act was wrongful and put him in fault, so that the vendee was at liberty to treat it as rescinded, stop short in its performance, and when he paid the note assigned to Robinson, the payment of which he could not successfully resist, could sue the vendor, in an action at law, and recover back all that he had paid under it.

And this, it seems, was the remedy resorted to, for, after the

assignment by Clayton, in 1859, of his interest in the contract to appellant, the latter, on the 26th July, 1861, commenced an action of assumpsit in the name of the former, in the Superior Court of Chicago, against Gibson, to recover back the money paid, but no steps were ever taken in the cause, although personal service was had upon Gibson, but it was permitted to remain thus pending, until the 30th of January, 1869, when, after a period of over seven years and a half, it was voluntarily dismissed by the plaintiff in interest, and this bill filed for specific performance, which is resisted upon two principal grounds: First, that appellant does not, by his bill, attempt to excuse the non-performance of the contract by the vendee, in essential particulars. Secondly, long lapse of time or gross *laches* unexplained.

It is conceded that default was made in the payment of the Iglehart notes, due, respectively, in three, four, six and seven months from date, and in the payment of the Vail notes, due the 16th September, 1856; the payment of all which, at the times they respectively came due, was a condition precedent to the execution of a conveyance by the vendor, and that time was of the essence of the contract.

It is not required of this court to say what would constitute a sufficient excuse for these defaults, because none is attempted to be set up, except the mere fact of the payment of the last note, due in eight months from date. The payment of that note was to a *bona fide* holder, not connected with the contract. The transfer of it on the 28th of June, as we have seen, would debar the vendor of the right of rescinding the contract, but it was neither an excuse for, nor waiver of, the subsequent defaults, as to the notes due in six and seven months, or the Vail notes, due the 16th September. Not an excuse, because the assignment of the note to Robinson in nowise prevented, interfered with, or embarrassed the vendee in the performance of his contract. It was not a breach of the contract on the part of the vendor. The notes were made negotiable, and he had a legal right to negotiate them, and the only consequence

was, that it debarred him of exercising another right, the proper exercise of which was dependent upon his ability and willingness to surrender up all unpaid notes to the vendee. It was no waiver of the defaults intervening the transfer and payment to Robinson. The transfer itself could be no waiver, because there was then no default, and of course, no knowledge that the defaults would happen. The receipt of the money upon it by Robinson could have no such effect, because he was a stranger to the contract.

Waiver is the relinquishment or refusal to accept of a right. Robinson, as the holder of the note, was vested with no right under the contract, and could therefore relinquish none. The transfer of the note by Gibson was, as to him, a payment of it at that time. Suppose Gibson had, at the date of the transfer, proposed to Iglehart to receive the *then* present worth of the note, and the latter had paid it; would it be contended that such payment was a waiver of all defaults occurring between that time and that of the maturity of the note?

We have seen by the proofs that a formal declaration of forfeiture was made on the 27th of August, which was wrongful and would authorize the vendee to treat the contract as rescinded and recover back the amount paid under it. Did the vendee not make this election? If he intended to hold the contract as subsisting, and claim specific performance of it, he should have paid, or tendered, the amount due on the Vail notes, September 16, 1856, and upon the Iglehart note due on the 24th same month. By making default in these payments, and letting the property be sold on the Vail mortgage, without showing it to be the result of fraud, accident or mistake, he must be presumed to have acquiesced in the repudiation of the contract by the vendor. Iglehart testifies to an ample ability on his part to pay. He says the non-payment of the Vail notes was an oversight. But Ogden, a disinterested witness, says, that Iglehart knew the notes in his hands were coming due, and that a sale would be made if they were not paid; that he promised to give his attention to it but he did not. Then the

vendee's attention was directly called to the Iglehart note, due on the 24th September, 1856, by a demand made upon him on the 27th, and with ample ability to pay he positively refused to do so. What other inference can be drawn, in the absence of any explanation, than that they had elected to treat the contract as at an end, especially when we find that suit was afterward commenced to recover back the purchase money paid? *Herrington* v. *Hubbard*, 1 Scam. 569. From the frame of the bill, appellant seems to have supposed that the vendee could refuse to pay at his discretion, if he only paid the last note, and a payment of that, though to a party other than the vendor, would give him the right to have specific performance of his contract; because, the only allegations of the bill as to performance by the vendee or appellant are, that the cash payment of $1,266.66 was made at the time of executing the agreement, and that afterward, the first, second, fifth and eighth of the notes of Iglehart, mentioned in the agreement, were paid. "The last of which said notes, dated March 24, 1856, and payable eight months from date, was duly paid at maturity, to wit, on the 27th day of November, 1856." It is not alleged that it was paid to Gibson, nor is any thing concerning the transfer of it to Robinson, or the repudiation of the contract on the 27th of August by the vendor, and no excuse is pretended to be set up for the non-payment of the Vail notes, or any of the other four Iglehart notes. Enough of the contract is set out to show that time was of the essence of it.

"No rule," said this court, "is better settled than that a party can not compel specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance." *Scott* v. *Shephard*, 3 Gilm. 483; *Heckard* v. *Sayre*, 34 Ill. 142; *Stow* v. *Russell et al.*, 36 id. 18; *Supervisors* v. *Henneberry*, 41 id. 180.

"In general, it may be stated, that to entitle a party to specific performance he must show that he has been in no default in not having performed the agreement, and that he has taken all

necessary steps toward the performance on his part. If he has been guilty of gross *laches*, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed." 2 Story's Eq. Jur., § 771.

Here the bill shows upon its face that the party seeking specific performance has been in default, and which he does not attempt to account for.

He applies for relief after a long lapse of time — upwards of twelve years. Is this delay explained by equitable circumstances? If not, appellant has been guilty of gross *laches*.

The entire basis of the explanation is, that Gibson, by stating in his letter of the 24th July, 1857, in reply to the Iglehart-Clayton letter of the 8th of that month, that he then had no claim or interest in the property, misled appellant and Clayton. But, the first question is, was Gibson under any duty whatever to make disclosure as to his interest? It was not his fault that the property had been sold under the mortgage, but the fault of appellant and Clayton. There is no pretense that there was any fraud or abuse of the power in making the sale. Gibson, therefore, had a perfect right to obtain an equitable or any other interest in the property, and hold it in any manner he pleased, and if he was under no obligation to make disclosure of his interest before, certainly it can not be pretended by anybody not blinded by the pardonable infirmities of paternity toward offspring, that the letter of July 8 imposed any; for, a more uncandid communication, or one fraught with more unreasonable claims, can seldom be found in the records of human affairs.

But Iglehart testifies, that M. D. Ogden, about the last of November, 1856, called his attention to the advertisement and sale, and that he found that Cobb virtually paid the money and did all the business, but had the property struck off to Robbins, Gibson still having an interest in the property to the extent of witness' four unpaid notes and his agreement; witness did not believe this sale *bona fide* or binding.

If he knew, in November, 1856, that Cobb virtually paid

the money, but the property was placed nominally in Robbins' name, and inferred from facts within his own knowledge, that Gibson had an interest, and that the sale was not *bona fide* or valid, then is it reasonable or probable that the answer Gibson made to the provoking claims and pretensions of appellant's letter of the 8th of July could have had any tendency whatever to mislead appellant or improperly shape his course? He says he was led by it to bring the action at law in 1861. If so, he was induced to resort to his proper remedy, which should, under the circumstances of this case, have been pursued with diligence.

The bill in this case fails to state a case for specific performance, because it fails to excuse defaults on the part of appellant, apparent upon the face of it. The case made by the proof is different from that attempted to be stated in the bill. The delay in applying for relief is unexplained by equitable circumstances. For these reasons we are of opinion that appellant has not shown himself entitled to specific performance, as against Gibson, and, as a matter of course, he is not, as against Miller, the purchaser of the property.

The decree of the court below is therefore affirmed.

Decree affirmed.

JOSEPH DEMESMEY

v.

CELESTIN GRAVELIN.

1. PLEADING — *defects cured after verdict.* A declaration in assumpsit, where the evidence supported only an action for money had and received, contained the common counts, but no allegation of a promise to pay the sums mentioned in the several counts, except as to the amount on an account stated: *Held,* such insufficiency of the declaration was cured by verdict.

Syllabus. Statement of the case.

2. DEED — *escrow.* If a party execute a deed and deliver it to a third person, to be delivered to the grantee upon some future event, it is not the grantor's deed until the second delivery.

3. VENDOR AND PURCHASER — *when the latter may recover back purchase money.* So where the grantor, on receiving a part of the purchase money, executes a deed and delivers it to a third person to be delivered to the grantee on the latter becoming satisfied as to the title, the agreement being for a good title, upon it appearing that the grantor is unable to make a good title, the purchaser has the right to consider the contract at an end, and to recover the money paid, in an action for money had and received.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

This action was brought by Gravelin against Demesmey, to recover money paid by the former to the latter on a contract for the purchase of land. The plaintiff, basing his right of recovery on a breach of the contract on the part of the defendant, declared on the common counts, but failed to allege any promise to pay the sums mentioned in the several counts, except as to the amount on an account stated, and the defendant insists that the plaintiff must recover, if at all, on that count; that the testimony, if it would support a verdict at all, would not on that count; and denies there was any breach of the contract on his part. The defendant did not hold the legal title to the land, but procured one Jarvis and others to execute deeds for the lands to the plaintiff, which deeds, as the plaintiff testifies, were left in the hands of LeMoine, the attorney who drafted them, until the proper examination could be made to satisfy the plaintiff that they conveyed the title.

Messrs. LAKE & LORING, for the appellant.

Mr. W. A. RICHARDSON and Mr. T. P. BONFIELD, for the appellee.

MR. JUSTICE THORNTON delivered the opinion of the Court:

This is an action of assumpsit. The declaration contains the count for money had and received. The general issue was filed, and plaintiff recovered a verdict for $680. The alleged insufficiency of the declaration is cured by verdict.

The testimony of the plaintiff is, that he purchased a tract of land of defendant; was to have a good title; and paid on the contract $680. He further testified that LeMoine, who was selected to draft the deeds, said that the title was good. The deeds were left with LeMoine until the proper examination could be made.

The land had been inherited by four children, of the name of LeFevre. The record wholly fails to show that Edward, one of the heirs, had conveyed to any person, and, therefore, at the time of the agreement, had one-fourth interest in the land.

Demesmey contradicts the statement of Gravelin to some extent. He testified that Gravelin was to pay $3,600, for which he was to release his interest; that "Jarvis was to make a deed, and I was, as I *understood* it, to have nothing to do with it. There were no arrangements as to payments." The fact that no arrangement as to payments was made strengthens the evidence of Gravelin that the trade was not consummated until he was satisfied as to the title. He employs a lawyer, who reports that the title is defective. He then informed Demesmey that he could not take the land, and LeMoine surrendered the deeds to the grantors.

Jarvis had married one of the LeFevre heirs, and he and wife and Alfred LeFevre join in the deed to Gravelin. Jarvis also claimed the interest of Maxmie LeFevre, but there is no pretense that any of the grantors owned the interest of Edward LeFevre.

LeMoine also corroborates Gravelin. He says that he held the deeds as an *escrow*. The deeds, in fact, were never delivered to the grantee. If a grantor execute a deed, and

deliver it to a third person, to be delivered to the grantee upon some future event, it is not the grantor's deed until the second delivery. In this case the grantee never had the deeds. The future event never happened. The title was bad, and the trade was not perfected.

The proof shows that the agreement was, to have a good title, and that there was an utter inability to make one. The law, then, is plain. Appellant sold an interest which he did not have, and the purchaser had the right to consider the contract at an end, and to recover the money paid in an action for money had and received.

The contract was rescinded and the land sold to other parties. The money paid was received and retained wrongfully, and should be recovered. *Smith* v. *Lamb*, 26 Ill. 398.

The judgment must be affirmed.

Judgment affirmed.

ISAAC SIMMONS

v.

JOHN B. CLARK.

1. ACCORD AND SATISFACTION—*of a promise to pay a less sum in satisfaction of a judgment for a larger sum.* A judgment creditor and his debtor entered into a written agreement, by which the latter was to pay the former $500 in six months, and to give his promissory note for $3,500 payable in two years, and the note was given accordingly. The contract provided that when the debtor "shall have paid the said sums of money, with interest, the same are to be in full settlement of the judgment," which was for over $8,000; and the creditor "further agrees and binds himself to release said judgment upon payment of the sum mentioned in said promissory note by the" maker thereof: *Held*, the proper construction of the agreement was, that the payment of the $4,000 was to operate as a satisfaction of the judgment, not that the mere promise of payment was to have that effect.

2. A promise in such case, without execution, and without an express agreement that the promise itself shall be a satisfaction, will not amount to a satisfaction. The distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance.

3. So the mere execution of such an agreement, without a payment according to its terms, would not debar the judgment creditor from maintaining an action on his judgment.

4. SAME—*discharge as to residue of judgment.* Nor would such an agreement operate as a present release of all the judgment beyond the $4,000 agreed to be paid in its satisfaction. The meaning of the agreement was, that the release was to take effect in the future, upon payment of the moneys named, and then to be a release of the entire judgment, not merely a part of it.

5. SAME—*construction of the contract as to other claims.* It seems that prior to the making of this agreement, the debtor had given a mortgage to secure three notes, upon two of which the judgment in question was rendered, and the other belonged to a third person. In addition to the provision in the agreement that the judgment was to be satisfied by the payment of the $4,000, it provided that the judgment creditor would protect the debtor against the third note secured by the mortgage, and that whatever dividend the judgment creditor might receive from the sale of the mortgaged premises should be considered as forming a portion of the $4,000. It was *held*, this provision, in regard to the application of the dividend which the judgment creditor might receive from the mortgaged property, did not operate to postpone his right to have payment of the $4,000 within the time stipulated in the agreement, although proceedings were pending at the time such payment became due for the ascertainment of the amount of the dividend.

6. SAME—*effect of a partial payment after the time expired.* Nor would the acceptance by the judgment creditor, of a partial payment, after the expiration of the time fixed in the agreement and note, at all affect his right to enforce the collection of his judgment, so far as it remained unpaid, no matter in what form he gave the evidence of the receipt of such partial payment.

7. SAME—*surrender of the note.* It was not essential to the right of the judgment creditor to institute suit upon his judgment, the agreement in regard to the payment of the $4,000 not being complied with, that he should first have surrendered the note mentioned in the agreement; it would be sufficient to surrender it on the trial, or, if not so surrendered, and not shown to be lost or destroyed, it would operate as a payment of the judgment to that extent.

8. ERRORS — *in foreign judgments — in what mode to be corrected.* It was *held,* in a suit to enjoin an action at law upon a foreign judgment, that this court cannot sit in review of a judgment obtained in another State, for the purpose of correcting a mere error in its rendition, where there was jurisdiction of the subject matter and the parties, and no fraud in obtaining the judgment.

APPEAL from the Superior Court of Chicago.

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

Messrs. GOOKINS & ROBERTS, for the appellant.

Mr. B. D. MAGRUDER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill filed in the Superior Court of Chicago, to enjoin the prosecution of a suit by attachment on a certain judgment, for $8,253.94, recovered by the appellee, against the appellant in one of the State courts of Maryland. The claim for equitable relief under the bill was founded on the following agreement between the parties:

Know all men by these presents, that for the purpose of compromising and settling pending claims of the undersigned, John R. Clark against the undersigned Isaac Simmons, the said Clark and Simmons agree and bind themselves each to the other, as follows, viz.: The said Simmons agrees to pay to the said Clark the sum of five hundred dollars in cash, and to give his note of the following tenor, that is to say, to pay thirty-five hundred dollars on or before two years from the date hereof; but the sum of five hundred dollars, part of said thirty-five hundred dollars, to be paid within six months; and when the said Simmons shall have paid the said sums of money, with interest, the same are to be in full settlement of the judg-

ment hereinafter mentioned. And in consideration thereof the said Clark hereby agrees and binds himself to give a stay of execution for two years upon a judgment by default, obtained by him against the said Simmons in the superior court of Baltimore city, in the year 1865, but not extended until this year; and the said Clark further agrees and binds himself to release said judgment upon payment of the sum mentioned in said promissory note by the said Simmons. And the said Clark also agrees to indemnify and protect the said Simmons from and against all claims of James M. Buchanan, and the estate of Samuel Chew, M. D., and likewise from and against all claims of Mrs. Rachel Tyson, widow of John S. Tyson, Esq., or of said John S. Tyson's estate, upon three promissory notes, two of which constitute the claim upon which said judgment is founded, and the other for about twenty-three hundred dollars is held by the estate of said Chew; and all of which notes were secured by a mortgage upon property in Anne Arundell county, the said Simmons to the said Rachel Tyson.

In witness whereof, the said Simmons and Clark have, respectively, hereunto set their hands and seals, on this sixteenth day of April, A. D. 1866. (Signed in duplicate.)

(Signed) ISAAC SIMMONS, [SEAL.]
JOHN R. CLARK, [SEAL.]

Signed, sealed and delivered in presence of
Witness, EDWARD R. SCHUMACKER.

And it is furthermore agreed by the parties hereto, in explanation of the foregoing indemnity as regards Dr. Chew's claim against the said Simmons, that the said Clark is not to be held responsible to the said Simmons to an amount beyond the proceeds obtained from the sale of the said mortgaged property now in the hands of Messrs. Stackett and Snowden, trustees. And it is furthermore agreed by the parties hereto, that whatever dividend the said Clark and Buchanan may receive from the sale of the aforesaid mortgaged property,

shall be considered as forming a portion of the four thousand dollars upon which this compromise is made.

(Signed) ISAAC SIMMONS, [SEAL.]
JOHN R. CLARK, [SEAL.]

Witness, EDW'D. R. SCHUMACKER.

Receipts indorsed on the agreement signed by Clark, as paid by Simmons, as follows:

April 17, 1866. $500 in money, and Simmons' note for $3,500.

December 27, 1866. $200 on the within agreement.

March 8, 1867. $300, same.

February 9, 1869. $250 "on the within agreement. This and all the above receipts, except the first, being credited also on said Simmons' note herein referred to."

It is evident that the agreement, and note therein mentioned, which was given, were not taken in satisfaction and extinction of the judgment. The agreement provides, that, when Simmons shall have paid said sums of money, with interest, the same are to be in full settlement of the judgment. Clark agrees to give a stay of execution for two years upon the judgment, and further agrees to release the judgment upon payment of the note. It was only payment of the money which was to satisfy the judgment, and not the promise of payment.

Nor can we accede to the view which is urged, that the agreement was a present release of all of the judgment beyond the $4,000. To have that operation, there must be express words or an unequivocal intention to that effect; but all the language and intent of the agreement, in respect to the release, are, that it is to take place in the future, upon payment of the

moneys named, and to be then a release of the judgment, not of part of it.

This is the case, then, of a promise without execution; and without an express agreement that the promise itself should be a satisfaction; in such case there is no satisfaction of the original debt. The distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance. *Cumber* v. *Wane*, Smith's Lead. Cas. 146. A mere *agreement*, unexecuted, to accept a smaller sum in discharge of a larger, is not valid, and the giving of a negotiable promissory note of the debtor, for the smaller sum, on account of, and not in satisfaction of the prior debt, will make no difference. Id. 259, top paging, and see cases there cited.

Where an accord is relied on, it must be executed; readiness to perform is not sufficient, nor is part performance sufficient; an accord is always to be entirely executed and not executory in any part. 2 Parsons on Cont. 193; *Russell* v. *Lytle*, 6 Wend. 390; *Hawley* v. *Foote*, 19 id. 516.

Here, this judgment of $8,253.94 was to be satisfied upon the payment of $4,000 within two years from April 16, 1866; payment, and not the promise of payment, was to be received in satisfaction; the two years have elapsed and the appellant has only paid $1,250. He has not performed, and there is no satisfaction of the judgment.

It is claimed that, under the last clause of the agreement, Simmons was not obliged to pay his note, due by its terms on the 16th day of April, 1868, until the courts should finally decide what dividend Clark & Buchanan were to have from the proceeds of the mortgage sale.

Simmons had given a mortgage to secure the payment of three notes, upon two of which, belonging to Clark & Buchanan, the judgment in question was rendered, and the other note belonged to Chew's estate. The mortgaged prop-

erty had been sold, on the 5th day of February, 1865, for $3,178.14.

Appellant alleges, in his bill, that on the 9th day of February, 1869, when he made his last payment of $250, the circuit court had decided that Clark & Buchanan were entitled to about three-fourths of the $3,178.14, that is to say, about $2,383.59, but that an appeal had been taken from that decision, which was then pending; and it is claimed that, as long as that appeal was pending, the dividend which Clark & Buchanan were to receive from the proceeds of the mortgaged property had not been determined, and, until it was determined, that appellant was not obliged to pay any more of the $4,000.

But, as we construe this agreement, the $4,000 was to be paid within two years. If, in the mean time, any thing was received from the proceeds of the sale of the mortgaged property, that was to be taken as a part of the $4,000; but the payment of the $4,000, or any part of it, was not to be postponed until the courts should decide upon the amount of the dividend coming to Clark & Buchanan from such proceeds.

Simmons should have paid the $4,000 within two years, and if, afterward, Clark had kept any dividend obtained by him, Simmons would have had his action against him for money had and received.

But the bill itself states that the appellate court decided, on March 12, 1869, six months before Clark commenced his action on the judgment, that Clark & Buchanan were not entitled to any dividend; alleging in excuse that appellant did not know of it until after the commencement of such action.

We do not consider that the acceptance by the appellee of $250 after the expiration of the two years, on February 9, 1869, and the indorsement of it on the agreement and note, in any way affect the right of the appellee to enforce the collection of this judgment. At that time, he had the right to collect the full amount of the judgment remaining unpaid. It was of no consequence in what form he gave the evidence of the receipt of the

$250 then paid, whether by indorsement on the agreement or note, or by an independent receipt. Indorsing it on the note might manifest a willingness, perhaps, at that time, to accept the amount of the note in full of the judgment, or it might be evidence tending to show that the note was accepted in satisfaction of the judgment. We can give to it no other effect.

It is again insisted, that the note given under the agreement should have been surrendered up before the commencement of the suit upon the judgment.

The bill does not allege that the note had been negotiated, or that it was beyond the power of the appellee to produce it; and it would be sufficient if the appellee should, at the time of the trial of the suit upon the judgment, produce the note to be canceled; and if he failed to do so, and the note were not shown to be lost or destroyed, it would operate as a payment to that extent, upon the judgment. *Hughes* v. *Wheeler*, 8 Cow. 77; 1 Smith's Lead. Cas., *supra*.

It is lastly claimed, that in case the appellant should be entitled to no other relief, he is, at least, entitled to be relieved against the judgment to the extent of $500; claiming that there was an error to that amount in the computation of the sum due upon the notes on which the judgment was rendered.

We cannot sit in review of a judgment obtained in another State, for the purpose of correcting a mere error in its rendition, where there was jurisdiction of the person and subject matter, and no fraud in obtaining the judgment, and this bill sets up no pretense of such want of jurisdiction or fraud.

The agreement in this case recites that it was made for the purpose of compromising and settling pending claims between the parties; but, so for as the bill shows, there was no disputed claim between the parties at the time the agreement was made, in respect to this judgment, or otherwise; the error claimed of the $500, does not appear to have ever been set up previous to the filing of the bill; and, so far as any compromise was concerned, it seems to have been nothing more than an agreement to accept a less sum in payment of a greater one, a mere

act of grace, which the appellant never availed himself of in accordance with the terms of the agreement.

From the showing of the bill, we perceive no obstacle, legal or equitable, in the way of the collection of this judgment; the appellee should be left at liberty to pursue his remedy for that purpose, and the decree of the court below sustaining the demurrer, dissolving the injunction and dismissing the bill, is affirmed.

Decree affirmed.

JOHN J. WORDEN

v.

JAMES H. SHARP.

STATUTE OF FRAUDS — *verbal contract for sale of land.* Where a verbal contract for the sale of land has been executed on one side, by the purchaser receiving a deed for the premises, the statute of frauds has no application and the vendor may recover for the unpaid purchase money.

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

This was a suit brought by Sharp against Worden, to recover the balance of the purchase money due the plaintiff on a sale by him of a tract of land, to the defendant.

It appears that Sharp, by verbal contract, sold to Worden thirteen and a half acres of land, a tract of eight and a half acres and one of five acres. At the time of the sale Sharp did not have the legal title to either parcel, but procured conveyances to be made to Worden, which he accepted. The five acre tract Sharp had previously purchased from one Crane, by verbal contract, and after the sale by Sharp to Worden, by agreement

of the parties, Crane conveyed to Worden, the latter paying him $50.

On the trial below, the plaintiff recovered a judgment, from which the defendant appealed. The defense was, that the contract being verbal, it was within the statute of frauds and could not be enforced by either party.

Messrs. STEWART & PHELPS, for the appellant.

Messrs. KIDDER & NORCROSS, for the appellee.

PER CURIAM: This was an action, originally brought before a justice of the peace, in which the plaintiff recovered judgment, and, on appeal to the circuit court, he recovered judgment a second time. There is no ground for reversing it. The statute of frauds has no application. The contract was executed, on one side, by the defendant's receipt of a conveyance for the five acres from Crane. Crane gave him this deed, as he himself testifies, under the contract between Crane and Sharp, and Sharp and the defendant, and the jury did rightly in finding a verdict for Sharp against defendant, for the contract price of the land, less the $50 paid by the defendant to Crane.

Judgment affirmed.

RICHARD BALL *et al.*

v.

JOHN BENJAMIN.

1. EVIDENCE — *construction of words used in a contract — when to be determined by a jury.* A purchased of B a machine, called a double saw bench, to be used in his planing mill; but, after the machine was ordered, and before it was delivered, formed a partnership with C. A, however, when

the machine was delivered, gave his individual note for it. Upon a subsequent dissolution of the firm, C executed to A a bond, by which he undertook to pay all the indebtedness of the firm, and "all debts due for material used in the construction of the planing mill and building occupied by them:" *Held*, in an action by B against C, wherein it was sought to recover the price of the machine, on the ground that the defendant undertook to pay it, among other debts, the bond should have been admitted as evidence, and the jury permitted to decide, in view of all the evidence, whether, by the phrase "material used in the construction of the planing mill," contained in the bond, the parties intended to include this machine.

2. PAROL EVIDENCE — *when a contract is in writing.* But evidence offered by the plaintiff, to show that the defendant, by the terms of his purchase of A's interest in the mill, was to pay the debt to plaintiff, was properly rejected, for the reason that the terms of the dissolution were embodied in the bond.

3. ACTION — *on a promise to another.* The doctrine is settled in this court, that a third party may maintain an action on a promise made to another for his benefit.

WRIT OF ERROR to the Circuit Court of Whiteside county.

The opinion states the case.

Messrs. KILGOUR & MANAHAN and Mr. D. P. JONES, for the plaintiffs in error.

Mr. F. VANDERVOORT, for the defendant in error.

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

This was an action brought by plaintiffs to recover the value of a machine called a double saw bench, made by plaintiffs for one Call, to be used by him in his planing mill. After Call ordered the machine, but before it was delivered, the defendant entered into partnership with Call, but Call, when the machine was delivered, gave his individual note for it. This suit is based on the theory that, when Call and the defendant subsequently dissolved their partnership, the defendant undertook to pay this, among other debts.

The plaintiffs offered in evidence a bond executed by defendant to Call at the time of the dissolution, by which the defendant undertook to pay all the indebtedness of the firm and "all debts due for material used in the construction of the planing mill and building occupied by them." This offered evidence was not admitted. The plaintiffs then proposed to prove by Call that defendant, by the terms of his purchase of Call's interest in the mill, was to pay this particular debt. This evidence was also excluded, because the terms of the dissolution were embodied in the bond. This was a good reason, but the bond itself should have been admitted and the jury should have been permitted to decide, in view of all the evidence, whether by the phrase "material used in the construction of the planing mill," contained in said bond, the parties intended to include this machine. If such was their purpose, the plaintiffs were entitled to a verdict, and the jury should have been so instructed. Whether this was so used by the parties was a question of fact, which it was not proper for the court to decide, by refusing to let the bond go to the jury. The interpretation to be given to these words does not depend upon any legal principle, but upon the nature of the machine and the extent to which it was a part of the planing mill. It will be observed that the planing mill and the building are mentioned in the bond as separate things, and the question is, whether the parties intended to cover by the term "planing mill," all the machinery used in doing the work.

That the plaintiffs can maintain an action, if the defendant promised Call to pay this debt, is settled in this court by *Bristow* v. *Lane*, 21 Ill. 194.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOSEPH LIGHTHALL

v.

JOHN COLWELL *et al.*

1. PAROL EVIDENCE cannot be heard to contradict, vary or explain a written agreement. Its meaning must be ascertained from the instrument itself without the aid of extraneous evidence.

2. ACTION — *recovery where the contract has not been complied with.* In an action brought to recover the balance of the contract price for building a house on the land of the defendant, a portion thereof having been paid, he contending the work was not done according to the terms of the agreement, it was *held*, the plaintiff, notwithstanding he had not performed all his covenants, was entitled to recover such unpaid balance, less any damage resulting to the defendant by reason of such neglect to comply with the terms of the contract.

APPEAL from the County Court of La Salle county; the Hon. CHARLES H. GILMAN, Judge, presiding.

The opinion states the case.

Mr. H. K. BOYLE, for the appellant.

Messrs. BUSHNELL & AVERY and Mr. E. F. BULL, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of debt, brought by appellees in the county court of La Salle county against appellant, on a contract to build a house by the former for the latter. The agreement specifies the sum to be paid by appellant and the character of the building to be erected by appellees. It is averred that appellees did furnish the materials and finish the house according to the terms of the agreement. Appellant filed pleas of *nil debit*, *non est factum*, set-off, that plaintiffs did not build

the house according to the terms of the agreement; that plaintiffs did not keep their covenants in the agreement; that plaintiffs did not use clear siding on the building, and that the work was not done according to the agreement, whereby appellant sustained damage. Replications were filed and issue joined on each of the pleas. It will be observed that a number of these pleas are not appropriate to this form of action, but no exceptions were taken to them on the trial below, and a trial was had by a jury, resulting in a verdict and judgment in favor of plaintiffs, and defendant has appealed to this court.

The first error assigned questions the correctness of the decision of the court below in admitting evidence of the custom in that neighborhood as to boarding carpenters while building a house for the owner of the land. As drawn and signed by appellees, the agreement required appellant to board the hands without charge while engaged in building the house, but he struck that clause out before he signed it, and appellees' attention was called to the erasure when the agreement was returned to them executed by the appellant. They received it and went on and completed the building without any thing further being said in reference to board. From this evidence, and the agreement as it reads, there can be no question that both parties understood that appellant was not to board the hands free of cost to appellees. As executed, appellant was not bound to board the hands, under the terms of the agreement, and if he did board them he had the same right to have compensation as would any other person. And it was clearly erroneous to permit appellees to give evidence that it was customary for carpenters to have their board free of charge from persons for whom they worked. It was against and calculated to overcome the clear intention of the parties, as manifested by their contract. And the rule is familiar, that parol evidence cannot be heard to contradict, vary or explain a written agreement, but its meaning must be ascertained from the instrument itself, without the aid of extraneous evidence.

Appellant asked, and the court refused to give, these instructions:

1st. "The jury are instructed, as a matter of law, that if they believe from the evidence that the plaintiffs did not build said dwelling-house, and do said work, and complete said house according to the conditions and stipulations of the agreement introduced in evidence, then the jury will find for the defendant."

2d. "The jury are instructed, as a matter of law, that if they believe from the evidence that the plaintiffs did not, prior to the commencement of this suit, perform all the covenants in said agreement in reference to the building of said house, then the jury will find for the defendant."

3d. "The jury are instructed, as a matter of law, that if they believe from the evidence that by the terms of said agreement the plaintiffs were to put on said building clear siding, and if the jury believe from the evidence that said plaintiffs did not put upon said building such clear lumber as agreed upon, then the jury will find for the defendant under the issues in this case."

These instructions were properly refused. The contract price to be paid was $620, $500 of which seems to have been paid, leaving $120. These instructions claim that a failure on the part of appellees to perform the agreement as therein specified, entitled appellant to recover. If there were such breaches as named, appellant would be entitled to recover damages to the extent of the injury sustained, to be deducted from the unpaid portion of the contract price. It was not for the court to find that the damages were equal to the $120, which was unpaid. Had these instructions been given, the court would have so found. The instructions, to have been correct, should have simply directed the jury, if there were such breaches, to find the damages sustained, and deduct the amount from any unpaid balance of the price of the house. But for the error in admitting improper evidence, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Syllabus.

BOARD OF SUPERVISORS OF WARREN COUNTY

v.

AZRO PATTERSON *et al.*

1. COUNTIES — *of their power to sell land purchased for a specific purpose.* The proper constituted authorities of a county have the power, under the statute, to sell and convey real estate owned by the county, although such real estate may have been purchased for the purpose of erecting thereon a court house and other county buildings.

2. SAME — *where the purpose of the purchase by the county was expressed in the contract and deed.* In a contract of sale of land to a county was this clause: that the party of the first part "agrees to sell to the said party of the second part (certain described property) for court house and other county buildings," and the same clause was contained in the deed to the county: *Held,* those words did not operate in anywise to limit or restrain the power of alienation by the proper county authorities.

3. If A buys a lot of ground of B, and it is declared in the deed that he purchased it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention.

4. SAME — *effect of a contribution by individuals.* Where the authorities of a county, in proposing to buy a site for county buildings, were unwilling to pay the price asked for the property by the owner, and individuals interested in property adjacent to that so proposed to be purchased, voluntarily, and without solicitation on the part of the county authorities, offer to pay, and do pay, the difference in the price, in order to secure the site for such purpose: *Held,* that fact will not authorize such individuals to restrain the county authorities from making sale of the premises so purchased by them.

5. SAME — *power to sell — whence derived.* The county commissioners' courts, established by the constitution of 1818, were by law vested with plenary powers over all the concerns, fiscal and otherwise, of the several counties, including the power of alienation of their real estate, and these powers were succeeded to by boards of supervisors, in those counties which have adopted township organization, under the constitution of 1848, and by county courts in those counties which have not adopted that organization.

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

The opinion states the case.

Mr. WILLIAM MARSHALL and Messrs. FROST & TUNNICLIFF, for the appellants.

The board had full power, under the statute, to sell the property, which they had originally purchased with a view to using the same exclusively for the erection of a court house thereon. The board has all the power originally conferred upon the county court and upon the county commissioners' court, before the adoption of the township organization, as well as the power conferred expressly upon the board of supervisors under the township organization act. Scates' Statutes, 337, § 4, subd. 1 and 4; also, p. 299, § 15, p. 302, §§ 35 and 36; *The People* v. *Thurber*, 13 Ill. 554–559; *Green* v. *Wardwell*, 17 id. 278–281.

It is claimed, that the words following the grant and description of the property, "to be used by said party of the second part for a court house, jail, and any other necessary county buildings," restrict the rights of the county, and the board of supervisors, as its agent, to the use of the property for the erection of county buildings thereon, and exclude their right to use it for any other purpose. This is not the fair intendment from the language used. It simply designates the purpose for which the property was purchased, a legitimate public object, which warrants the board in making the purchase, and it imposes no obligation upon the board forever to devote the premises to this use, or to devote them to it at all, should the exigencies of the county or the public interests require that some other use should be made of the property; but, if this is the import of this clause in the deed, it is of no avail, for the simple reason, that it is repugnant to the words of the grant, and hence, by the settled rule of construction, applicable to deeds, it is utterly *void*. 4 Kent's Com. (marginal paging) 131–468; 2 Black. Com. (marginal paging) 298; Willard on Real Estate and Cont. 103, 104; 2 Washb. on Real Prop. 639–646; 2 Bacon's Abridg. 555; 1 Chitty's Pl. (marginal paging)

3; 1 Washb. on Real Prop. (marginal paging) 459; *Crawford* v. *Chitman*, 17 Ohio, 452; *Baulos* v. *Ash*, 19 Ill. 187, 188; *Hornbeck* v. *Westbrook*, 9 Johns. 74; 1 Kern. 315–322, 323.

Mr. JOHN J. GLENN, for the appellees.

In construing deeds, as other writings, courts must seek to ascertain and give effect to the intentions of the parties, and for that purpose they may and will take notice of attendant circumstances, and by them determine the intentions of the parties. *Hadden* v. *Shoutz*, 15 Ill. 582; *Williams* v. *Claiborne*, 1 S. & M. Ch. 364; *Woods* v. *N. M. Comp.*, 5 N. H. 473. The evidence in this case clearly establishes these facts: The board of supervisors purchased the premises for the purpose of erecting thereon a court house and other county buildings; the appellees paid their portion of the purchase money, with the understanding and agreement they were to be used for that purpose; that the negotiations for the premises would have failed if the clause "*for the purpose of erecting thereon a court house, jail, and any other necessary county buildings*," had not been inserted in the contract at the time of the purchase; and the appellees would not have paid any part of the purchase money of the premises, if they had been informed the premises were not to be used for that purpose.

The clause in the contract and deed "*for the purpose of erecting thereon a court house, jail and any other necessary county buildings*," is a condition subsequent. And if the board of supervisors fail to use it for that purpose, or attempt to sell and dispose of it, they thereby forfeit all claim to that portion of the purchase money paid by appellees, and must refund it to them. *Police Jury* v. *Reeves*, 18 Martin Lou. 221; S. C., 3 Cond. R. 818; *Pickle* v. *McKissick*, 16 Penn. St. 140; *Hayden* v. *Stoughten*, 5 Pick. 534; *Grissom* v. *Hill*, 17 Ark. 483; *Lessees of Sperry* v. *Pond*, 5 Ohio, 242; *Hefner et al.* v. *Yount et al.*, 8 Blackf. 455; *Scott* v. *Stipe et al.*, 12 Ind. 74; *Castleton* v. *Langdon*, 19 Vt. 217; *Kirk* v. *King*, 3

Barr, 440; *Leach* v. *Leach*, 4 Ind. 628; *Broadway* v. *State*, 8 Blackf. 290.

The clause inserted in the deed and contract immediately following the description of the premises "for a court house," etc., was inserted for the protection of the appellees. And, although they are not mentioned in the deed or contract, it is peculiarly the province of a court of chancery to see that this stipulation is carried out or their money is refunded to them, and, especially in this case, when their interest is held in trust. *Leach* v. *Leach*, 4 Ind. 628; *Wallace* v. *Associate Reformed Church*, 10 id. 162; *Scott* v. *Stipe et al.*, 12 id. 76; *Bleeker* v. *Bingham*, 3 Paige, 249; Kerr on Injunctions, 97; *Hills* v. *Miller*, 3 Paige, 256; *Trustees of Watertown* v. *Cowen*, 4 id. 515.

The consideration that induced the appellees to contribute their money to purchase the block, was, that the county would erect thereon county buildings of magnificent proportions and fine architectural beauty, and thereby increase the value of their property; which is a sufficient consideration to enable them to maintain this suit, and one which both courts of law and equity recognize. *Robertson* v. *March et al.*, 3 Scam. 198; *Cross* v. *Pinkneyville Mill Co.*, 17 Ill. 57; *Pryor* v. *Cain*, 25 id. 294; *Thompson* v. *Supervisors, etc.*, 40 id. 385; *Stone* v. *Great Western Oil Co.*, 41 id. 96; *McClure* v. *Wilson*, 43 id. 362; *Barrow* v. *Richard*, 8 Paige, 358.

MR. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in equity, in the Warren circuit court, exhibited by Azro Patterson and others against the board of supervisors of that county, the scope and object of which was to enjoin defendants from selling or disposing of block 16 in the city of Monmouth, on the allegation that the block in question was purchased as a site for a court house and other county buildings, and to which complainants had contributed the sum of $750, part of the purchase price thereof.

It appears this block of ground was the property of Mary W. Collins, and that the board of supervisors, in September, 1867, were negotiating with her and her husband, John W. Collins, for its purchase, and that the price demanded by Collins was $6,250. This the board declined to give, but were willing to pay $5,500 for the block. The complainants, feeling a deep interest in this matter, agreed among themselves, if the board would buy the property, they would make up the difference between the price asked and that offered, being $750. The block was purchased and conveyed to the county for the expressed consideration of $5,500.

In the agreement for the sale, which bears date September 11, 1867, there is this clause: The party of the first part "agree to sell to the said party of the second part, block number 16, in the city of Monmouth, in the said county of Warren, with appurtenances thereunto belonging, for court house and other county buildings."

It is alleged in the bill of complaint that a proposition was made by the said defendants, that if the complainants would furnish the amount in difference on the purchase of the block, they, the defendants, would purchase it for the purpose of erecting thereon a court house and other buildings; and complainants being interested in property in the neighborhood of this block, and anxious for the erection of county buildings upon it, by which the value of their property would be enhanced, acceded to the proposition of the defendants, and, through one Hiram Baldwin, thereupon executed a promissory note to Mary W. Collins for the sum of $750, at ten per cent, payable thirty days after date, of which $710 had been paid at the time of filing the bill of complaint.

It is then alleged that the defendants had caused the clerk of the county court of Warren county to publish an advertisement in the county newspapers, that the county would receive sealed bids, to be opened at the meeting of the board on the second Monday of September, 1868, for the sale of this block, or for one or more lots thereof, by which the

erection of a court house and other county buildings would be prevented; and the bill further charges that such sale is proposed to be made purposely to avoid the erection of such buildings, in fraud of the rights of complainants, and to their irreparable injury.

It is further charged, that complainants were especially invited and requested by the legal agents of the county to contribute their money toward the purchase of this block, to be purchased and used by the county, for the purpose of erecting upon it county buildings; and it is further charged, that the defendants do not possess the statutory power to sell and convey this block, or any portion of it, nor do they, by the terms of the grant to them, possess such power, but if such a colorable sale should be made, the erection of public buildings thereon would be prevented, and complainants defrauded of their money.

An injunction was prayed for to restrain the sale, which was granted.

The defendants in their answer deny any proposition to complainants of the kind and nature set up in their bill, and allege, if any note was executed for $750 to Mrs. Collins, it was not in pursuance of any agreement between the makers of the note and the defendants, and they distinctly deny that any agreement was ever made between these parties touching the purchase by the defendants of this block of ground; and, without making an exhibit of the deed from Collins and wife, they say that the deed is a deed conveying the premises to the county in fee simple absolute, and not upon any confidence, trust or condition whatsoever. The answer admits advertising for bids for the purchase of this block, and denies all combination and fraud, and thereupon the defendants entered a motion to dissolve the injunction. This motion was denied, and thereupon the complainants filed their replication, and the cause was heard on bill, answer, replication, depositions and exhibits, when, on the 2d day of February, 1870, the following decree was entered:

"This day this cause comes on to be heard upon the bill,

answer, proofs and exhibits in the cause, on consideration of all which the court do find the equity of the cause to be with the complainants, and that they are entitled to be repaid by the defendants the moneys advanced by them toward the purchase of said block number 16. But it is hereby ordered, adjudged and decreed, that the injunction heretofore issued in this cause be and the same is hereby so far modified, that upon the payment by the defendants to the master in chancery of this court, for the use of the complainants, the sum of $710.00, and interest from the time it was so paid by complainants, said injunction shall from thenceforth be wholly and totally dissolved, and that the defendants pay the costs, to be taxed."

To reverse this decree, the defendants appeal.

The first question to be considered is, were appellants a party to any agreement such as is set forth in the bill of complaint? We have examined the record carefully, and can find no evidence that appellants, or any authorized committee of their body, made any proposition to appellees to advance the difference for this block between the prices defendants were willing to pay and the owners to take. The fair inference from all the testimony is, that at the meeting at Baldwin's hotel, at which a committee of the board of supervisors was present, such was the anxiety of the complainants to have county buildings erected on that particular block, that they voluntarily assumed the payment of this difference, they themselves supposing that on the purchase being effected, their object would be accomplished, and they thereby derive, as individuals, more or less advantage. No promise or contract was made to or with them, that county buildings should be erected on the block, nor has the committee appointed by the board to make the purchase, any power so to bind their constituents or the county.

The main allegation of the bill, that such a proposition was made by the committee of appellants, is not established by the proof, and if it was, it is very clear the committee had no authority to make it. That appellees understood the block was to be used for the purpose of erecting upon it county

buildings is quite probable, but we fail to see, no agreement having been made to that effect, how they can profit by it. The presumption is, they were willing to risk their money, the proportion of each being small, on the chance, which seemed a flattering one, that after the block was purchased the erection of buildings "of magnificent proportions and fine architectural beauty," by which the value of their property would be increased, would follow as a matter of course.

The only question in the case is, as to the power of the proper constituted authorities of a county to sell land which may have been purchased for the purpose of erecting thereon the necessary county buildings. For this, ample power is given by chapter 27, Revised Statutes 1845. Section 36 of that act provides that the county commissioners' courts in each county shall have power to contract for and provide for the use of their respective counties, whenever it shall become necessary, any lot or lots of land whereon to erect such county buildings and obtain deeds of conveyance to such counties, and to sell and convey the same when it shall become necessary, to any purchaser or purchasers, in the manner prescribed by law. Scates' Comp. 302.

Section 35 of the same act makes it the duty of the county commissioners to cause to be erected, when in the opinion of the court the means of the county are such as to justify it, a suitable court house in each of their respective counties. Id.

Section 15 of the same act provides that the county commissioners' court, by an order entered on their minutes, may appoint a commissioner to sell and dispose of any real estate of their county, whose deed, duly acknowledged and recorded, shall convey to the purchaser all the right, title and estate of the county in the premises so conveyed. Id. 299.

These courts of county commissioners were established by the constitution of 1818, and by law were vested with plenary powers over all the concerns, fiscal and otherwise, of the several counties, to whom have succeeded boards of supervisors in those counties which have adopted township organiza-

tion, under the constitution of 1848, and county courts in those counties which have not adopted that organization. This is not now an open question in this court, it having been decided, after full consideration, that boards of supervisors of the several counties adopting township organization, are the legal successors to the county commissioners' courts. *Green et al.* v. *Wardwell et al.*, 17 Ill. 278. It follows, therefore, that as the county commissioners' courts had power to sell and convey any ground that may have been selected for the public buildings, the same power exists in the board of supervisors, the exercise must, of necessity, be a matter of discretion, for the proper exercise of which these functionaries are responsible only to their constituents.

The only remaining question is, as to the effect of the clause in the contract to convey the block, and which, it is not denied, is also contained in the deed executed by Collins. The deed conveys the absolute fee, without any conditions or restrictions whatsoever. The power of alienation is not limited or confined in any way. Had the grantors in the deed imposed as a condition of the sale, that the block should be used for county buildings and for no other purpose, they, perhaps, might invoke the power of a court of chancery to restrain a threatened sale of it, but the facts show the grantors received the price demanded for the property, abating nothing, on the ground that the purchase was made for the purpose of erecting upon it county buildings, and it was quite immaterial to them to what purpose the block would be devoted, they having received full price for it. It, no doubt, was the intention of appellants, when the purchase was made, to devote it as expressed in the deed, but that formed no part of the consideration, nor was it the inducement to the grant. Subsequent events may have admonished those authorities, that the financial condition of the county did not justify an expenditure such as contemplated when the purchase was made, and that the best interests of the county required a sale of the property. We fail to see any thing in the transaction to take from them the power expressly

conferred upon them by statute, to sell the land. There is no covenant in the deed that the land shall be devoted to a particular purpose, but by its terms the county became possessed of an absolute estate in fee simple to the land, uncontrolled by any condition, restriction, limitation or reservation, whatever.

If A buys a lot of ground of B, and it is declared in the deed that he purchases it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention. But if a grant be made by A to B, on condition B erects on the land granted a certain structure, and he fails so to do, the land might revert to the grantor. But it is needless further to argue the case. Here was an unqualified sale of the fee in this block; it became vested in the county, and appellants, as their lawful agents, have full right and authority to sell it, and should not have been enjoined from so doing.

In case a sale shall be made of the premises by appellants, whatever claim appellees may have to a portion of the proceeds, can be adjusted in an action which they may institute for such purpose, but as to this right we express no opinion. The right to sell being undoubted, in the appellants, the injunction should have been dissolved on the coming in of the answer and the proofs. To refuse it was error, and for the error the decree must be reversed and the cause remanded.

Decree reversed.

The State Trustee of the Illinois and Michigan Canal

v.

Charles Daft.

1. Negligence — *action for, will not lie against the board of trustees — must be brought against the State trustee.* The ruling in the case of *Trustees of the Illinois and Michigan Canal* v. *Daft,* 48 Ill. 96, holding, in an action on the case brought against the board of trustees, to recover damages for the loss of a canal boat, occasioned, as alleged, by the negligence of the defendants, that the action was *alone* maintainable against the State trustee, and would not, therefore, lie against the defendants as a board of trustees, re-affirmed.

Appeal from the Superior Court of Chicago.

The opinion states the case.

Mr. Isaac N. Arnold, for the appellant.

Messrs. Rae & Mitchell, for the appellee.

Mr. Justice Scott delivered the opinion of the Court:

This was an action commenced in the Superior Court of Chicago, by the appellee, against the appellant, for alleged damages to appellee's canal boat, resulting from an insufficient aqueduct, which, it is averred, had been negligently left out of repair, the appellant knowing the same to be unsafe and dangerous.

The action was originally commenced against "The Board of Trustees of the Illinois and Michigan Canal," instead of the "State Trustee," as in the present case.

A trial was had in the first case on substantially the same evidence as is contained in the present record, which resulted in a verdict for the plaintiff, on which the court rendered a judgment against the "board of trustees."

From that judgment the "board of trustees" prosecuted an appeal, and the cause came before this court at the September term, 1868, and the case is reported in 48 Ill. 96.

It was then held, on the evidence contained in the record, that the appellee was entitled to recover, but that the action was improperly brought against the "board of trustees." The action should have been brought against the "State trustee." The present action was commenced, in conformity with the views expressed in that opinion, against the State trustee.

We are now asked by counsel to reconsider the former decision of this court. We have carefully done so, and we can perceive no good reason for changing the views then expressed. The question was fully discussed in the former opinion and there is now no necessity for discussing it again.

No other objection is urged on the attention of the court, and the judgment must be affirmed.

Judgment affirmed.

JOHN KNIGHT *et al.*

v.

BRADLEY B. BEGOLE.

1. CONSTRUCTION OF STATUTES. In construing a statute, a prospective operation only will be given to it unless its terms show a legislative intent that it should have a retrospective effect.

2. REDEMPTION — *from sales under mechanics' liens — construction of act of* 1869. So the act of 30th March, 1869, giving a right of redemption from sales under decrees to enforce mechanics' liens, cannot be construed as affecting a decree which cuts off the right of redemption, entered before that act went into effect. Such a decree, being proper at the time it was entered, would not, upon the act going into operation before the time fixed for the sale of the premises, thereby become erroneous.

3. *Held,* where a decree entered before that act went into effect, barred and foreclosed all title or interest of the defendant in the premises "held or

acquired since the 23d day of February, 1865," and meaning, of course, down to the time of entering it, that even if the defendant would, upon the act becoming operative before the time fixed for the sale, have a right of redemption under that statute, the decree could not be regarded in conflict with it.

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

The opinion states the case.

Mr. GEORGE SCOVILLE, for the appellants.

Messrs. BARKER & TULEY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a bill to enforce a mechanic's lien, under chapter 65 of the Revised Statutes and the acts amendatory thereof. A decree ordering the sale of the premises subject to the lien, was made on the 21st day of May, 1869, which, after finding the amount due appellee, and declaring the lien on the premises described, orders that unless the amount found, with costs, shall be paid within ninety days, the premises shall be sold by the master, at public auction, on twenty days' notice, etc., and then declares "that the defendants and every of them, and all persons claiming under them, be forever barred and foreclosed of and from any and every right, title or interest in said premises, held or acquired since the 23d day of February, 1865, as against the rights of the said Bradley B. Begole, or the purchaser at any sale made under this decree."

On the 30th of March, 1869, an act of the general assembly was approved, which declared that thereafter there should exist, in favor of the same persons, and in the same manner, as is or may be provided for the redemption of real estate from sales under judgments and executions at common law, the right to redeem real estate sold under any decree obtained under the provisions of chapter 65 of the Revised Statutes or any act amendatory thereof, from such sales.

The session of the legislature ended on the 30th of April, 1869, and there being no provision for an earlier effect, this act did not go into effect until the end of sixty days from that time, and some thirty-nine days after the decree herein was entered.

Several points are made for reversal of the decree; but the only one deemed worthy of consideration is, that the decree is erroneous, because it expressly takes away the right of redemption.

It is not pretended that, as the law stood at the time of entering the decree, there was any right of redemption in such cases, or that, when tested by that law, it was erroneous. The essence of this point is, that although the statute giving the right of redemption, did not take effect until some thirty-nine days after the decree, and the latter was entirely proper at the time it was rendered, yet, when the statute giving the right of redemption went into effect, it made this decree erroneous, because it contains language which cuts off the right of redemption. That statute does not purport to have a retrospective effect. It says, "that, *thereafter* there should exist," etc. It is a familiar and sound rule of construction, to give a statute a prospective operation only, unless its terms show a legislative intent that it should have a retrospective effect. *Thompson* v. *Alexander*, 11 Ill. 54; *Garrett* v. *Doe*, 1 Scam. 335; *Guard* v. *Rowan*, 2 id. 499. Besides, if appellants could be deemed vested with a right of redemption, by an act not operative until after the decree, that right is not, by any fair construction of the decree itself, within its scope or contemplation. It bars and forecloses all title or interest in the premises, "held or acquired since the 23d day of February, 1865," and meaning, of course, down to the time of entering it. So that, if appellants have any right of redemption under that statute, the terms of the decree will not be deemed in conflict with it.

The decree of the court below must be affirmed, with costs.

Decree affirmed.

Syllabus. Statement of the case.

WILLIAM HALL

v.

LEWELLYN MARKS.

1. PLEADING — *of the prayer for judgment in a plea in bar.* In a plea in bar of only a part of the plaintiff's cause of action, a conclusion of a prayer of judgment, generally, is sufficient, without pointing out what judgment, or the appropriate judgment, because, the facts being shown, the court is bound to pronounce the proper judgment.

2. SAME — *in a plea in abatement.* But in the case of a plea in abatement, the defendant must pray a particular and proper judgment.

3. SAME — *sufficiency of an averment as to representations by the plaintiff.* In an action upon a promissory note for $200, the defendant, in a plea, averred the note was given for that amount in bank bills, which he had borrowed from the plaintiff, and which the latter represented were good and current and would pass for the full face thereof; whereas, in fact, the plea averred, the bank bills were of small value, to wit, of $100, and no more, and that the defendant was defrauded by reason of the bills being only of that value: *Held,* this averment as to the value of the bills did not show the falsity of the representation alleged to have been made by the plaintiff that they were current, and was insufficient in that regard.

4. And where a plea averred a warranty by the plaintiff that the bills were good and current, and would pass for their full face, it is doubtful whether an averment simply that the bills were depreciated and of small value, to wit, of $100, and no more, would sufficiently negative the terms of the alleged warranty.

5. SAME — *plea of partial failure of consideration.* A plea of partial failure of consideration is defective which sets up such failure to a certain extent, and only showing a failure to a less extent.

APPEAL from the County Court of De Kalb county; the Hon. DANIEL B. JAMES, Judge, presiding.

This was an action of assumpsit brought by Marks against Hall, on the following promissory note:

"$200. SHABONA GROVE, *March* 28, 1861.

Middle of June, after date, I promise to pay to the order of

L. Marks, two hundred dollars, value received, at ten per cent interest.

"WM. HALL."

The declaration contained a special count upon the note, and the common counts.

Among other pleas, the defendant filed the following:

The second plea, after alleging that the several counts in the declaration were for one and the same cause of action, to wit, the promissory note in the special count mentioned, says: "And said plaintiff ought not to have and recover of the defendant twenty dollars of the amount of the said promissory note described in said count, and ten per centum interest therein stated, because he says that on, to wit, the 28th day of March, A. D. 1861, being in want of money, defendant made application to the plaintiff to borrow of him two hundred dollars for about two and a half months from that date, and the said plaintiff agreed with defendant to loan him the sum of one hundred and eighty dollars of money, and that defendant should give said plaintiff his promissory note for two hundred dollars, payable the middle of June next after date, with ten per cent interest from the date thereof; and the defendant, in fact, says, that, in pursuance of said corrupt and usurious agreement, he executed and delivered to the said plaintiff his promissory note for the sum of two hundred dollars, dated the said 28th day of March, 1868, and due and payable the middle of June next after date, with ten per cent interest from the date thereof, in consideration of the loan of the said sum of one hundred and eighty dollars, the loan of which for the term of from the said 28th day of March, 1861, until the middle of June then next as aforesaid, the only consideration of the said note being the same note sued on and described in the said first count of said declaration. And defendant further avers, that twenty dollars of the amount of said promissory note, and the ten per cent interest as aforesaid, were usuriously, corruptly and unlawfully charged, and were contrary to the

statute in such cases made and provided, and this he, the said defendant, is ready to verify. Wherefore, he prays judgment," etc.

Sixth plea. And for a further plea in this behalf, defendant says the said supposed causes of action in the several counts are for one and the same thing, to wit: the promissory note in the first count of said declaration mentioned, and that the said plaintiff ought not to have and recover, to wit, one hundred and fifty dollars, because he says the consideration for which the said promissory note was given has in part failed in this: that the only consideration for which the said promissory note was given was the full amount of two hundred dollars of broken, depreciated and uncurrent bank bills, commonly known as "stump-tail," of the value of fifty cents, and no more, for cash, and which said defendant borrowed of said plaintiff at the time of the date of said note, and every dollar thereof; and the said plaintiff then and there represented and stated that said bank bills were good, current and would pass for the full face thereof. The said plaintiff then and there well knowing such statements and allegations by him made as to the value of said money or bank bills to be false; and the said defendant, not knowing said bank bills to be depreciated and uncurrent, and relying upon the statements and representations of the said plaintiff as to the value thereof, received the same as and for two hundred dollars, and then and there gave his note therefor, for the sum of two hundred dollars, and the defendant avers that said bank bills were of small value, to wit, of one hundred dollars, and no more, and that he, said defendant, was thereby then and there cheated and defrauded of a large sum, to wit, one hundred dollars; wherefore, defendant says, that the consideration of said promissory note in said declaration mentioned, to the extent of one hundred and fifty dollars, has failed, and this the said defendant is ready to verify, wherefore he prays judgment of, to wit, one hundred and fifty dollars.

Seventh plea. And for a further plea in this behalf, said defendant says that the said supposed causes of action in the said counts in the declaration mentioned are for one and the same thing, to wit, the promissory note in the first count in said declaration mentioned, and that the said plaintiff ought not to have and recover of defendant one hundred dollars of the said sum in the said promissory note specified in said declaration mentioned, because he says the consideration for which the said promissory note was given was the full amount of two hundred dollars of broken, depreciated bank bills, usually known and designated at that time as "stump-tail," moneys of the value of, to wit, fifty cents, and no more, for each and every dollar thereof which defendant borrowed of said plaintiff at the time of the date of said note, and the said plaintiff then represented and warranted said money or bank bills to be good and current and to pass for the full face thereof; and the said defendant not knowing said bank bills to be depreciated and uncurrent, and relying upon the representation and warranty of the said plaintiff as to the value thereof, received the same as good for two hundred dollars, and then and there gave his note therefor for the sum of two hundred dollars; and the defendant avers that said bank bills were depreciated and of small value, to wit, of one hundred dollars and no more, and the said defendant was thereby then and there cheated and defrauded of a large sum, to wit, one hundred dollars; wherefore defendant says that the consideration of said promissory note in said declaration mentioned, to the extent of, to wit, one hundred dollars, has failed. And this the said defendant is ready to verify, wherefore he prays judgment of, to wit, one hundred dollars, etc.

The court below sustained a demurrer to each of these pleas, and the cause being tried upon issues on other pleas, there was a finding and judgment in favor of the plaintiff for the amount of the note. The defendant appealed.

Mr. B. F. PARKS, for the appellant.

Mr. CHARLES KELLUM, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The errors assigned on this record are, the sustaining of demurrers to certain pleas. It is assigned as a special cause of demurrer to the second plea, that it commences in bar of a part of the plaintiff's cause of action, and prays judgment of the whole declaration or cause of action. The plea concludes with a prayer of judgment generally, and not of any particular judgment. The general rule which prevails in pleading is, that a mere prayer of judgment, without pointing out what judgment, or the appropriate judgment, is sufficient; because, the facts being shown, the court are bound to pronounce the proper judgment. 1 Chit. Pl. 492.

Such is the rule in the case of a plea in bar, but in the case of a plea in abatement, the defendant must pray a particular and proper judgment. *The King* v. *Shakespeare*, 10 East, 83.

This being the only objection pointed out to this plea, and none other being perceived, we hold the plea to be good.

The sixth plea makes the averment, that the two hundred dollars of bank bills, for which the note in suit was given, were of the value of only one hundred dollars, and then alleges that the plaintiff, well knowing such statement and allegation by him made as to the value of the bank bills to be false, and that the defendant, relying upon the statements of the plaintiff as to the value of the bank bills, received the same as and for two hundred dollars, and gave his note therefor; whereas the plea does not set up any statement or representation on the part of the plaintiff, in regard to the value of the bank bills, but the pleader makes his own averment as to their value, and subsequently refers to it as a representation of the plaintiff.

The only representation the plea charges the plaintiff to have made is, that the bills were good and current and would pass for the full face thereof; and it does not show the falsity of the representation, by averring that the bills were not good and

current and would not pass for their full face, but only avers, in that respect, that the bank bills were of small value, to wit, of one hundred dollars and no more, and that the defendant was defrauded by reason of the bills being only of that value, and not by reason of their being uncurrent. They might have been current, although their actual value in coin, or upon winding up the affairs of the bank, might have been found to be much less than their face value.

The plea is defective too, in professing to set up a failure of consideration to the extent of one hundred and fifty dollars, and only showing one to the extent of one hundred dollars.

The demurrer to this plea was properly sustained.

The seventh plea is of doubtful validity, in that it does not directly negative the terms of the alleged warranty, by averring that the bank bills were not current and would not pass for their full face; but only avers that the bills were depreciated and of small value, to wit, of one hundred dollars and no more. But as the case is to be remanded, for sustaining the demurrer to the second plea, we will grant leave to the defendant to amend the seventh plea, without pronouncing definitely upon its sufficiency.

For error in sustaining the demurrer to the second plea, the judgment will be reversed, and the cause remanded.

Judgment reversed.

GEORGE JAY

v.

HENRY C. REED.

1. ASSIGNEE BEFORE MATURITY, *with notice — subject to defense of usury.* Where a promissory note is given for an usurious consideration, and the payee indorses it to a party having notice of that fact, the usury is a good defense to the note as to such assignee without regard to the time of his ownership.

Syllabus. Opinion of the Court.

2. SECOND ASSIGNEE, *after maturity.* And a second assignee of the note, after maturity, must take it subject to the equities which properly attach thereto between the maker and the first assignee.

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

The opinion states the case.

Mr. J. I. TAYLOR and Mr. T. J. HENDERSON, for the appellant.

Messrs. STIPP & GIBONS, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellant was sued on a promissory note, executed by him to Cephas Clapp, who indorsed to Kelsey, and he to appellee. The defense of usury was interposed to a portion of the note, and it was alleged that it was assigned after maturity.

Upon a trial the whole amount of the note was recovered.

There is proof in the record, from which it may be inferred that the first assignee, who received the note before maturity, had full knowledge of the usury, and that appellee obtained the note after its maturity.

The court gave the following instructions:

"That if Clapp indorsed his name on the note and delivered it to Kelsey as a purchaser, before its maturity, and Kelsey delivered it so indorsed to Reed, either before or after its maturity, that then they must find for Reed, and that it is not material whether Kelsey and Reed, or either of them, had notice of the alleged usury."

If the first assignee had notice of the usury, it was a good defense, as to him, without regard to the time of his ownership. He was not an innocent holder, but had full knowledge of the rights of the maker. He did not take it free of all equities between the antecedent parties.

If the note was over due when indorsed to appellee, then he took it subject to the equities which properly attach thereto between the maker and the first assignee. The note was payable at a specified time, and had become due and was dishonored when it came to the possession of appellee. He then was not a *bona fide* holder, without notice. It was his duty to inquire as to the rights of the former holders and the liability of the maker. *Lord et al.* v. *Favorite*, 29 Ill. 149.

The court should have submitted to the jury the question of usury, and Kelsey's knowledge of it.

The instruction given was therefore erroneous.

The judgment is reversed and the cause remanded.

Judgment reversed.

CITY OF AURORA

v.

WILLIAM B. GILLETT *et al.*

1. INSTRUCTIONS. It is not error to refuse instructions, although they may be proper in themselves, where they are substantially embraced in others which were given.

2. CITIES — HIGHWAYS — *how far a city is responsible for the manner of its exercise of the power to grade and drain the streets.* The rule in regard to the liability of a city for injury to private property, resulting from drains and sewers constructed by the city being defective or having become obstructed, by reason whereof surface waters from the streets are thrown upon the premises of an individual, is correctly laid down in the case of *Nevins* v. *The City of Peoria*, 41 Ill. 502, and is applied in this case.

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

This was an action on the case brought by William B. Gillett and Abner Bushee, against the city of Aurora, to recover

damages resulting from the flooding of the basement of the Aurora House, in said city, occupied by the plaintiffs, in September, 1867, the flooding occurring, as is alleged, by reason of the gutters on both sides of Main street being filled up, and being otherwise defective. It appears that the Aurora House, which was being used as a hotel, stands on the north-east corner of Main and La Salle streets, and prior to the flooding complained of, the city had extensively graded Main street and put in gutters on both sides of the street, and a culvert across Lincoln avenue, at the top of the hill above the Aurora House, on the south side of Main street, to turn the water from its natural course so as to flow through these gutters down Main street into Fox river, and thus provide, as the city supposed, a better drainage for that street, and the streets crossing it at the top of the hill. It is alleged that by means of such drainage the city had increased the volume of water that would naturally have flowed down Main street. The gutter and the culvert put in by the city drained, at the time of the flooding, a portion of Lincoln avenue and of Main street, above Lincoln avenue, and forced the water from those portions down Main street, where it would not have naturally run, and the volume of the water thus largely increased was forced down Main street, through these insufficient gutters.

A heavy rain occurring, the gutters were filled up with sand and gravel on both sides of the street, and the water about half way down the hill ran across the street (Main street), from the south side, overflowed the platform in front of the Aurora House, and the gutter on the north side of the street being choked up so water could not pass through, the basement of the house was flooded, and the tea, coffee and sugar of the plaintiffs were destroyed, and for the injury this action was brought.

Much testimony was taken on both sides in support and in rebuttal of the theory of the plaintiffs, that the injury was the result of an improper exercise of the power of the city in draining and grading the streets.

The court gave to the jury, on behalf of the plaintiffs, the following instructions:

"A city has no more power over its streets than a private individual has over his own land; and it cannot, under the plea of public convenience, be permitted to exercise that dominion to the injury of the property of any one else, in a mode that would render a private individual responsible in damages, without being responsible itself.

"If the jury believe, from the evidence, that the city of Aurora, in Main street in said city, fixed the grade and constructed the street and caused to be constructed sewers and drains on said street to carry off the surplus water which necessarily, in case of rains, would run down said street, by reason of said grading; and that, in September, 1867, there came a rain, and said sewers or drains were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water from said rain was forced into the basement of the plaintiffs' building, and the plaintiffs thereby damaged, then the jury should find for the plaintiffs to the amount which the proof shows such damage to be.

"If the jury believe, from the evidence, that the sewers, drains or gutters on the south side of Main street in the city of Aurora were stopped up or otherwise defective; and that, at the time of the rain storm in September, 1867, the water, by reason of such defect in said sewer, drain or gutter, was forced across Main street toward the premises of the plaintiffs; and that, by reason of the defective drain, sewer or gutter under the railroad track on the north side of Main street, the basement of the Aurora House was flooded by water, and plaintiffs' property damaged, then the jury should find for plaintiffs, to the amount which the proof showed such loss to be.

"Although the jury may believe, from the evidence, that prior to the creation of Main street, there was a natural watercourse which drained the land lying on or back of what is now Lincoln avenue, which ran across a portion of what is now Main street toward the Aurora House, and that the water in a

wet time ran around the said Aurora House; yet if the jury further believe, from the evidence, that the city of Aurora graded and fixed said Main street, and caused sewers, drains or gutters to be put in said street so as to carry the surplus water of a rain and the drainage of said street and the land above mentioned down Main street to Fox river, changing the natural course of said water or increasing its volume, and that said sewers, drains or gutters were defective, and in September, 1867, a rain came, and the water in such rain, while forcing itself down said street by reason of said grade, found obstructions by reason of said sewers, drains or gutters being stopped up or being otherwise defective, and was thereby forced into the basement of plaintiffs, and damaged plaintiffs' property — then the plaintiffs are entitled to recover the amount which the proof shows the damage to be.

"The jury are instructed that the city of Aurora has the control of all the sidewalks in said city; and if the jury believe, from the evidence, that the sidewalk on LaSalle street, in front of the Aurora House, pitched toward said house, and was permitted so to be constructed by said city, or the corporate authorities of the village of East Aurora, prior to said city's organization, then said city cannot shield themselves from liability for flooding plaintiffs' basement on account of the pitch of said sidewalk."

The following were given for the defendant:

"It may be stated as a general principle, that when the situation of two adjoining fields, lots or pieces, is such that the water falling or collected by melting snows upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his lands, if desired by the owner of the upper field; but the latter cannot, by artificial trenches or otherwise, cause the natural mode of its being discharged to be changed to the injury of the lower field or lot, as by conducting it by new channels in unusual quantities on to particular parts of the lower field or lot; therefore, if the jury believe,

from the evidence, that the water which flowed into the basement of the building, and occupied by plaintiffs in September, 1867, would have flowed upon the lot covered by the building, in a state of nature, then it still had the right to flow over the same, and the jury should find for the defendant. But if the jury also believe, from the evidence, that the natural flow of the said water across Main street was interfered with by the grading of Main street, and that the water was sought to be conducted by the city by drains and sewers down Main street to Fox river, and that, by reason of such interference and of insufficient sewers and drains, or by allowing the sewers to fill up, conducted the water by new channels in unusual quantities into the basement of said building, then the city is liable to the plaintiffs in this suit.

"If the jury believe, from the evidence, that the plaintiffs had notice or knowledge that their sugar, coffee and tea were being injured by the water, then it was their duty to remove the same, if they could have conveniently done so; and all damage that accrued to the said groceries after such notice the plaintiffs can not recover, if the evidence shows that the same could have been removed without much trouble or inconvenience."

Other instructions were asked by the defendant, and refused.

The jury returned a verdict in favor of the plaintiffs for $95, and judgment was entered thereon, from which the city appealed.

Mr. B. F. PARKS, for the appellant, on the principal question cited Washburne on Easements and Servitudes, 427; *Martin* v. *Riddle*, 26 Penn. 415; *Eiller* v. *Laubach*, 47 id. 155; *Lowin* v. *Francis*, 23 Mo. 181; *Bellows* v. *Sackett*, 15 Barb. 96; *Kauffmann* v. *Greseman*, 26 Penn. St. 407; *Adams* v. *Hemson*, 4 La. Ann. 165; *Luthemn* v. *Derrick*, 14 La. 161; *Hays* v. *Hays*, 19 id. 251.

Messrs. WHEATON & SEARLES, for the appellees, cited *Nevins* v. *City of Peoria*, 41 Ill. 502; *Rochester White Lead Co.* v. *City of Rochester*, 3 Comst. 464; *Furse* v. *The Mayor of New York*, 3 Hill, 612; *Ross* v. *City of Madison*, 1 Carter (Ind.), 281; *Lecour* v. *City of New York*, 3 Duer, 417; *Bailey* v. *The Mayor of New York*, 3 Denio, 540.

PER CURIAM: The error relied upon for the reversal of the judgment in this case is the refusal of the court to give instructions asked for in behalf of the defendant. All the instructions have been carefully examined, those refused as well as those given. Most of those refused contained objectionable features, which rendered their refusal proper. Some of them might have properly been given, but we think they were substantially embraced in the instructions that were given for the defendant. Taking all the instructions together, given on both sides, they very fairly laid down the law to the jury, as applicable to the facts of the case.

They rested the liability of the city upon the question of fact, whether the alleged injury was caused by reason of the drains and sewers which the city had constructed, being defective or having become obstructed. The case comes within the principle of the case of *Nevins* v. *The City of Peoria*, 41 Ill. 502, and under that decision the law was correctly given to the jury.

Finding no substantial cause of complaint, in the refusing of instructions, the judgment must be affirmed.

Judgment affirmed.

Pittsburg, Cincinnati & St. Louis Railway Company

v.

Henry R. Thompson.

1. Negligence — *of common carriers — duty of railroad companies in guarding against injury to passengers.* The true rule in regard to the degree of care required of railroad companies to guard against injury to their passengers is, that the carrier shall do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road.

2. A company cannot be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable.

3. It would be unreasonable to hold that a road-bed should be laid with ties of iron, or cut stone, because, in that way, the danger arising from wooden ties, subject to decay, would be avoided.

4. But it is by no means unreasonable to hold that, although a railway company may use ties of wood, such ties shall be absolutely sound and road-worthy.

5. The obligation of the company to provide the safest pattern of rail can not be made to depend merely upon whether a change of rail could be made without any additional expense.

6. Proof of negligence — *burden of proof.* In an action against a railroad company for personal injuries received from the alleged negligence of the defendants, if it be shown by the plaintiff that the injury was caused by the overturning of a car on the defendants' road, in which he was a passenger, without fault upon his part, he thereby makes out against the company a *prima facie* case of negligence, and places upon them the burden of rebutting that presumption by proving that the accident resulted from a cause for which they should not be held responsible.

7. Measure of damages *in such case — effect of payment of accident insurance.* The liability of a railway company to respond in damages for an injury, occasioned by accident, to a passenger on their road, is not discharged *pro tanto* by the payment of any sum, on account of such injury, by an accident insurance company, the primary liability being on the railway company.

8. Excessive damages. In an action against a railroad company to recover for injuries to the plaintiff occasioned by the negligence of the defendants, it appeared, the plaintiff, on account of the injuries, was con-

Syllabus. Brief for the appellants.

fined from two to three weeks to his bed, but did not, when quiet, suffer greatly from pain. After that period he began to walk about, though with great difficulty, but did not resume business in his office for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience: *Held*, if such temporary confinement and pain were the only consequences of the injury, a verdict of $5,000 should be regarded as excessive.

9. But the proof being conflicting as to whether the plaintiff was injured in the membranous covering of the spine, or merely in the muscular ligaments connected with it, there being evidence from which the jury might find the plaintiff would never entirely recover, the attending physician and two others called by the plaintiff testifying that in their opinion in the future any imprudence or unusual exposure, which would not affect a person in sound condition, might lead to very serious and even fatal results, a verdict for that amount was not disturbed.

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

This was an action on the case, brought by Thompson against the railroad company, to recover damages for personal injuries sustained by the plaintiff while a passenger on the road of the defendants, the accident occurring, as is alleged, in consequence of the negligence of the company.

A trial in the court below resulted in a verdict in favor of the plaintiff for $5,000, upon which judgment was entered. The company appealed.

Mr. E. Walker, for the appellants, on the question of the degree of care and vigilance required of railroad companies in providing safe structures and machinery in the carrying of passengers, cited *Tuller et al.* v. *Talbot*, 23 Ill. 357; *Ill. Cent. Railroad Co.* v. *Phillips*, 49 id. 234; 2 Redfield on Railways, 187; *Bowen* v. *N. Y. Central R. R. Co.*, 18 N. Y. 408; Shearman & Redfield on Negligence, 296; *Weed* v. *Panama R. R. Co.*, 5 Duer, 192; *Fairchild* v. *California Stage Co.*, 13 Cal. 599; *Derwart* v. *Loomer*, 21 Conn. 245; *Farish* v. *Reigle*, 11 Gratt. 697; 4 Iowa, 547; *Thayer* v. *St. Louis, Alton and Terre Haute R. R. Co.*, 22 Ind. 26; *Readhead* v

The Midland Railway Co., Redfield's Am. Railway Cases, 484; *Beisiegel* v. *New York Cent. R. R. Co.*, 4 N. Y. 15.

Messrs. Lyman & Jackson, for the appellee, on the same subject, cited *Galena and Chicago Union R. R. Co.* v. *Yarwood*, 15 Ill. 469; *Saltonstall* v. *Stokes*, 13 Pet. 191; *Christie* v. *Griggs*, 2 Campb. 79; *Galena and Chicago Union R. R. Co.* v. *Fay*, 16 Ill. 563; *Chicago, Burlington and Quincy R. R. Co.* v. *George*, 19 id. 517; *Asten* v. *Heeren*, 2 Esp. 533; *Ingalls* v. *Bills*, 9 Metc. 1; *Caldwell* v. *Murphy*, 1 Duer, 233; *Phila. and Reading R. R. Co.* v. *Derby*, 14 How. (U. S.) 585; Angell on Carriers, § 569; *Hegeman* v. *Western R. R. Co.*, 3 Kern. 24; *McElroy* v. *Nashua and Lowell R. R. Co.*, 4 Cush. 402; *Curtis* v. *Rochester and Syracuse R. R. Co.*, 18 N. Y. 537.

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

Whether the road-bed was in a safe condition at the time the accident occurred, which led to the injury of the plaintiff in the present case, is a question about which the evidence is far too contradictory to permit us to set aside the verdict, because unsustained by the evidence in that particular. Indeed, the impression produced upon our minds by the record inclines us to think, as the jury have found, that the road was not in as complete repair as it should have been. It is sufficient, however, on this point, to say, the evidence is very contradictory, and the verdict is not plainly against its weight.

So, too, as to the question whether the cars were precipitated from the track in consequence of the defective road-bed, admitting it to have been defective, or by reason of the inexplicable breaking of an axle apparently sound, we can only say the jury have found, and we cannot decide they found erroneously. It is the theory of appellants' counsel that the cars were thrown from the track by the breaking of an axle

which was, so far as could be discovered, sound. On the other hand, counsel for appellee contend that the axle was broken after the train was thrown from the track, or, if broken before, that it was in consequence of the roughness and improper condition of the road. The jury adopted one of the latter theories, and although the question is incapable of precise determination, there is, at least, this in favor of their conclusion, that one theory furnishes a cause for the breaking of the axle, while the other does not. Axles may sometimes break when the track is in good condition and the iron without any discoverable flaw, as stated by some of the witnesses, but we cannot condemn the action of a jury because it has found its verdict upon a theory which furnishes an explanation of the breaking, rather than upon one which does not. When the plaintiff showed the injury was caused by the overturning of the car, without fault upon his own part, he made out against the company, a *prima facie* case of negligence, and placed upon them the burden of rebutting that presumption by proving that the accident resulted from a cause for which they should not be held responsible.

The chief ground relied upon, however, for a reversal of the judgment, seems to be the alleged error in the fourth instruction given for the plaintiff. This was as follows :

"The jury are instructed, as a matter of law, that it is the duty of a railway company, employed in transporting passengers, to do all that human care, vigilance and foresight can do, both in providing safe coaches, machinery, tracks and roadway, and to keep the same in repair ; and if, from the evidence in this case, the jury believe that the plaintiff, while a passenger, in the cars of the defendant, received an injury resulting from the negligence of the defendant in either of the above particulars, they will find for the plaintiff and assess his damages."

It is urged that this instruction, in requiring a company to do all that human care, vigilance and foresight can do in providing safe coaches, machinery, tracks and roadway, imposes

upon them an obligation of unreasonable strictness and impossible of performance without subjecting all the railway companies in the country to bankruptcy. It would, for example, require them to lay steel rails instead of iron, and adopt all other possible precautions, without reference to the extravagance of the expenditure. In default of doing this they would become insurers for their passengers, except as against the acts of God and the public enemy.

The instruction, in its strict sense, is open to this objection, the true rule being, as said by this court in *Fuller* v. *Talbott*, 23 Ill. 357, that the carrier shall do all that human care, vigilance and foresight can reasonably do, consistently with the mode of conveyance and the practical operation of the road. A company cannot be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. It would be unreasonable, for example, to hold that a road-bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties subject to decay would be avoided, but, on the other hand, it is by no means unreasonable to hold that, although a railway company may use ties of wood, such ties shall be absolutely sound and road-worthy.

Still, although this instruction was, in its literal sense, erroneous, it is no ground for reversing the judgment in the present case. The defendant asked, and the court gave, the following instruction, which embodies, substantially, in another form of words, the same principle announced in the plaintiff's fourth instruction:

"*Third.* The defendant was bound to use the utmost care and diligence in providing a safe, sufficient and suitable means of conveyance for the plaintiff, in every thing appertaining to the mode of conveyance adopted, in order to prevent those injuries which human care and foresight could guard against; and if, in the absence of such care and prudence, and by reason thereof, the plaintiff sustained injury, the defendant is liable to the extent of such injury.

"On the other hand, if the injury complained of was occasioned by an internal or hidden defect in the axle of the car in which the plaintiff was at the time riding, which a thorough and careful examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the defendant is not liable for the injury, if any, sustained by the plaintiff."

There is no substantial difference between this and the plaintiff's fourth instruction, as to the degree of care required from a railway company, and we cannot reverse for an erroneous instruction when the same instruction has been asked by the adverse party and given at his suggestion. It is evident, indeed, from the whole record, taken in connection with this instruction asked by the defendant, that the case was tried on the question whether the accident was caused by an internal defect of the axle which could not be guarded against by the most vigilant foresight, or was attributable to decayed ties and battered rails, and an uneven road-bed; defects which can be guarded against by that reasonable degree of care for which it is admitted a railway company must be held responsible.

The fifth instruction asked by the defendant was properly refused, because one clause in it makes the obligation of the company to provide the safest pattern of rail depend merely upon whether a change of rail could be made without any additional expense.

The eighth instruction asked by defendant, directing the jury to deduct from the damages any sum paid to the plaintiff by an accident insurance company, was properly refused. If such sum was paid, it was not *pro tanto* a discharge of the railway company. The primary liability was on this company.

The only remaining question is as to the quantum of damages. The jury found $5,000. It is claimed the verdict is unreasonably large. The proof is conflicting as to whether the plaintiff was injured in the membranous covering of the spine or merely in the muscular ligaments connected with it. He was confined from two to three weeks to his bed, but did

not, when quiet, suffer greatly from pain. After that period he began to walk about, though with great difficulty, but did not resume business in his office for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. If this temporary confinement and pain were the only consequences of the injury, we should not hesitate to pronounce the damages excessive. But the physician who attended the plaintiff, testified that, in his opinion, the plaintiff would never entirely recover, and that, in future, any imprudence or unusual exposure which would not affect a person in sound condition, might lead to very serious and even fatal results. Two other physicians called by plaintiff concurred in this view, while two, called by the defendant, thought the injury was only to the muscles and not to the spine or its coverings, and that the recovery was already substantially complete. In the former view the damages cannot be considered excessive, and we have no right to say the jury erred in adopting it, rather than that of the physicians called by defendant.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* THE CHICAGO AND ROCK RIVER RAILROAD COMPANY

v.

FREDERICK R. DUTCHER, Supervisor, etc.

1. ELECTION *in townships—in what manner to be held.* The charter of the Chicago and Rock River Railroad Company authorizes cities, towns, and townships under township organization, to subscribe to the stock of the company, upon a vote of the legal voters therein, but prescribes no mode in which the election shall be conducted: *Held,* the presumption would be, in the absence of any provision on the subject, the election should be conducted in the manner prescribed by the law of the organization of the body in which it is held.

2. So an election in a township for such purpose, should be held in the manner township elections are required to be held in the election of their town officers, and not under the general election laws.

3. SAME — *of the registry of voters.* Elections held at town meetings in townships acting under the township organization law, are not within the law requiring voters to be registered, town meetings being excluded, in terms, from its operation.

4. So an election in regard to a subscription by a township to the capital stock of the Chicago and Rock River Railroad Company, being properly had at a town meeting, it is not required the voters shall be registered before the election can be properly held.

5. SUBSCRIPTION *to stock of a railroad, by a town.* Under a law authorizing a town to determine by vote whether it will subscribe to the capital stock of a railroad company, and requiring the town supervisor to make the subscription if it be so voted, but leaving it entirely optional with the town whether it will subscribe at all, in determining the question of subscription the town may impose any conditions in respect thereto it thinks proper, and the supervisor would have no power, in making the subscrip tion, to disregard such conditions, nor would the railroad company have any right to demand he should.

APPLICATION for writ of mandamus. The opinion states the case.

Mr. J. M. BAILEY, for the relators.

Mr. W. E. IVES, for the respondent.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This is an application to this court for a writ of mandamus against the supervisor of the township of Amboy, to compel the subscription of $100,000 to the stock of the company of petitioners. On filing the petition by the company, the defendant entered his appearance, waived the issuing of an alternative writ, and stipulated that the petition might stand for an alternative writ, and demurred to it. It appears from the writ that, by the charter of the company, cities, towns, and townships, along or near to the railroad, were authorized to subscribe to

the capital stock of the company, when authorized by a majority of the legal votes of such city, town or township, cast at an election authorized to be held, upon the petition of ten voters of the city, town or township, and a notice given for thirty days of the time, and at the usual place of holding elections. The charter also provides that if the election results in favor of subscription, it shall be the duty of the officers named in the act to make the subscription and receive from the company the proper certificates therefor, and to issue bonds of the corporate body thus voting in favor of subscription, bearing interest, and which shall not run for more than twenty years, etc.

It is alleged that on the 25th of June, 1869, after giving notice for the requisite time, an election was held, resulting in favor of subscription for $100,000 of the stock of the road. The township clerk, after reciting that portion of the charter which authorized the township to vote for and against the subscription, gave this notice:

"Now, therefore, I, Charles E. Ives, clerk of said township of Amboy, do hereby notify the legal voters of the said township of Amboy, to meet at Simon Badger's office, on the 26th July, A. D. 1869, for the purpose of voting for or against the said township subscribing $100,000 to the capital of the Chicago and Rock River Railroad Company, upon the express condition, however, that should the legal voters vote in favor of the subscription, that none of the town bonds will be delivered until the road is completed into the township of Amboy, and cars running on the same. The form of voting at said election will be, 'For subscription' or 'Against subscription.'

"Given under my hand this 25th day of June, A. D. 1869.'

It is urged that the election thus held was invalid, for the reason that it was held in the manner regulating town meetings, and not under the general election laws of the State; because there was no registration of the voters, and because

certain conditions were imposed not specified in the statute authorizing the election to be held.

Do the provisions of the charter authorizing the vote in this case require that it shall be under the general election laws, or under the law establishing township organization? Amboy being a township organized under the general township law, the presumption would be, unless a contrary intention was expressed, that the election should be held in the mode prescribed for its government. Where legislation is adopted in reference to the action of an incorporated body and no mode is prescribed in which it shall be performed, the presumption must be indulged that it is intended that the body shall act through its officers and in the course usually adopted and authorized by the law governing the action of the body. And this being the rule, when the legislature has authorized this township as a corporate body to hold an election, and has prescribed no mode, a majority of the court hold that it was designed to authorize it to be in the manner township elections are required to be held in the election of their officers, and not under the general election laws. And it appears that this election was conducted in conformity to the law of its organization. And in this there was no error.

Was this a State, county, city or town election, in the sense of the law which has provided for the registry for such elections? The law requiring the registry to be made declares that the registry shall be made three weeks previous to any State, county, city or town election, except town meetings in towns adopting the township organization law. Session Laws, 1865, p. 51. The exception contained in this clause is not sufficiently explicit to leave it free from doubt in its construction. But the fifth article of the act providing for township organization relates to and governs town meetings. It provides for the manner of conducting the business of the town and for electing town officers. The latter, with some exceptions, are required to be elected by ballot. Nor do the different provisions of the article make any distinction in the meet-

ings, between the transaction of the business of the town and the election of officers. It is all required to be done at the town meeting, although it is called an election when choosing the officers, and a town meeting when transacting other business. Article 4 requires the regular town meetings to be held on the first Tuesday in April of each year, and the voters are then authorized to elect town officers and, quadrennially, justices of the peace and constables.

Such an election being at a town meeting, it is manifestly not embraced in the registry law, as such meetings are excluded, in terms, from its operation. And inasmuch as the statute contemplated the vote on this subscription to be taken in the town in the mode other town elections are held, and such elections being excepted from the provisions of the registry law, it follows that a registry of the voters was not necessary to this election, and there was not a want of power to hold it by reason of the failure to make a registry of the voters of the town.

In the case of *Boren* v. *Smith*, 47 Ill. 482, it was held, that a vote on the re-location of a county seat was not an election, within the registry law. Again, in the case of *The People ex rel.* v. *The Ohio Grove Township*, 51 id. 191, where an election was held to vote for and against a subscription to the stock of a railroad company, held on a ten days' notice authorized by the statute, it was held, that the registry law was not intended to be applied, because there was not time within which to prepare the registry before the election. In that case it was, for that reason, deemed unnecessary to determine whether the registry law applies to town meetings, and hence the question was not decided.

We now come to the question whether the notice containing the condition that the road should be completed into the township and cars running on the same, vitiates the election, and failed to confer power to make the subscription. It is true, the law has failed to authorize conditions to be imposed by the voters, but it has not prohibited their imposition. It is not,

nor can it be, denied, that an individual may or not subscribe to such a corporation, as he may freely choose, and he may impose any condition he desires to such a subscription, and it then is within the free choice of the company whether it will accept the subscription on the conditions. And the general assembly has left it to the voluntary determination of the voters of the town to say whether they would subscribe for the stock, or refuse to do so, by their vote. And if it was a matter of choice whether they would or not make such subscription, then why might they not impose any condition they desired, and, when imposed, why should the company be at liberty to compel an unconditional subscription to which the voters have not and probably never would assent? We have no hesitation in saying, that the electors might vote to subscribe on any conditions they might see proper to annex, and that the company can only receive it on the terms prescribed by the vote.

The township has no power to compel the railroad company to accept a conditional subscription. Nor can the company compel an unconditional one. In the case of *The People ex rel.* v. *Tazewell County*, 22 Ill. 147, it was held, under the general law, that it was discretionary whether the county should subscribe all or but a portion of the amount voted by the citizens, and that the county authorities might impose any proper conditions they might choose. And the same rule must apply to the voters of a town, in determining whether they will make a subscription. In the case at bar, the law declares that, if the vote results in favor of subscription, it shall be the duty of the supervisor to subscribe to the capital stock of the company, in the name of the township, the amount voted to be subscribed, and to receive a certificate therefor.

In the case at bar the relator claimed the right to an unconditional subscription, and it is the purpose of this proceeding to compel the supervisor to make such a subscription. We have seen that he is not authorized, under any circumstances, or at any time, to make a subscription upon any but the con-

ditions it was voted. It then follows that the supervisor cannot be compelled to make an unconditional subscription, and the peremptory writ must be denied.

Mandamus refused.

DAVID GARRISON

v.

JAMES B. DINGMAN.

ACTION FOR WORK AND LABOR — *acceptance of the article manufactured.* In an action to recover the price of painting and lettering a sign, it appeared the defendant had employed the plaintiff to paint the sign for a third person, to be of the same general style as another one designated. While working upon it, defendant visited the shop and objected to the shade or coloring of the bead upon the margin, which the painter changed. No other objection was made. Without the knowledge of the plaintiff, defendant took the sign from the shop and put it up, when the person for whom it was designed objected to it as greatly inferior to the model: *Held,* the defendant, by thus accepting the sign, was concluded from any defense on account of defects in the work.

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

The opinion states the case.

Mr. C. M. HARDY, for the appellant.

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

Mr. JUSTICE BREESE delivered the opinion of the Court:

This action was originally brought before a justice of the peace, and a judgment for the plaintiff, Dingman. The defend-

ant, Garrison, appealed to the circuit court, and on trial there a verdict and judgment were rendered against the defendant, to reverse which he appeals to this court.

Mr. James B. Dingman was a sign painter, and appellant employed him to paint and letter a sign for Madame Poncelot, doing business as a milliner at No. 26 Washington street, in Chicago, and to be of the same general style as the sign at No. 24 on the same street. Appellant was to find the board, and agreed to pay $34.50 for the work upon it. While working upon it appellant visited the shop and objected to the shade or color of the bead upon the margin of the sign, and the painter changed it. No other objection was made. Without the knowledge of the workman appellant took the sign from the shop and conveyed it to No. 26 Washington street, and, as appellee testified, mutilated it in putting it up.

There was some conflicting evidence as to the quality of the work, but it is fully proved that appellant took the sign from the shop and put it up without the knowledge of appellee, and when put up, Madame Poncelot did not like it; she thought it greatly inferior to that of the rival establishment at No. 24. Why did not the Madame examine the sign at the shop before it was removed? Her employee, the appellant, must have been pleased with it, or he would not have taken it and put it up. This, we think, should conclude him.

The instructions given for the defendant were all he could with propriety ask. The others were properly refused. There being no error in the record, the judgment is affirmed.

Judgment affirmed.

CHARLES M. HARDY *et al.*

v.

CYRUS KEELER.

1. TROVER — *whether a demand necessary — what constitutes a wrongful taking.* No demand is necessary in order to maintain an action of trover, where the original taking was tortious and wrongful.

2. A bailee of chattels, without the knowledge or consent of the owner, mortgaged them to secure rent, and, upon the rent coming due and remaining unpaid, the landlord seized the property with a view to a foreclosure of the mortgage. Thereupon the owner replevied the property and placed it back in the possession of the original bailee, and, while so in the possession of the latter, the landlord again seized the property, through his agents, under a distress warrant issued by him against the bailee: *Held*, the property when placed in the hands of the bailee, under the writ of replevin, was in the custody of the law, and its seizure by the landlord under his distress warrant was wrongful, so that the owner could maintain trover therefor without having first made a demand.

3. ATTORNEY AT LAW — *whether liable to an action for a wrongful seizure.* An attorney at law is not liable for any illegal seizure that may be made under a writ or warrant which he may happen to prepare.

4. But if an attorney, in addition to preparing a distress warrant, shall send his clerk to assist in the levy thereof, thus becoming an assistant bailiff to the landlord, he will be held liable for any and every illegal seizure that may be made by his assistants under the warrant, and the plea that he is an attorney will not avail for his defense.

5. ERROR WILL NOT ALWAYS REVERSE — *erroneous instructions.* A judgment will not be reversed, although some of the instructions may be technically wrong, where they were not calculated to mislead the jury, and justice has been done.

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

This was an action of trover, brought by Keeler against Hardy, Dailey and Miller. There was a verdict and judgment for the plaintiff. The defendants Hardy and Dailey appealed.

Mr. C. M. HARDY, for the appellants.

Messrs. KINNEY, PECK & KINNEY, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The evidence sufficiently sustains the claim of title to the property in question in the appellee, at least it is of such a character that the verdict of a jury finding that issue in his favor will not, and ought not, to be disturbed by an appellate court.

It is insisted that the appellee can not recover on the evidence in this case, in an action of trover. The action was originally commenced in replevin, before a justice of the peace, but the property was not found by the officer; service of the writ was had on the appellants, and the suit progressed as in an action of trover.

It appears that the appellee allowed his former wife, who had been divorced from him, to have the use of the property in question. It seems that she had rented the house of one William T. Miller, impleaded with the appellants, and to secure him in the rents, she executed to him a chattel mortgage on the property. It does not appear that appellee knew of the execution of the mortgage at the time, or that he ever ratified the act after he received information of what had been done by his former wife. The rent was not paid when due, and the landlord undertook to foreclose the chattel mortgage, and for that purpose seized the goods with a view to sell the same in satisfaction of the mortgage indebtedness. Immediately upon receiving information of the seizure of the goods, the appellee replevied the goods of the officer having the same in possession, and placed them back again in the possession of Mrs. Keeler. The landlord then issued his distress warrant for the rent due, and, by the direction of the appellant Hardy, the goods were again seized by the bailiff, with the assistance of the appellant Daly, and taken out of the possession of Mrs.

Keeler, where they had been placed by the appellee when the same were replevied only a short time before. This last taking, alleged to be wrongful, is the act complained of, and to recover damages for which wrongful taking, this suit was instituted.

The general rule is, that before a party can maintain trover, he must prove that he has a general or special property in the goods, and, if the original taking is not wrongful or tortious in its inception, he must prove a conversion of the property, or, where there is no actual conversion, such demand, and refusal to return the property before the commencement of the suit as amounts to a conversion in law. The rule is, however, well settled, that if the taking in the first place is tortious and wrongful, no demand is necessary before bringing the suit.

Was the original taking in this instance wrongful? The goods were in the custody of the law at the time, and the appellants well knew that fact. They knew that the goods had just been replevied by the appellee and that that action was then pending and undetermined. For the time being the law had placed this property in the possession of the appellee as the lawful owner. The possession of Mrs. Keeler was appellee's possession, and rightfully so. In defiance of the mandate of the law, and in utter violation of the rights of appellee, these appellants make themselves the willing agents of this landlord to seize and remove the property. The property was then in the possession of the appellee by virtue of the writ of replevin and by force of the law, and the appellants, without any process of any kind against him, seize and remove the property, and so far as this evidence discloses, it was wholly lost to the appellee.

These acts were sufficient, in themselves, to constitute a wrongful taking of the goods, and no demand was necessary before bringing the suit. The law does not impose upon the owner of property the duty to go to a wrong-doer and demand of him that he restore that which he has seized in violence and in defiance of law, before he can institute his action for redress. This is the exact status of this case, and these appellants can

not be heard to say that a demand is necessary before they can be compelled to make reparation for their wrongful and illegal acts.

But the appellant Hardy insists that he was simply acting as the attorney of the landlord and only wrote the distress warrant at his instance, and is not therefore liable even if the goods were wrongfully seized. If this was all that the appellant did, he certainly would not be liable. An attorney is not liable for any illegal seizures that may be made under a writ or warrant that he may happen to prepare. But the evidence shows that the appellant Hardy, in this instance, did something more than merely to prepare the warrant as requested by the landlord. It is not denied that he sent his clerk, Daly, the other appellant, to assist the officer to make the levy under the distress warrant. If a respectable attorney will consent to act as assistant bailiff to every landlord that may seek to avail of his professional services, he may expect to be held liable for any and every unlawful seizure that may be made by his assistants under the warrant, and the plea that he is an attorney will not avail for his defense.

We are satisfied, from a careful consideration of the evidence, that complete justice has been done, and the instructions refused for the appellants, and those given for the appellee, even if they were technically wrong, were not of such a character as would tend to mislead the jury; and we would not, for that reason alone, disturb the verdict. But if the instructions be taken and considered together, as they ought to have been, and as we have no doubt the jury did consider them, they do, substantially at least, state the law correctly. There is no substantial error in the record. Let the judgment be affirmed.

Judgment affirmed.

MCALLISTER, J., took no part in the decision of this case.

WILLIAM J. PHELPS *et al.*

v.

OVID B. NORTHUP *et al.*

1. ACCEPTANCE — *by parol.* A parol acceptance of an order to pay money out of the proceeds of a claim in the hands of the party upon whom the order is drawn for collection, is binding.

2. ACCEPTANCE — *of order to pay over proceeds of a claim when collected.* A party in whose hands a promissory note was placed for collection, accepted an order from the owner of the note to pay over a portion of the proceeds thereof, when collected, to a third person. Afterward, the acceptor, by direction of the party placing the note in his hands, but without the knowledge or assent of the holder of the order, surrendered the note to another, to whom it was paid: *Held,* in an action of assumpsit by the holder of the order against the acceptor, the surrender of the note, under the circumstances, was a fraud upon the plaintiff, and as much a breach of their contract as if the acceptor had himself collected the note and refused to pay over the portion of the proceeds represented by the order, and he was, therefore, liable in that action.

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

August 11, 1869, appellants, being bankers at Elmwood, Illinois, received from Dogget, Bassett & Hill, of Chicago, a claim for collection, against one John J. Rose, who had been doing a boot and shoe business at the former place, but, who, on the third of that month, had sold out his stock to W. H. and John Struthers, taking their promissory note of that date, for $845.52, payable to Rose's order two months after date. August 16, Rose paid appellants on the D., B. & Hill claim $150, leaving a balance of about $142, which he was unable to pay, but to secure which, he transferred to appellants the Struthers note, for $845.52, taking their receipt in these words: "Banking house of Phelps & Tracy, Elmwood, Ill., September 16, 1869. From J. J. Rose, note of

W. H. and John Struthers, for $845.52, due October 3, for collection. Phelps & Tracy."

Rose, being indebted to appellees in the sum of $415, on the 20th September, 1869, gave them a written order upon appellants, as follows:

"ELMWOOD, *September* 20, 1869.

Messrs. PHELPS & TRACY, Bankers, Elmwood, Illinois: Please pay Northup & Sherman $415, when note in your possession for collection against W. H. and John Struthers is collected. JOHN J. ROSE."

Rose inclosed this order to appellees in a letter, requesting them to put it in the hands of one N. D. Jay, an attorney, to be collected. Rose swears that, before he sent the order to appellees, he showed it to Tracy, and said: "I have drawn this order on you," and he said, "it would be all right when the money was paid in." That fact, however, is controverted. But it is not disputed that appellees placed the order in Jay's hands, for collection, who, about a week before the Struthers note became due, took the order to appellants' bank, and asked them to write an acceptance upon it, which they declined to do, but took the order, laid it away with the Struthers note, which was pinned to the D., B. & Hill collection, and their counsel admit that they then intended to pay it out of the proceeds of that note, in case they came into their hands, and, on one occasion, appellants, in figuring up the amount of claims against the Struthers note, reckoned appellees' claim among others. It appears that during these transactions Thomas Cratty, an attorney, received for collection a claim against Rose, in favor of one Voigt, for $267. After the order in favor of appellees had been placed in appellants' hands, Rose being pressed for payment of the Voigt claim, made an arrangement with Cratty, that in case appellants had not accepted the said order in favor of appellees, Cratty should furnish Rose the means to pay off the claim upon which appellants held the Struthers note as collateral (not includ-

ing appellees' claim), and Rose should take up the Struthers note and deliver it to Cratty, as security for the money so advanced and the Voigt note. On the 20th October, 1869, Cratty and Rose applied to appellants, inquiring if they had accepted the order of Rose in favor of appellees, and, being informed by them that they had not, Rose then proposed to pay off what they held against the note and to receive it back. Tracy figured up the amount due D., B. & Hill, and some claims they had against Rose in their own right, making the sum of $218.15, which Cratty paid, took the Struthers note and went away with it, to whom it was paid.

Appellees brought assumpsit against appellants to recover the amount of said order. The declaration contains special counts upon the order and an acceptance of it by them. Also, upon an acceptance and wrongful disposal by them of the Struthers note, and the common counts. Evidence was given upon both sides as to the question of express acceptance; the jury found in favor of appellees.

Messrs. JOHNSON & HOPKINS and Mr. THOMAS CRATTY, for the appellants.

Messrs. O'BRIEN & HARMON and Mr. H. W. WELLS, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

There was sufficient testimony, if believed, to warrant the jury in finding an acceptance, which might be by parol. And there is no such weight or preponderance of evidence the other way as would justify our interference with the verdict. We are to assume, therefore, that the order was accepted. If so, the legal effect was an undertaking on the part of appellants to pay the amount when the note in their possession for collection was collected, and there can be no doubt that, but for their act disabling them from collecting the Struthers note,

by transferring it, without appellees' consent, to Cratty, it would have been collected by appellants, and then their refusal to pay would have been a breach of their undertaking. If they had the power to disable themselves from collecting the note, in violation of the rights of appellees, and thus get rid of their contract, the law would aid them in the commission of a fraud. The contract itself imports that they would use due diligence to collect the Struthers note. Allowing the note to be withdrawn from their hands, and delivering it over to another, while appellees' order was in their hands and accepted by them, was a positive breach of duty, and as much a breach of their contract as if they had collected the note, and then refused to pay appellees. *White* v. *Snell*, 9 Pick. 16.

In *Yeates* v. *Groves*, 1 Ves. Jr. 280, Lord THURLOW decided that an order to pay a debt out of a particular fund belonging to the debtor, constituted an equitable assignment of the fund *pro tanto*, and gave the creditor a specific, equitable lien thereon, although the order had not been accepted by the holder of the fund before the debtor's bankruptcy.

In *Israel* v. *Douglass*, 1 H. Black. 239, Lord LOUGHBOROUGH said, "This debt is, with the consent of the parties, assigned to the plaintiff (the payee); Douglass (the drawee) has notice of it and assents, by which assent he becomes liable to the plaintiffs." *Ex parte Alderson*, 1 Mad. 53; *Lett* v. *Morris*, 4 Sim. 607; *Weston* v. *Barker*, 12 Johns. 279; *Taylor* v. *Bates*, 5 Cow. 376; *Wheeler* v. *Wheeler*, 9 id. 34; *Bradley* v. *Root*, 5 Paige, 632.

It follows, from these authorities, that the order upon appellants, notice to them, and their assent, bound the fund in their hands. Rose had no right to withdraw, nor they to surrender or assign it over to Cratty. The surrender and transfer of the Struthers note to Cratty was clearly a fraud upon appellees, a breach of appellants' contract, and they were, therefore, liable in this action.

We have examined the instructions given on behalf of appellees, and such on behalf of appellants as were refused,

and find no error in either the giving or refusing of instructions.

The judgment of the court below must be affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE LAWRENCE, Mr. JUSTICE THORNTON, and Mr. JUSTICE SHELDON dissenting.

BOARD OF SUPERVISORS OF STEPHENSON COUNTY

v.

PELLS MANNY.

1. REMEDY — *to recover back taxes improperly collected.* If money has been paid for taxes illegally assessed, the proper remedy to recover the same back is by an action for money had and received. That action is applicable where a person receives money, which, in equity and good conscience, he ought to refund.

2. DEFENSE — *in such action.* In an action for money had and received, the party sued may go into every equitable defense upon the general issue; he may claim every equitable allowance, in short, he may defend himself by every thing which shows that the plaintiff, *ex æquo et bono,* is not entitled to recover.

3. TAXES *irregularly assessed — whether they may be recovered back.* Where taxes have been paid upon property legally liable to taxation, it cannot be recovered back, although the assessment was informal and irregular and not strictly in conformity with the statute, or the statute itself defective in respect to the manner in which the assessment is directed to be made.

4. TAXATION OF NATIONAL BANKS *by the State — of the mode thereof.* Whether the shares of national bank stock are listed for taxation by the individual owners, or the capital stock is listed by the bank, a similar valuation and a like burden are imposed, and in whichever mode the assessment is made, there is no wrong perpetrated and no injustice done.

5. SAME — *legality of assessment — in what proceeding may be questioned.* While the question of the sufficiency of the law of this State in regard to the mode of assessment of stock or shares in national banks, for taxation, might possibly arise in case of an attempt to enforce the collection of a tax, it cannot properly arise in an action for money had and received to recover back money paid for such a tax.

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

The opinion states the case.

Mr. J. M. BAILEY, for the appellants.

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

Mr. JUSTICE THORNTON delivered the opinion of the Court:

An action of assumpsit was brought to recover back moneys paid for taxes assessed upon certain shares in the capital stock of the Second National Bank of Freeport. The taxes were assessed for the years 1865 and 1866.

If any recovery can be had, it is upon the count for money had and received. The principle governing in such case is, that the possession of money has been obtained, which cannot conscientiously be withheld. Such an action is designed for the advancement of justice; and it is applicable, where a person receives money, which, in equity and good conscience, he ought to refund.

The defense to the claim, as well as the claim itself, is governed by the same principles. In speaking of this action, Lord MANSFIELD, in *Moses* v. *McFarland*, 2 Burr. 1010, said, "It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that may go into every equitable defense upon the general issue; he may claim every equitable allowance, etc.; in short, he may defend himself by every thing which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or any part of it."

Apply these principles to the facts of this case, and there can be but one conclusion. Appellee was the owner of certain shares of stock in the National Bank of Freeport. This was property, within the meaning of the law. According to our con-

stitution and revenue laws, every person or corporation must pay a tax, in proportion to the value of his or its property. There was the highest obligation upon appellee, to pay the taxes assessed upon his shares of stock. The law did not and could not exempt him from this obligation. He was, then, bound to pay the taxes on his property. This he did do; and even though the assessment was informal and irregular, and not strictly in conformity to the statute, the money cannot be recovered back. It was not money which, in equity and good conscience, ought to have been refunded. Appellant had an equitable right to the taxes paid, and for the promotion of justice should retain the money. *The People* v. *Bradley*, 39 Ill. 131; *The People* v. *Miner*, 46 id. 374; *Eddy* v. *Smith*, 13 Wend. 489.

It is contended that the act of February 14, 1857, entitled "An act to amend 'An act to establish a general system of banking,' passed February 15, 1851," requires the capital stock to be taxed, instead of the shares, in banking corporations; that property cannot be held liable to double taxation; and that our statute authorizing the taxation of stocks in banks, does not conform to the limitations of the act of congress, of June 3, 1864, creating national banks.

There is no proof in the record that the bank had ever paid taxes upon the capital stock; and in the language of this court, in the case of *People* v. *Bradley*, *supra*, "the shares represent the capital stock, and the capital stock represents the shares. If listed by the shareholder he would pay the tax directly; if listed by the bank he would pay the same amount indirectly." The payment of the tax is made; and thus the same result is reached by different means. A similar valuation, and a like burden are imposed in the one case as in the other. There is no wrong perpetrated, and no injustice done.

The question, whether our statute conforms to the act of congress or not does not arise in this case. It can make no difference to the rights of the parties if our statute does not prescribe the exact mode of assessment required by the act of

congress. These questions might possibly arise, in case of an attempt to enforce the collection of a tax irregularly assessed. This is not such a case, and we therefore forbear any discussion of such questions.

Appellee was under a legal and equitable obligation to pay the taxes complained of. There was legislation upon the subject. It may have been defective. The assessment may have been irregular. The alleged illegality in the assessment is, however, wholly technical, and should not be regarded in this form of action.

Appellee has discharged an obligation, has performed a duty resting upon him, and has done nothing more. His claim is not based upon any merit or equity, and the judgment is therefore reversed, and the cause remanded.

Judgment reversed.

SHELDON, J., took no part in the decision of this case.

ELISHA W. WILLARD *et al.*

v.

GEORGE BOGGS.

1. STATE OF WAR — *absence of debtor in enemy's country — suspension of creditor's rights thereby.* The last of a series of notes secured by mortgage upon lands lying in this State, having matured in September, 1861, an assignee of the notes and mortgage, who resided in this State, in pursuance of a power contained in the mortgage, in November following sold and conveyed the mortgaged premises to a third person. In May, 1860, prior to the maturity of such note, the mortgagor went to New Orleans, where he remained until June, 1862, when the city was occupied by the Federal forces, and soon after he returned to this State: *Held*, that neither the contract of indebtedness nor the power of sale was suspended during the debtor's residence within the confederate lines, so as in anywise to affect the validity of the sale made during that time.

Syllabus. Brief for the appellants.

2. SAME — *effect of the prohibition of commercial intercourse during the late rebellion.* As was held in *Mixer et al.* v. *Sibley et al.*, 53 Ill. 61, the act of congress of July 12, 1861, empowering the president to prohibit, by proclamation, all commercial intercourse between the rebellious and the loyal States, and the proclamation of the president in pursuance thereof, issued August 16, 1861, prohibiting such intercourse, were not designed to deprive creditors in the adhering States of the use of all such remedies for the collection of their debts, as the laws of those States gave them.

3. REDEMPTION *from sale under power in a mortgage — as against a third person — where the debtor resided within one of the rebellious States.* Where a sale of land was had under a power of sale in a mortgage, at a time when the mortgagor was residing in one of the rebellious States, during the late war, and the purchaser at such sale was a stranger to the mortgage, without notice of any reason why the power could not properly be exercised, he would be protected against any claim on the part of the debtor to a right of redemption based upon the fact of the inability of the latter to communicate with his creditor; and the same protection would be accorded to a *bona fide* vendee of such purchaser, although he held the mortgage by assignment at the time of the sale.

APPEAL from the Superior Court of Chicago.

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

Messrs. GOUDY & CHANDLER, for the appellants.

A power of sale contained in a mortgage was not suspended by reason of the residence of the debtor in one of the States in rebellion, during the existence of hostilities in the late war. This is settled under the rule in the case of *Mixer* v. *Sibley*, 53 Ill. 61. See, also, *Dorsey* v. *Dorsey*, 30 Maryland, 522.

Moreover, the laws of war did not apply at the time of the sale and conveyance in this case, November 5, 1861.

For the purpose of discussing this point, we admit that a war between different nations would destroy the right of a mortgagee to enforce his security against the property of one in the enemy's country. It is a matter of grave doubt whether the international rules of war apply to a civil war, to the full

extent. The supreme court of the United States has held that the late rebellion was such a war as authorized the capture of property on sea and land, and that the limitation law of the State was suspended by it. Other courts have extended the rule to other cases. But it is not material in this case to fix the limits on that subject.

It is settled beyond controversy that the sovereign of a nation may apply the laws of war with full vigor, yet he may and does relax them. In a civil war, such rules are only partially applied as the progress of the insurrection requires; they are not to be considered as in full force *ipso facto*, but only so far as declared from time to time.

The history of the late rebellion in this country illustrates and proves this proposition. First, the government treated the insurrection as existing only among certain persons, and all others were regarded as loyal. Provisions were constantly made recognizing the existence of loyal citizens within the seceding States; they were not treated as enemies. From time to time congress extended more rigorous rules as the exigency demanded, but at no time were all the inhabitants of the States in insurrection treated as rebels.

These doctrines are fully recognized in *Allen* v. *Russel et al.*, 3 Am. Law Reg. 366; *Filor* v. *United States*, 3 C. Claims R. 34; *Fairfax Devisee* v. *Hunter's Lessee*, 7 Cranch, 603; *Clarke* v. *Morey*, 10 Johns. 69; 3 Wash. C. C. 484.

The government of the United States had not, prior to November 5, 1861, established any rule which would prevent the sale and deed under the provisions of this mortgage. In the case of *Allen* v. *Russel et al.*, it was expressly decided that a deed made November 29, 1861, by persons in actual rebellion, to a loyal person, of property in Kentucky, was valid.

The proclamation of the president, of August 16, 1861, prohibiting all commercial intercourse between persons in the States in rebellion and those in the loyal States, did not embrace the case of the resort to the remedy afforded by the contract of the parties.

Mr. EDWARD S. ISHAM, for the appellee.

The breaking out of war operates to suspend all contracts existing between the residents of the hostile countries; such contracts, and all right to enforce them, are suspended and put in abeyance until the return of peace; interest ceases to accrue during the same period; and by the laws of war all pacific intercourse between the people of the contending nations is absolutely prohibited. *Semmes, admr.*, v. *The City Fire Ins. Co.*, in U. S. Cir. Co. for the District of Connecticut, reported in 2 Chicago Legal News, 17; *The Prize Cases*, 2 Black, 678; *Griswold* v. *Waddington*, 16 Johns. 447; *The Rapid*, 8 Cranch, 160; *The Julia*, id. 193; *Hanger* v. *Abbott*, 6 Wall. 535; Wheaton's International Law, by Lawrence, 551, 556.

The rule by which pacific intercourse was interdicted and contracts were suspended had the same force and effect in the late civil war, both by virtue of the general law and by force of the proclamation of the president, as in a foreign war. *Semmes* v. *Ins. Co.*, before cited; *The William Bagaley*, 5 Wall. 407; *The Ouachita Cotton*, 6 id. 521; *Hanger* v. *Abbott*, id. 535.

In the case of *Mixer* v. *Sibley*, 53 Ill. 61, the creditor had invoked the aid of the civil courts. In the case at bar, however, there was no intervention of a court of justice. The holder of the notes and mortgage took his case into his own hand, and advertised the property for sale under a power of attorney. He went through a proceeding deriving all its right from the terms of a suspended contract. By the rules of international law, the debt could not become due while the debtor was absent within the rebel lines. *Baylies* v. *Fettyplace*, 7 Mass. 325; *Quick* v. *Sturtevant*, 2 Paige's Ch. 91; *Hatchett* v. *Pattle*, 6 Madd. Ch. 11; 1 Story's Eq. Juris., § 93.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 25th of September, 1857, James Boggs, George Boggs and Redmond Cotter, then residents of Chicago, executed a mortgage to Julius Crane and William P. Apthorp, of certain premises, situate in Cook county, to secure the payment of four promissory notes of even date, each for $1,400, due in one, two, three, and four years.

Cotter afterward conveyed to the two Boggs, and they became the sole owners of the equity of redemption.

The last note having fallen due September 25, 1861, and it and a portion of the third note remaining unpaid, to satisfy the payment of the same, on the 5th day of November, 1861, Willard, the assignee of the notes and mortgage, sold and conveyed the mortgaged premises to George Smith for $300, in pursuance of a power of sale contained in the mortgage, authorizing the mortgagees or their assigns, in default of payment of the notes, or either of them, to sell the premises for their payment, after publishing a notice in a newspaper in Chicago for thirty days. July 14, 1862, Smith sold and conveyed the property to Willard, for $334.

George Boggs left Chicago in May, 1860, and went to New Orleans, where he remained until June, 1862, when the city was occupied by the Federal forces. He soon after returned to Chicago, via New York.

After the sale, Willard took possession of the land, and has held it ever since, and paid all taxes.

James Boggs has acquiesced in the sale, and makes no question as to Willard's title. But George Boggs commenced this suit in chancery, on the 26th day of October, 1868, to declare the sale void as to him, and to permit him to redeem an undivided half of the property.

The court below rendered a *pro forma* decree as prayed in the complainant's bill.

To reverse the decree, the defendants bring the record here, assigning this decree as error.

There is no pretense that the sale and conveyance of the mortgaged premises in this case by Willard to Smith were not in entire conformity with the power of sale contained in the mortgage; but the ground of the claim to relief is, that, at the time of such sale, and of the maturity of the last note, George Boggs was within the territory then occupied by the confederate forces in the late rebellion; that while the war and the complainant's residence within the confederate lines continued, the contract of indebtedness was suspended; that it was unlawful for the complainant to pay, and for Willard to receive payment, and that the power of sale was suspended; that these effects resulted from the laws of war, and the proclamation of the president prohibiting all commercial intercourse between the rebellious and the loyal States, issued August 16, 1861, in pursuance of the act of congress of July 12, 1861, empowering him to do so; in consequence of which, it is claimed that the sale to Smith was void, and that the equity of redemption still exists in George Boggs.

The decision of this court in the case of *Mixer* v. *Sibley*, 53 Ill. 63, is adverse to the claim here set up.

It was held, in that case, that proceedings by attachment, in 1862, for the collection of a debt, on the part of a creditor living in this State, against a defendant who resided in Alabama, a State then in rebellion against the United States, notice of the pendency of the suit having been given by publication in a newspaper, which resulted in a judgment by default and sale of the property attached, were not void, and were not suspended by the state of war. It is there said, "No authority has been or can be shown, that the right to the writ was taken away by the rebellion, or by act of congress, or by the president's proclamation consequent thereupon.

Such was not the object of either. Neither was designed to deprive creditors in the adhering States of the use of all such remedies for the collection of their debts as the laws of those States gave them."

As in that case, the remedy for the collection of the debt by

writ of attachment was not taken away, so here, the remedy for the collection of this mortgage debt by the exercise of the power of sale given in the mortgage was not taken away. It may be said, as it was there, that the question is not whether the sale might not have been stayed until the termination of the war, but whether, not having been stayed, and the power of sale having been actually exercised by the sale of the premises to a third person, is that sale void? The court went so far only in that case as to hold that the efflux of time as to redemption from the sale under execution was suspended during the continuance of hostilities, and to allow the judgment debtor, after the expiration of the time for redemption, to redeem from the judgment creditor, such land as he had purchased under the execution sale as remained in his hands, but denied that, or any relief, as against purchasers from the judgment creditor, holding their equities to be equal to those of the complainants.

It is admitted by the counsel for the appellee that the sale to Smith and the reconveyance by Smith to Willard, were *bona fide* and for actual consideration paid, as was sworn to in the answer of Willard, called for under oath, or at least it is admitted that the contrary is not proved.

Under the principle of the above decision, had this sale been under a decree of foreclosure in a suit in court, with notice by publication, it would have been sustained.

We think the sale under the power in the mortgage must be entitled to equal force. In the one case it would have been in pursuance of law, in the other it was in pursuance of the contract between the parties, which was as a law between themselves.

The sale here was under the precise conditions Boggs, by his deed, authorized it to be made. But he claims that the power of sale was suspended by an event which had occurred *aliunde*, to wit: his being, by his own voluntary act, in another State at the time the last note fell due, and the publication of notice and sale were made, where he was cut off

from all means of access to his creditor to pay the debt, and shut out from the receipt of any newspaper notice of the sale. But neither Willard nor Smith appear to have had any knowledge of the whereabouts of Boggs, and no duty was imposed upon them to ascertain it.

Boggs was free to annex his own conditions to the power of sale, and he might have provided that it should not be exercised in such a contingency as here occurred, in which case, Smith would have been put upon inquiry, by the terms of the power of sale, to ascertain whether it existed or not. Boggs, by his deed of mortgage, made a conveyance of the legal title, and saw fit to give therein an irrevocable power of sale, to sell the equity of redemption, on two conditions only, the non-payment of the debt after its maturity, and publication of thirty days' notice of the sale, in a newspaper printed in Chicago.

When Willard, in execution of the power of sale, offered the mortgaged premises for sale, Smith saw that both the conditions required for the exercise of the power existed; he had no notice of any thing to affect the proper exercise of the power, and he was entitled to act on the faith of the power given by Boggs, and to lay out his money in the purchase of the property, in confidence that he was acquiring all the interest of Boggs in it.

The same reason of public policy exists for giving security to titles derived under such sales, as under judicial sales. Were they liable to be invalidated on any such grounds as are set up in this case, it would tend to discourage purchases at such sales, and lead to the sacrifice of property so exposed for sale.

Certainly, no greater effect should be given to this supposed suspension of the power of sale, claimed to have been caused by the facts set forth, than would be given to an actual revocation of a power by the principal. Had the power of sale in this case been a revocable one, and Boggs had actually revoked it, a subsequent sale of the property to a third person

in pursuance of the power, who had purchased on the faith of it, without any notice of the revocation, would bind the principal, Boggs. Story on Agency, § 470.

If the complainant has suffered by the sale of his property, it has only been in consequence of what he himself expressly contracted and authorized to be done. The defendant, Smith, has parted with his money for the property, in reliance upon the express written authority to sell it, given by the complainant, without notice of any reason why the power might not properly have been exercised, acquiring an apparently perfect title by the record. On comparison of the equities between the parties, we can perceive no just claim on the part of the complainant, which entitles him to take from the defendant a title acquired under the circumstances of the present case.

We think the bill should have been dismissed.

The decree *pro forma* is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

GERHARD KUHNEN

v.

WILLIAM BLITZ.

1. INSTRUCTIONS. It is not error to refuse an instruction embodied in those already given.

2. NEW TRIAL — *weight of evidence.* Where the verdict is not clearly against the weight of the evidence, the judgment will not be disturbed.

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

This was an action of trespass brought by Blitz against Kuhnen to recover for injuries to the person of the plaintiff, caused

by the alleged wrongful and willful act of the defendant. A trial by jury resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Mr. THOMAS SHIRLEY, for the appellant.

Mr. H. BARBER, Jr., for the appellee.

PER CURIAM: Although we entertain some doubt as to the correctness of this verdict, we find no legal grounds in the record for reversing the judgment. The law governing the case was stated to the jury with entire correctness. The instructions refused for the defendant, so far as they were correct, were fully embodied in those given. The evidence is so nearly balanced that we cannot say the verdict was clearly against its weight. We must affirm the judgment.

Judgment affirmed.

MATTHIAS NEIFING *et al.*

v

THE TOWN OF PONTIAC.

1. SALE OF BEER — *prohibition thereof.* Where a person is being prosecuted for selling beer by the glass, in violation of a town charter which forbids beer to be brought within three miles of the town "for the purpose of trafficking therein in any way whatever," the offense charged being within the power of prohibition in the legislature, the question can not arise whether that clause was unconstitutional, in that it was broad enough in its language to embrace other modes of traffic not within the power of the legislature to prohibit.

2. STATUTES — *of the title of a local or private law.* The town of Pontiac having been incorporated under the general law, an act was passed with this title: "An act to extend the corporate powers of the town of Pontiac:" *Held,* though the act may restrict the corporate powers of the

town in some respects, as well as extend them in others, this is not a violation of the provision in the constitution which forbids a local or private law to embrace more than one subject, and requires that subject to be expressed in the title.

3. So it was competent for the legislature to provide in the act having such title, for the regulation of the subject of the sale of liquors, within certain prescribed limits, prohibiting the general traffic therein, and providing for what purposes the town council may grant licenses for the sale of liquors.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

This action was brought by the town of Pontiac against appellants, for an alleged violation of section 17, article 7, of its charter, and was tried before a justice of the peace and a fine entered against them by said justice, from which an appeal was taken to the circuit court of Livingston county, and by change of venue was taken to Kankakee county, and tried at the April term of circuit court of said county, 1870, and judgment rendered against appellants by the court (a jury being waived) for $25, and from thence the cause is brought here by appeal.

The cause was tried upon the following stipulation, no other evidence being adduced, to wit:

"It is admitted in this case that defendants, on the 1st day of May, A. D. 1869, at their place of business, made four different sales of lager beer (the same being a malt beer), to one Stacy Stevens, in less quantities than one pint, to wit: by the glass; that the same was drank on the premises aforesaid in the presence of and with the consent of defendants; that said place of business and premises were outside the corporate limits of said town and within three miles, to wit: within forty rods of said corporate limits; that said place of business was a brewery for the sale and manufacture of said beer; that defendants were brewers by occupation at that time, and carried on said business at said brewery, and that said beer so manufactured was sold by defendants by the

wholesale, and shipped from said brewery, as well as by retail; and that the beer sold as aforesaid was all manufactured by said defendants as such brewers."

That said town of Pontiac was incorporated under the general incorporation laws of Illinois, and continued to act thereunder until the passage of the law approved February 14, 1865, entitled "an act to extend the corporate powers of the town of Pontiac," since which time it has continued to act under the last named act.

That portion of section 17, article 7, upon which this suit is brought, reads as follows: "And no person shall be permitted to bring into the town, or keep about his, her or their premises, saloon, cellar, dwelling-house, out-house or in any other place in said town, or within three miles thereof, any of the above-named drinks, liquors or intoxicating beverages, for the purpose of trafficking therein in any way whatever." Private laws, 1865, vol. 2, p. 550.

The act (the charter) is entitled, "An act to extend the corporate powers of the town of Pontiac."

Mr. A. E. HARDING, for the appellants.

Mr. L. E. PAYSON and Mr. E. M. JOHNSON, for the appellee.

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

The charter of the town of Pontiac forbids beer to be brought within three miles of the town, "for the purpose of trafficking therein in any way whatever." The appellants were convicted of violating this provision, and were fined $25. Their counsel urge that this prohibition in the charter is unconstitutional, since it is broad enough in its language to forbid the manufacture of beer within the specified limits, or its being made an article of commerce by wholesale. When a record

comes before us presenting such a state of facts, we will consider this question. In this case the traffic in beer in which defendants were engaged, and upon which the conviction rests, was its sale by the glass, and so far as concerns such traffic the prohibition in the charter is a mere police regulation, and free from constitutional objection. Whether the prohibition can be made effective to its full extent is a question not arising upon this record and not decided.

It is further objected, that the title of the act which contains this prohibition does not indicate the subject of the enactment. The title is "An act to extend the corporate powers of the town of Pontiac." The act embraces the complete charter of a town, with all its necessarily manifold provisions.

The section in which the provision in question is found provides for what purposes the town council may grant licenses to sell liquors, after prohibiting the general traffic. This is a subject of regulation in all our municipal charters. Before the passage of this law the town of Pontiac was merely incorporated under the general law. The object of this law, as indicated by its title, was to extend the corporate powers of the town. These corporate powers were therefore the subject matter of the act, and though the act may restrict these powers in some respects, as well as extend them in others, it cannot be said this is a violation of the provision in the constitution which forbids a local or private law to embrace more than one subject, and requires that subject to be expressed in the title. As already said, the subject of this act is the corporate powers of the town of Pontiac, and that subject is expressed in the title.

Judgment affirmed.

CYRENUS RUSSELL *et al.*

v.

JAMES H. ROGERS *et al.*

1. INJUNCTION — *dissolution of — assessment of damages.* Where an injunction bond was executed since the adoption of the act of 1861, authorizing the circuit courts to assess damages on the dissolution of any injunction, in a suit to restrain the defendants from opening a road over the complainant's land, conditioned that the complainant should prosecute his suit with effect, or should pay all such damages as might be awarded against him for a failure, it was *held,* that, inasmuch as the defendants had failed to claim and have their damages assessed when the injunction was dissolved and the suit dismissed, they had no right, under the bond and that statute, to have damages assessed in a suit on the bond.

2. FORMER DECISIONS. The cases of *Phelps* v. *Foster,* 18 Ill. 309, and *Hibbard* v. *McKindley,* 28 id. 240, holding, except in the case of an injunction to restrain the collection of a debt, that it was error to assess damages on the dissolution of an injunction, thus rendering it necessary to prove the damages sustained, on the trial of the suit on the bond, were before the passage of the act of 1861, and hence have no controlling effect upon this case.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. S. D. PUTERBAUGH, Judge, presiding.

The opinion states the case.

Messrs. JOHNSON & HOPKINS, for the plaintiffs in error.

Messrs. MCCULLOCH & CRATTY, for the defendants in error

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that in the year 1869 defendants in error were road commissioners of the town of Radnor, in the county of Peoria, and as such were about to open a public highway over the premises of Russell. And on the 8th day of March of

that year he filed his bill and obtained an injunction against defendants in error, restraining them from opening the road, when Russell, with the other plaintiffs in error, filed an injunction bond in the case. On the 3d day of June, 1869, the cause came on to be heard on a demurrer to the bill and on a motion to dissolve the injunction, upon proofs of the parties, when the injunction was dissolved and the bill dismissed. This suit is brought on the bond to recover for expenses, costs and solicitors' fees paid, and for solicitors' fees for which defendants in error are liable to pay and for damages paid and sustained. On the trial in the court below the only evidence of damage was, that defendants in error were liable to their attorneys for $100 for defending the suit for the injunction, and for that amount they recovered a judgment; to reverse which the record is brought to this court and errors have been assigned.

In support of the judgment of the court below we are referred to the case *Hibbard* v. *McKindley*, 28 Ill. 240, where it was held, that under the condition of an injunction bond, that the obligors would pay all such costs and damages as should be awarded against the complainant on the dissolution of the injunction, damages might be recovered that were not assessed by the court when the dissolution was ordered. It is urged that this case is conclusive of the question. This would no doubt be true were it not for the act of 1861 (Sess. Laws, 133). Prior to the passage of that law, the circuit courts were authorized to award damages not exceeding ten per cent, when an injunction restraining the collection of a debt was dissolved, but there was no provision of the statute authorizing the assessment of damages in other cases. And the act of 1861 was no doubt passed to remedy the existing inconvenience in the practice, and to relieve the defendant from the necessity of suing on the injunction bond, when the damages could be collected on execution against complainant.

That act declares that, in all cases, on the dissolution of an injunction, the chancellor, before finally disposing of the case,

upon the party claiming damages by reason of such injunction, upon suggestions in writing, with their nature and amount, shall hear evidence and assess such damages as the nature of the case may require and to equity may appertain, to the party damnified by such injunction, and may award execution to collect the same. Thus it is seen that this enactment has conferred upon the chancellor enlarged powers, and has materially changed the practice on the dissolution of an injunction.

The legislature no doubt designed to give a more expeditious, cheaper and equally as efficacious a mode of assessing damages sustained for the wrongful suing out of injunctions; and it must have been intended to confine the assessment of damages to that mode. The right to have them so assessed existed when the bond in this case was executed. When the condition was inserted that Russell should prosecute his suit with effect, or should pay all such damages as might be awarded against him for a failure, it would seem that the condition was intended to refer to the awarding of damages at the time he failed to prosecute the suit with effect. This is the natural import of the language, and the court having ample power to make such assessment, the condition of the bond must be held to refer to such, and not to an assessment in a suit on the bond. This is a fair and reasonable construction of the language of the bond. If the condition had been different, then it would no doubt be otherwise.

In the case of *Roberts* v. *Fahs*, 36 Ill. 268, it was said, since the statute of 1861 has been adopted, the true measure of damages under such a breach, was the judgment enjoined, with interest and costs, and such damages as might be assessed on the dissolution of the injunction.

In the case of *Phelps* v. *Foster*, 18 Ill. 309, it was held, that it was error to assess damages on the dissolution of an injunction restraining the sale of goods, thus rendering it necessary to prove the damages sustained, on the trial of the suit on the injunction bond; and it was so held in *Hibbard* v. *McKindley*, *supra*. Those cases were, however, before the adoption of the

act of 1861, and hence have no controlling effect upon this case. Inasmuch as the defendants in error failed to claim and have their damages assessed, as the condition of their bond required, when Russell failed to prosecute his suit with effect, which occurred when the suit was dismissed, they have no right, under the bond and this statute, to have damages assessed in the suit on the bond. And the judgment must be reversed and the cause remanded.

Judgment reversed.

WILLIAM L. HARPER *et al.*

v.

DAVID J. ELY *et al.*

1. STATE OF WAR — *sale under power in a mortgage — residence of the debtor within the States in rebellion — redemption.* The remedy of the holder of a mortgage in this State, to make sale of the mortgaged premises in case of default, under a power in the mortgage, was in no wise impaired or suspended during the existence of hostilities in the late war of the rebellion, on account of the residence of the mortgagor, and his grantee subsequent to the mortgage, within the rebellious States; and this rule applies as well to the grantee of the mortgagor, who always resided within one of the States, which, after the conveyance to him, joined in the rebellion, as to the mortgagor himself, who, after making the mortgage, left his residence in one of the loyal States, for the purpose of engaging in hostilities against the government. So on bill filed to redeem from a sale had under such circumstances, the relief was denied.

2. MORTGAGE — *whether principal to become due on default of payment of interest.* A bond which was conditioned for the payment of a sum of money at a specified time, as principal, and interest thereon in semi-annual installments, until the principal should become due, contained the *proviso*, "that if default be made in the payment of any of the interest on the said principal sum as aforesaid, and any portion thereof shall remain due and unpaid for the space of thirty days after the same shall become due and payable, according to the above recital and condition, and in that case, the said principal sum, together with all arrearages of

interest thereon, shall, at the option of the said" creditor, "thereupon become due and payable, and may be demanded immediately." A mortgage given to secure this bond, provided: "But if default shall be made in the payment of the said sums of money above mentioned, or of the interest that may grow due thereon, or of any part thereof, at the time and times respectively when the same ought to be paid, as set forth in said condition," "that then and thenceforth it shall be lawful for the said party of the second part to enter into and upon all and singular the premises hereby conveyed," "and to sell and dispose of the same," after giving notice, etc.: *Held*, by a proper construction of the mortgage itself, a default in the payment of the interest matured the entire debt, and authorized the mortgagee to exercise the power of sale for the satisfaction thereof.

3. But the bond and mortgage being executed on the same day should be taken as one instrument, and so construed, and so taking them, there could be no doubt that in default of payment of the interest the whole debt matured, and the power to sell was called into action.

4. SAME — *of the option of the mortgagee to consider the entire debt matured.* Where a mortgage provides that in case of default in the payment of any installment of interest the entire debt shall, at the option of the mortgagee, become due, it is not necessary that any particular form of expression should be used for the purpose of declaring such option. So where the deed, executed by the mortgagee, who sold under a power in the mortgage, recited that the mortgagee, "having elected to declare said mortgage due and payable, as by the said mortgage he was authorized to do, according to the terms and conditions thereof," he took possession, gave notice, etc., that was deemed sufficient.

5. PUBLICATION OF NOTICE — *computation of time.* In the computation of time, where an act is to be performed within a particular period, or on a particular day from and after a certain day, the rule is to exclude the day named and include the day on which the act is to be done.

6. So where a notice of a sale was required to be published thirty days before the sale, and the first publication was on the 27th day of July, 1861, and the sale took place on the 27th day of August following, it was *held*, the thirty days' notice was properly given, that is, four days in July and twenty-six in August.

7. PURCHASER — *trustee can not buy at his own sale.* Where a mortgage confers a power of sale upon the mortgagee, and a third person becomes the purchaser at a sale under such power, at the request and for the benefit of the mortgagee, the sale will be set aside at the instance of the holder of the equity of redemption, as against such purchaser, or a subsequent purchaser with notice.

Syllabus. Brief for the appellants.

8. NOTICE — *what constitutes.* Whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to a knowledge of the facts by the exercise of ordinary diligence and understanding.

9. LACHES — *whether accounted for.* A sale of real estate was had, under a power in a mortgage, on the 27th day of August, 1861. A subsequent purchaser, not choosing to rely upon that sale, on the 17th of April, 1863, filed a bill for a strict foreclosure, and obtained a final decree on the 23d day of May, 1864. The mortgagor, and his grantee subsequent to the mortgage, were both non-residents at the time of the original sale, and so continued. On the 30th of November, 1866, the latter obtained an order setting aside the decree of strict foreclosure, and filed their answer in that suit, whereupon the complainant therein dismissed the same. In March, 1867, the defendant in the foreclosure suit entered a motion to set aside the order of dismissal, which was denied, and thereupon, they filed their bill to set aside the original sale under the mortgage; *held,* they were not guilty of *laches* in respect to the time of filing their bill.

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

The opinion states the case.

Messrs. MOORE & CAULFIELD, for the appellants.

This is a suit in chancery, instituted by the appellants to set aside a sale made under a power claimed to have been given in a mortgage. The sale took place in August, 1861. The appellants contend that, inasmuch as the sale was had during the late war of the rebellion, and those who held the equity of redemption were residents of the States in rebellion, the sale was void, or voidable, at their option, citing *Hoare* v. *Allan*, 2 Dal. 102; *Hanger* v. *Abbott*, 5 Wall. 532; *Wm. Begley*, ib. 403; *The Reform*, 3 id. 628; *Semmes, Admr.*, v. *City Fire Ins. Co. of Hartford*, U. S. Cir. Court, dist. of Conn. (Chicago Legal News, Oct. 16, 1869); *Mrs. Alexander's Cotton*, 2 Wall. 404; *Thorington* v. *Smith et al.*, Legal News, Nov. 29, 1869; *Billgery* v. *Branch & Sons*, No. 6, vol. 8, Am.

Law Reg. 334; 6 ib. 220 and 732; *Leathers* v. *Commercial Ins. Co.*, 2 Bush, (Ky.) 296; *Bell* v. *Louisville R. R. Co.*, 1 Bush, 404; *Griswold* v. *Waddington*, 16 Johns. 482; 3 Bos. & Pul. 191; *Tintudo* v. *Rogers*, 13 Vesey, Jr. 71; *Ex parte Bonsmaker*, 6 Am. Law Reg. 220, and cases there cited; *Tucker* v. *Watson; Jackson Ins. Co.* v. *Stuart*, 6 Am. Law Reg. 733; *Prize Cases*, 2 Black; Wheat. Inter. Law, §§ 305, 306, 307, 317 (see p. 297 and note 153, 8th ed.); Ed. Admir. 60; 23 Law, 335, 494; 3 Rob. Admir. 12; same Book, page 1; same Book — *The Vigilantia*, vol. 2, p. 255; same vol. — 3, p. 41; same vol. — 5, p. 297; 1 Wheat. 159; same vol. — 4, 105; 8 Cranch, 253; Vattel's Law of Nations, 321; 2 Gall. 295; *Exposito* v. *Bowden*, 7 Ell. and Blackb. 762; *Flint* v. *Waters*, 15 East, 260; *Bassick* v. *Buba*, 32 Eng. Law and Eq. 465; Kent, 65, 66, 67; *Scholfield* v. *Eichelberger*, 7 Peters (U. S.) 586; *Hughes* v. *Litssy et al.*, 5 Am. Law Reg. 148.

Messrs. KING, SCOTT & PAYSON, for the appellees, denied that the power of sale was in any wise suspended by reason of the mortgagor having gone within the rebel lines and become a resident of one of the States in rebellion, citing *Mixer* v. *Sibley*, 53 Ill. 61; *Dorsey* v. *Dorsey*, 30 Md. 522; *Buchanan* v. *Curvey*, 19 Johns. 137; 9 Wall. 75.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the equity side of the circuit court of Cook county, to reverse a decree dismissing a bill filed by appellants praying to redeem certain premises therein described, from a sale under a mortgage executed by Benjamin F. Bradley, one of the complainants, to Benjamin F. Hadduck.

Appellants rely for a reversal of the decree upon three grounds: 1. That the sale by Hadduck under the mortgage of Bradley to him was made during the late war, and while Harper and Bradley were in the southern confederacy, and is void, or voidable, at complainants' option. 2. There was no

power expressed in the mortgage to sell the property for the whole debt, under the exercise of the holder's option to declare the whole debt due upon a default in the payment of interest, and that none can be implied. 3. That the sale by Hadduck to Heydock was a sham and a fraud, and that Ely had actual knowledge of the same, or of sufficient facts to put him on inquiry.

The first point we do not consider open for discussion in this court, it having been settled on the most mature and careful consideration, against appellants, in the case of *Mixer* v. *Sibley*, 53 Ill. 61, and in the case of *Willard* v. *Boggs*, *ante*, *p.* 163. The principles of the first named case have been recognized in the case of *Dorsey* v. *Dorsey*, 30 Md. 522, and by the supreme court of the United States in the case of *Ludlow* v. *Ramsay*, 11 Wall. 581. The position of Bradley, one of the appellants, is precisely like that of Ramsay, as he was the maker of the note and bound for its payment, and all the reasoning of the court applies with peculiar force to him. The difference is, that case was commenced by attachment, while here were no judicial proceedings, but a sale under a power claimed to have been conferred by the mortgage. Ramsay alleged in his bill that, at the time the attachment was sued out, and when the publication was made in the newspaper at Knoxville, Tennessee, notifying him to appear and defend the suit, or that judgment would be taken *pro confesso* against him, he was in no situation to see or know of such publication; that Tennessee was held by Federal troops, and he was in the country held by the confederate forces, and no newspapers published in the Federal lines were permitted in the confederate lines, and there were no mail facilities existing between them; that a great civil war was raging between these governments; and that martial law existed in the State of Tennessee, civil courts being only held by the will of military commanders. He also alleged that when the attachment was issued and the proceedings had under it, he was known to be one of the enemy of the party governing by arms, the locality of the court.

Ramsay, in his bill, stated he left Knoxville a short time before the arrival of the Federal troops, and took up his residence in one of the States of the confederacy.

The questions asked in that case, may be asked in this, so far as Bradley is concerned,— why was he in the States of the confederacy, his residence being in Kentucky? Why could he not return to Chicago, his former residence? Why could he not have communication with that place, or with his friends in Kentucky, the State of his residence? Why did he leave Kentucky? Was it enforced? and was his return forbidden? Was not his absence voluntary? He could have returned from Virginia under the president's proclamation of December 8, 1863, removing all obstacles to his return. He left the State of his residence for the purpose of engaging in hostilities against it, and must be liable to all the legal consequences flowing therefrom.

But Bradley, before entering the service of the confederacy, and before hostilities had broken out, and before a single State had attempted to secede, had sold and conveyed this property to his co-complainant, Harper, who was, at the date of the conveyance, 10th of January, 1860, a citizen of one of the seceding States, and has always resided there, and might, with some plausibility, urge this fact, as ground of relief; yet, in *Willard* v. *Boggs*, *supra*, that fact was not considered sufficiently potential to take away the power of the mortgagee to sell the property. We do not appreciate the force of appellants' argument that, when Hadduck exercised the power to sell, if such power was given by the mortgage, the donor of the power could not himself sell the property by reason of his residence in a rebellious State. What should have prevented Bradley from conveying his interest in this property, during the existence of hostilities, had he possessed any to convey, we do not understand. The cases cited by appellants, on this point, do not so hold. Nor was Harper prevented from conveying the fee by reason of hostilities. The right of the United States to confiscate the property could not be

defeated, but Harper's right would pass to his grantee, subject to any right of confiscation by the Federal government, should the authorities of that government choose to exercise such right. It can hardly be said, that money paid by a citizen of a seceding State, to his creditor, a citizen of an adhering State, during hostilities, can be recovered back on a cessation of hostilities. It has never been conceded by the United States, to the citizens in arms against the government, the character of alien enemies, but that of belligerents only. *Shortridge* v. *Macon*, per Ch. J. CHASE, in 1867; cited by appellees' counsel. Harper's rights, on this point, are disposed of by the case of *Willard* v. *Boggs*, *supra*, and we desire to add nothing to what is there said.

The second point is, that the mortgage executed by Bradley and wife to Hadduck, of 21st September, 1859, to secure the sum of $13,000, and interest at stated times, under which the sale was made to Heydock, contains no power to sell the property for the whole debt, under the exercise of the holder's option to declare the whole debt due upon a default in the payment of interest — that there is no express power in that deed, and none can be implied.

A reference to the deed itself must determine this point.

It appears from the record, that the bonds were executed by Bradley to Hadduck, one in the penalty of $16,000, to secure the notes of $8,000 principal, and ten other notes of $200 each, being interest notes, and payable to James McQuestion and William C. Thompson, which notes Hadduck signed as security of Bradley, and to secure the payment thereof Bradley, on the same day, September 28, 1859, together with his wife, executed a deed of trust to Edward H. Hadduck on the premises in controversy.

Being indebted to Benjamin F. Hadduck in the sum of $13,000 for money loaned, Bradley, on the same day, made and delivered to Hadduck a bond in the penalty of $20,000, conditioned for the payment of the said sum of $13,000 within seven years from the 1st day of December, 1859, with ten per

centum per annum interest thereon, to be computed from the 1st day of June, 1860, and payable semi-annually on the 1st day of June and December of each year, according to thirteen interest notes or coupons attached to the bond, for the sum of $650 each, excepting the one maturing on the 1st day of December, 1866, which was for the sum of $758.33.

This bond contained this *proviso*, "that if default be made in the payment of any of the interest on the said principal sum as aforesaid, and any portion thereof shall remain due and unpaid for the space of thirty days after the same shall become due and payable according to the above recital and condition; and in that case, the said principal sum, together with all arrearages of interest thereon, shall, at the option of the said Benjamin F. Hadduck, his executors, administrators or assigns, thereupon become due and payable, and may be demanded immediately, or at any time within thirty days after any such default."

To secure the payment of this last mentioned bond, and the coupons thereto attached, and to secure the performance of the covenants contained in the bond for $16,000, the mortgage in question was executed.

In the above mentioned bond it is conditioned, if default be made in the payment of any of the interest on the principal sum, and any portion thereof shall remain due and unpaid for the space of sixty days after the same shall become due and payable, in that case, the principal sum, together with all arrearages of interest thereon shall, at the option of Hadduck, his executors, etc., thereupon become due and payable, and may be demanded immediately, or at any time within thirty days after any such default. The default here provided for is in the payment of interest, and the penalty therefor is, that the principal sum, together with all arrearages of interest, at the option of Hadduck, shall become due and payable, and may be demanded immediately.

Now what is the provision in the mortgage? As plain as language can express an idea, it provides that Hadduck may

sell and dispose of the premises, and all benefit and equity of redemption of Bradley, in case default be made in the payment of the said sums of money mentioned in the mortgage, or of the interest that may become due thereon, or of any part thereof, at the time and times respectively when the same ought to be paid as set forth in the condition. Nothing is said in the mortgage about declaring an option by Hadduck, but, by the terms of the mortgage, a default in the payment of the interest matured the debt, and authorized the mortgagee to enter upon and sell the premises in satisfaction thereof. The provision in the mortgage is as follows:

"But if default shall be made in the payment of the said sums of money above mentioned, or of the interest that may grow due thereon, or of any part thereof, at the time and times respectively when the same ought to be paid, as set forth in said condition; or if said party of the first part shall suffer or permit said premises, or any part thereof, to be sold for taxes, or do or permit any thing to be done upon said premises, or any part thereof, that shall impair or injure the value thereof, or tend to impair or weaken the security intended to be hereby effected, or shall neglect, refuse or fail to keep the buildings upon said premises, or any part thereof, fully insured, and the policy or policies duly assigned and delivered to the said party of the second part, his executors, administrators or assigns, that then and thenceforth it shall be lawful for the said party of the second part, his certain attorney, executors, administrators or assigns, to enter into and upon all and singular the premises hereby conveyed, or intended to be, and each and every tract thereof, and the same from henceforth peaceably and quietly to have, hold and enjoy the rents, issues and profits thereof; to receive and take to his or their own use and benefit, without any hindrance, eviction or interruption whatsoever, and to sell and dispose of the same, either by himself, themselves, or by his or their attorney for that purpose constituted, and also of all benefit and equity of redemption of the said party of the first part, his heirs or assigns therein, at

public vendue, after having first given thirty days' notice of the time and place of such sale (the sale to be made in the city of Chicago), by advertisement in any one of the daily newspapers that may at that time be published in the city of Chicago, personal notice to the said party of the first part, his heirs, executors, administrators or assigns, of the said sale, being hereby expressly waived; and as the attorney of the said party of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple; which said deed shall be *prima facie* evidence of the full and complete performance of the advertisement, notice and other requirements of said sale under this mortgage; and out of the money arising from such sale to retain the principal and interest, which shall then be due on the said bond, and also all taxes and redemption money paid by the said party of the second part, for the redemption from tax sale of said premises, or any part thereof, together with the costs and charges of advertisement and sale of said premises, rendering the overplus of the purchase money (if any there shall be), unto the said Benjamin F. Bradley, his heirs, executors, administrators or assigns, which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them or any of them. But if the amount realized from said sale, after paying all costs, charges and expenses, including attorney fees, and all sums of money advanced on account of said property, shall not be sufficient to fully pay said bonds hereinbefore mentioned, and the interest due at the time of said sale, then to apply the amount so received, over and above costs and charges, first in payment of the interest then due, and to indorse the balance as so much paid on said bonds, given for said principal sum."

But this bond and mortgage, being executed on the same day,

should be taken as one instrument, and so construed, and so taking them, there can be no doubt that in default of payment of the interest the whole debt matured and the power to sell was called into action.

It is further objected, that Hadduck did not declare his option prior to the sale. It is not necessary that any particular form of expression should be used for such purpose. In the record (exhibit D) it is recited, among other things, as follows: "and the said Hadduck having elected to declare said mortgage due and payable, as by the said mortgage he was authorized to do according to the terms and conditions thereof, and having entered in and upon said mortgaged premises, and taken possession thereof, the said premises were, by the said Hadduck, duly advertised for public sale at the north door of the court-house in the city of Chicago, etc., on the 27th day of August, 1861, in the Chicago Post, a daily newspaper, etc.

Then follows the notice given in the Post.

And here, while on this branch of the case, we may dispose of the objection to this notice, that it was not published thirty days before the sale. The first publication was on the 27th day of July, 1861, and the sale took place on the 27th day of August following. In the computation of time, as to such notices, the rule is, when an act is to be performed within a particular period, or on a particular day, from and after a certain day, to exclude the day named and include the day on which the act is to be done. *Ewing* v. *Bailey*, 2 Scam. 420; *Hall* v. *Jones*, 28 Ill. 55. Or more concisely stated, it is to count one day in and the other out. Counting in the 27th July as one day, it being the day on which the first publication was made, and leaving out the 27th day of August, the day of the sale, there remains full thirty days, namely: four days in July, and twenty-six in August. This is the rule in publications of sixty days' notice in attachment suits. *Vairin* v. *Edmonson*, 5 Gilm. 270.

We come now to the third and last point raised by appel

lants, and that is, the sale by Hadduck to Heydock was a sham and a fraud, and that appellee Ely had actual knowledge of the same, or of sufficient facts to put him on inquiry.

On this point we are decidedly with the appellants. We do not believe any unprejudiced and right-minded man can read the testimony of Heydock, Honore, Hadduck and Ely, found in this record, without a deep conviction, that the sale of this property, under the circumstances, and in the manner in which it was consummated, was gotten up and carried on for the express benefit of B. F. Hadduck, to whom Bradley, in the confidence of friendship, had intrusted the management of this estate during the absence of the owner, he having every reason to believe it would receive the same care and attention Hadduck bestowed upon his own property. Hadduck himself says, he was to manage and control it as if it was his own, meaning thereby, "to manage it as carefully as if it was his own," to pay for repairs and taxes, and apply the net proceeds of the rents to the payment of interest.

We have read the testimony with great care, and will comment on such portions of it as tend to establish the important and controlling fact that the sale was made by Hadduck and the property purchased in for his own benefit.

This property was committed to the care and control of Hadduck, its owner being a non-resident, with the reasonable expectation, nay with the express understanding, that he would make as much profit out of it for the benefit of the owner as he would were it his own, and it was expected he would be ready, at all times, to render a true account of his stewardship. There were six new buildings on the Clark street front, arranged for stores, with dwellings above. They were on one of the greatest thoroughfares of a great and growing city, and not far removed from its business center. A faithful agent would have used the ordinary means at hand to have them occupied, the owner would, certainly, if he had no agent, yet we do not see that Hadduck advertised the buildings for rent, or devoted the front on Griswold street to any profitable purpose. An owner

of property so valuable would not so act. The question naturally arises here, what motive could Hadduck have to neglect this, why should he not desire the property should be brought up to its greatest limit of production? The answer is obvious. Hadduck well knew that the rents of this property was Bradley's sole reliance for the discharge of the mortgage, or at least the interest upon the notes as they became due, the principal not being due and payable for seven years. As the bond and mortgage provided for the maturity of the whole debt, in default of the payment of interest, and as the property was favorably situated and would in all probability greatly increase in value, being then at a low point of depression, how natural was it for a speculator in real estate, as Hadduck is shown to have been, to endeavor to produce a state of affairs which would call into action his power of sale, and through that, possess himself of the property at figures much below its real value. The absent owner could have had no other thought, but that the rents were keeping down the interest on the debt, paying the taxes and repairs, that the "trusty friend" to whom was committed the property, would see to that, taking the same care of it he would "of his own." The control of this property was committed to Hadduck in 1860. He sold it in August, 1861, for default in payment of the interest note due June 1st, of that year, and through his nephew Heydock, whom he procured to bid off the property at a price agreed upon between them, he became the owner, thus accomplishing a purpose, all the facts in the case persuade us to believe, he intended to accomplish when the control of the property was committed to him. It was not money he wanted, for none was paid or to be paid on the sale. No one can read the testimony of Doctor Heydock, without being convinced, that he was a mere instrument in the hands of his uncle to do a wrong, unwittingly no doubt, on his part, which would rob an absent owner of his property, he relying in perfect security on the fidelity of a "trusty friend." Dr. Heydock testifies that Hadduck came into his office and asked him to go to the court house and bid off this property;

he did so within ten minutes of the time, or it might have been an hour, when he first learned the property was to be sold; he went over alone and bid it off at about $5,000, the sum Hadduck advised him to bid. He states he did not examine into the title to the property before bidding, nor the property itself, nor did he then know there were improvements on it, nor did he know the width or depth of the lot. He does not know what the property rented for after he bid it off; he did not take possession of it, nor did he receive, directly, any rents from it. He did not have the property insured, nor does he know that the deed for it was ever in his possession, nor does he know if the deed was recorded or not. He distinctly admits, that while the title was in him by this sale, he would not have felt authorized to sell it at his own price and of his own motion; it was all the time subject to the control of Hadduck. In speaking of the sale to Ely, he says he does not know what Ely paid for it, nor what was the consideration, and never knew; that the purchase money from Ely did not come to him; that he did not make any deed to Ely, but signed any paper presented to him by Hadduck. His cross-examination puts no different phase on the transaction, and the conclusion is irresistible, that Dr. Heydock bid off the property for the benefit of Hadduck.

The testimony of Hadduck does not alter the character of this transaction. He says, before the day of sale, perhaps a week or three or four days, he told Heydock about it and advised him to buy it, and at the day of sale he did buy it for $5,000, and "supposes" he bought it for himself, "legally he did." Heydock says it was within ten minutes or an hour after he learned of the sale that he went to the court house and bid off the property. Hadduck further says, after "legally" buying the property, he had "the legal right" to dispose of it at his pleasure, but not the absolute right; evidently meaning that Heydock was under a moral obligation, growing out of some secret understanding between them, not to exercise absolute control over it, and this Heydock admits when he

testified that the property was all the time subject to the control of Hadduck.

In selling to Ely, Hadduck says he conveyed the impression to him that the sale to Heydock was *bona fide*. He told Ely he was owing Heydock and his bid was applied on that indebtedness. This indebtedness had existed for a long time prior to the purchase, and was originally a debt due to the wife of Dr. Heydock, for which Hadduck had been in the habit of giving Dr. Heydock various kinds of security, and which Hadduck always controlled — he could always get them changed or released as he desired.

This fact goes further to show, Dr. Heydock was a mere instrument of Hadduck, and this indebtedness a very convenient circumstance. To show still more clearly that the purchase by Heydock was for the benefit of Hadduck, we have only to consider the testimony in regard to the control of the property by Hadduck after the sale. For six months the property was insured in Hadduck's name, up to the time of the sale to Ely, and to him the policies were "passed over." The leases also were to Hadduck as lessor, and which he assigned to Ely. Hadduck introduced Ely's agent to the tenants, and instructed them to pay the rent to him thereafter.

Hadduck had not "passed over" or assigned the policies to Heydock, nor the leases, and he remained in possession of the property, collecting the rents and managing it as he had done, giving receipts in his own name, in short, exercising all those acts of ownership and control he had exercised before the sale to Heydock. That the purchase made by Heydock was for the benefit of Hadduck there remains not the shadow of a doubt. The testimony shows it most conclusively, and all the authorities are uniform that such a sale will be set aside in a court of equity. *Pensonneau* v. *Bleakley*, 14 Ill. 15; *Robbins* v. *Butler*, 24 id. 387; *Lockwood* v. *Mills*, 39 id. 603; *Miles* v. *Wheeler*, 43 id. 123.

As between Heydock and Hadduck this sale was invalid, but it is claimed Ely was an innocent purchaser, without notice of

any infirmity in the sale and cannot be affected. This is the only remaining point on this branch of the case. Was Ely an innocent purchaser without notice?

The generally received doctrine upon the subject of notice is, that whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the facts, by the exercise of ordinary diligence and understanding. 4 Kent's Com. 179. Under this rule it follows, that each case, as it arises, must be governed by its own peculiar circumstances, and, as was said in *Doyle et al.* v. *Teas et al.*, 4 Scam. 202, when the court is satisfied that the subsequent purchaser acted in bad faith, and that he either had actual notice, or might have had that notice, had he not wilfully or negligently shut his eyes against those lights which, with proper observation, would have led him to knowledge, he must suffer the consequences of his ignorance, and be held to have had notice, so as to taint the purchase with fraud in law. It is sufficient if the channels which would have led him to the truth were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequences of his ignorance. P. 250.

The fact of which it is alleged Ely had knowledge, or might have had, is the sale to Heydock as having been in truth and intention, a sale and purchase by him for the benefit of Hadduck. At the time Ely purchased, were there any circumstances of a suspicious character hanging about the transaction that should have put a prudent and cautious man on his guard and stimulated inquiry?

We think there were. In the first place, Ely knew Doctor Heydock was the ostensible purchaser at the sale. He knew it was a trust sale, in conducting which the utmost fidelity is demanded. He knew that at such a sale it was unlawful for the trustee to become the purchaser, directly or indirectly. He knew from Hadduck's acts and conduct in negotiating the

sale to Ely that he was doing it as one controlling the title. He knew the property was insured in Hadduck's name and leases taken in his name, all which were assigned or passed over to Ely. He caused the tenants to attorn to Ely. When told by Hadduck that the consideration paid by Heydock was a credit on Hadduck's indebtedness to Heydock's wife, why did not Ely inquire of Heydock into the truth of this statement and the accompanying circumstances? Had he done so, he would have been informed by Heydock that he bid for the property at the instigation of Hadduck, and at the sum advised by Hadduck, and that he did not consider himself the absolute owner of the title, but held it subject to the demand of Hadduck. All this Ely must be charged with knowing, for the reason that, upon inquiry, the channel being open to him, he might have known, and knowing them, he cannot claim to be an innocent purchaser, without notice of the invalidity of the sale to Heydock. *Rupert* v. *Mark*, 15 Ill. 542; *Ogden* v. *Haven*, 24 id. 57. But there are other circumstances going to show Ely did not purchase on the faith of this sale to Heydock; else why should he make objection to the title or to the receipt of a deed from Heydock, and why require Hadduck to procure a quit-claim deed from Harper? If he had confidence in Heydock's title is it reasonable he should require a guaranty from Hadduck, and is it not strange, if he had this confidence, he should soon after have recognised the subsisting validity of the mortgage and have taken all the necessary steps to its strict foreclosure, actually obtaining a decree to that effect, on a constructive notice to appellants, then and still non-residents? It is incredible that a person having confidence in a title, acquired by purchase, as this was, should incur the trouble and delay of an expensive chancery proceeding, though the expenses were to be paid by Hadduck. And this very fact that Hadduck agreed to pay those expenses on failing to procure a quit-claim deed from Harper, admonished Ely there was something wrong in the transaction which it was his duty to investigate before he paid his money. The

sale was negotiated by Honore, a real estate agent, he knowing no other persons in the transaction but Hadduck and Ely, and Ely himself having at no time any communication with Heydock upon the subject. Hadduck was the real owner, Heydock holding the legal title in secret trust for Hadduck, all which Ely had the means of knowing. From the facts in the record, all of which we cannot comment upon, nor is it necessary, we are forced to the conclusion that the sale to Heydock was for Hadduck's benefit, and from the circumstances given in evidence Ely was bound to know it, and knowing it, he is in no better position than Hadduck, as to whom the sale was invalid and ought to be set aside.

As the purchase was made by Ely for the joint benefit of himself and his brother, Z. S. Ely, to whom D. J. Ely has conveyed an undivided half of the property, he must be deemed in equity as equally affected by the notice D. J. Ely had, and, moreover, it is not shown Z. S. Ely paid any money.

There remains but one other point to consider, and that is, the claim of appellees that appellants have too long delayed the assertion of their rights, if any they have; that they are guilty of *laches*, and ought therefore to find no favor in a court of equity.

It is urged by appellees that complainants suffered more than five years to elapse after the sale to Heydock before any assertion by them of their rights.

This is satisfactorily answered by the facts in the case. Complainants were non-residents and had no knowledge of the sale and of appellees' participation in it, until a short time before filing their bill. *Laches* cannot be imputed if they proceeded to act so soon as they discovered the facts.

Ely virtually disclaiming to hold under the sale to Heydock by filing a bill for a strict foreclosure on the 17th of April, 1863, cannot go behind that date to fix the charge of *laches*, for by that bill the existence of the mortgage, as in full life and vigor, was admitted, and there was nothing for complainants to do but to await the decision of that case. The final decree

in that suit was entered May 23, 1864. They being non-residents had, under the statute, three years to come in and ask to have the decree set aside that they might put in their answer. This they did, the court granting their motion the 30th of November, 1866, when their answer was filed, whereupon the suit was dismissed by Ely. In March, 1867, appellants entered their motion to set aside the order dismissing the suit, which motion being denied, they thereupon filed this bill. There was no use for appellants to take any step while Ely's bill for a strict foreclosure was pending, for in that suit appellants could have asserted their equities, and it was only on its dismissal they were free to act. We see no ground for imputing *laches* in the case. The equity of the case is with complainants, and the decree of the circuit court must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

Therese LaFramboise

v.

Nathan S. Grow.

1. Dower — *to whom it may be released.* Before dower has been assigned, it can only be released to the owner of the fee, or to some one in privity with the title by his covenants of warranty.

2. But where the former owner of the fee in land in which a dower right still exists, has conveyed the same, with warranty, he may purchase the right of dower for the benefit of his grantee, however remote, and thus prevent a breach of his covenant.

3. Attorney at law — *whether he has a lien on the subject matter of the suit for his fees — subsequent purchaser, with notice.* Where a widow employed an attorney to prosecute a suit for her dower in lands sold and conveyed by her husband in his life-time, the attorney to have a certain portion of what might be recovered, as his fee and for costs expended by

him, and pending the suit the widow released her dower to one who stood in the relation of warrantor of the title, it was *held*, no lien upon the land could accrue to the attorney by reason of such agreement, although a remote grantee of the fee, for whose benefit the right of dower had been acquired, had notice thereof, because the attorney held no such relation to the title as would enable him to receive an interest in the dower right.

4. Nor did any lien accrue to the attorney, independently of the agreement, under any law in this State. An attorney has no lien on the subject matter of the suit which he is employed to prosecute, that can in anywise impair the right of his client to transfer the same to a third person *pendente lite*.

5. Same — *construction of Act of* 1869. Under the Act of 1869, providing for the fees of a solicitor who prosecutes a suit for the assignment of dower, to be taxed as costs therein, no allowance could be made to the attorney in case the complainant should release her right of dower pending the proceeding, because she could not, in that event, recover costs.

Appeal from the Superior Court of Chicago; the Hon. John A. Jameson, Chief Justice, presiding.

Mr. J. P. Atwood, for the appellant.

Messrs. Beckwith, Ayer & Kales, for the appellee.

Mr. Justice Scott delivered the opinion of the Court:

The appellant filed her bill in the Superior Court of Chicago, on the chancery side thereof, against the appellee, in which she alleged that, as widow of Joseph LaFramboise, deceased, she was entitled to dower in certain premises described in the bill. To this bill an answer was filed and replication thereto.

It appears that before the cause reached a hearing, the appellant, on the 28th day of May, 1870, executed to George E. Walker, for a valuable consideration, a release for her entire interest in the south forty acres described in the bill, in which the land in controversy is situated. Afterward, on the 30th day of May, 1870, the appellee filed his cross-bill against the appellant, wherein, after reciting the former proceedings had in the case, he alleged that the appellant, by deed duly

executed, to George E. Walker, released and discharged the premises described in the bill of and from all claim of dower on her part, and that, on the 25th day of August, 1835, the said Walker and one Kinzie, claiming to be the owners of the premises, conveyed the same by warranty deed to one Campbell, and that afterward, by certain mesne conveyances, whatever interest was thus conveyed to the said Campbell was vested in the appellee.

It is admitted that the title to the premises in controversy was at one time in Joseph LaFramboise, but that he conveyed the same to Walker and Kinzie, but his wife, the appellant, not joining in the conveyance. On the 15th day of June, 1870, Cyrus D. Roys, solicitor for the appellant, filed his petition in said cause, wherein he alleges that the appellant, being entitled to dower in certain lands formerly owned by her husband, entered into an agreement in writing with Archibald F. McGrew and Augustus C. Van Duyn, whereby she agreed to and with the said McGrew and Van Duyn that, in consideration of the services rendered and to be rendered by them in prosecuting her claim for dower in said lands, they should have two-thirds of whatever lands they might recover, or two-thirds of whatever might be recovered of her claim or interest, by suit or compromise, to their own use.

At the same time, July 21, 1868, she executed to the said McGrew and Van Duyn a power of attorney, declared to be irrevocable, to enable them to do, in her name, all things that might be necessary to sue for and recover her dower interest in any lands in which she might have an interest. By the power of attorney they were authorized to appoint one or more attorneys under them, as they might deem necessary, to the efficient prosecution of her interest. The letter of attorney and agreement were recorded in the recorder's office in Cook county, and it is alleged that the complainant in the cross-bill had notice of the same. The petitioner, Roys, alleges that the said McGrew and Van Duyn appointed him their attorney to institute and prosecute this suit, and under the authority thus con-

ferred he did institute this suit; that he has advanced all expenses necessary to sustain it, and has become liable by his individual bond for all costs that may accrue. The petitioner therefore asks to have his interest in the lands protected, and in case the release shall be held good as to appellant, that it shall not be held to operate against his interest, and that the court, by a proper decree, will subject the land to the lien of his interest.

On the final hearing the court dismissed the original bill and rendered a decree in favor of the appellee, to reverse which this appeal is now prosecuted.

The appellant makes three points on which it is sought to reverse this decree:

1st. That the complainant in the court below was entitled to dower in the premises.

2d. That the contract between the appellant and her solicitor is valid.

3d. If the release should be held good as to the appellant, the court erred in not protecting the interests of the solicitor.

It is unnecessary to discuss the question in this case, whether the appellant had a dower interest in the premises at the time of filing the bill. That question now becomes immaterial, except so far as it may affect the claim of the solicitor for fees and costs.

It is admitted in the evidence that the release to George E. Walker was fairly obtained and for a valuable consideration. No objection is made to the manner or form of executing the release of dower. Walker stood in the relation of a warrantor of the title to the premises, and in privity with the title, so that when it was assailed he could properly buy in the incumbrance for the benefit of the grantee holding his covenants of warranty. No reason is perceived why a party who has thus warranted a title should not be permitted to buy in an outstanding incumbrance for the benefit of his grantee, however remote, and thus prevent a breach of his covenants. It was so held in the case of *Robbins et al. v. Kinzie*, 45 Ill. 354, upon a full review of the authorities on that question. The dower

could only be released, before the same was assigned, to the owner of the fee, or to some one in privity with the title by his covenants of warranty. The release in this case was fairly obtained and for a valuable consideration, and was made to a party who stood in such relation to the title that he could in law receive it for the benefit of the remote grantee, and it must therefore be held to bar the appellant's right to recover, even admitting that she had dower at the time of filing her bill.

The appellant having parted with her interest, in a lawful manner, in the subject matter of the suit, *pendente lite*, did the solicitor acquire any lien for fees and costs expended?

The answer to this inquiry will make it necessary to examine the nature and extent of the lien for attorney and solicitor's fees, and in what cases allowed.

It is apparent in this case, that if the solicitor has a lien on the premises for his fees and costs expended, it is not under the agreement of appellant with McGrew and Van Duyn, for they stood in no such relation to the title in fee in the premises as would enable her to assign her dower interest to them. They could take no interest whatever in the land itself by their agreement. It was, therefore, wholly immaterial whether the appellee had notice of the agreement or not, between the appellant and her solicitor. The contract could perform no other office than to determine the extent of the interest that the solicitor could recover, in the event he recovered any thing for the appellant by suit or otherwise.

If, then, the solicitor had any lien at all, it must be at the common law or under our statute. At common law the attorney undoubtedly had a lien upon the judgment obtained for his clients for his taxable fees and costs. But, it has been held in this State, that no such lien exists, for the reason that we have no statute giving costs to attorneys. The amount of attorney's fees here rests entirely in the contract between the attorney and client, and he must recover for his services in the ordinary mode, by some appropriate action for that purpose. In the case of *Humphrey* v. *Browning*, 46 Ill. 476, it

was held, that an attorney had no lien on the real estate recovered in an action of ejectment for his client, for his fees as an attorney.

In *Forsyth v. Beveridge*, 52 Ill. 268, upon a full review of the authorities to which our attention has been directed in this case, it was held, that an attorney in this State has no lien for fees even after judgment obtained.

We have been unable to find any case that holds that the attorney or solicitor ever had a lien on the subject matter of the suit for his fees. A plaintiff may properly compromise his cause of action with the defendant, and the defendant will not be bound to inquire whether the plaintiff has paid his counsel fees, although the matter may be pending in a suit. This principle was fully recognized in the case of *Foot et al.* v. *Tewksbury*, 2 Vt. 97. In that case the court say, "but no case is shown, nor is any recollected by the court, in which this principle interposes to prevent an amicable adjustment of a litigated suit before final judgment in the same." Any other rule would be unreasonable and would often prevent the adjustment by the parties themselves of litigated controversies.

In the case now before us it appears very clear that the solicitor who claims a lien on the interest that the appellant may have had in the subject matter of the suit, was the solicitor of the appellant, and rendered her very valuable services, and we can see that it was through his services that she was enabled to effect the compromise that she did. But there was no decree, nor could there be any, for the reason that the appellant had released all her interest in the subject matter of controversy before final decree, and there was, therefore, nothing to which a lien could attach, even if any such lien existed.

We do not understand that a court of equity will ever award counsel fees or costs against a defendant on the dismissal of the bill, unless there remains a fund to be administered. If costs are to be given at all, it must be by a personal decree. *Westcott* v. *Culliford*, 3 Hare, 275.

In the case under consideration, there was no fund remaining

under the direction and control of the court out of which costs and counsel fees could be awarded.

We are unable to perceive that the case of *Johnson* v. *Bright*, 15 Ill. 464, to which our attention has been called, has any bearing whatever on the question before us. That case simply holds that where a party employs attorneys to bring a suit for him for a stipulated consideration, and the party compromises with his adversary before final judgment, the attorneys could recover in an action on their agreement with the party. The case does not recognize any lien on the subject matter of the suit in favor of the attorneys. No such question is even discussed in the case. We are unable to perceive that the other cases in this State, to which our attention has been called, have any possible bearing on this case.

But it is insisted that under the act of 1869, page 368, it was the duty of the court to make a proper allowance to the solicitor for his services in cases of this kind. It will be perceived, by reference to the phraseology of the statute, that the counsel fees provided for are to be taxed as part of the costs in such proceeding. The appellant in this case, having released her interest before final decree, could not recover costs against defendant, and therefore no solicitor's fee could be taxed. We do not see how the statute can aid the claim of the solicitor.

Inasmuch as appellant had released whatever dower interest in the premises she may have had, to a party who could lawfully take such release, the bill was properly dismissed as to her.

The solicitor did not acquire any interest in the estate itself, by virtue of the contract between the appellant and McGrew and Van Duyn, under which he rendered the services and advanced costs, nor did he acquire any lien on the subject matter of the suit by the common law, or under our statute, and his petition was, therefore, properly dismissed.

Perceiving no error in the record the decree is affirmed.

Decree affirmed.

PHILIP LARMON

v.

THOMAS M. JORDAN.

1. CONTRACTS—*proposition to sell—of its withdrawal and acceptance* A written proposition for the sale of land, without consideration, and not under seal, wherein the time of acceptance is limited, may be withdrawn by the party making it at any time before acceptance; who would not be bound by an acceptance not within the time limited, unless he assented in his turn.

2. And where no time is limited the law fixes a reasonable time, to be determined by the circumstances of the case. Then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind. The proposition, to be binding, must be accepted within such reasonable time.

3. If the party making the offer revokes the same at any time before its acceptance, and deals with the property in a manner inconsistent with a willingness to continue the offer, then the presumption that the *aggregatio mentium* necessary to a contract occurred, does not arise.

4. When the time is limited, by the offer, during which it is to continue, then, if without any previous revocation the offer is accepted, the presumption of a meeting of minds would be conclusive, simply because the offer is presumed to have been renewed during every moment of the time limited, which signifies the assent of the vendor, and the acceptance that of the vendee.

5. So, if no time be limited, the offer, in the absence of evidence to the contrary, will be presumed to have been continued every moment during a reasonable time and no longer; and, if there is no acceptance within a reasonable time, there can be no presumption of a meeting of minds, because there can be none of a continuance of the offer to the time of acceptance.

6. CLOUD UPON TITLE—*what constitutes.* Where a written proposition for the sale of lands, without consideration and not under seal, was delivered by the owner thereof to another, but which offer of sale was not accepted by the latter so as to be binding upon the former, and the vendee afterward wrote upon the same an acceptance of the offer, and caused the proposal and acceptance to be recorded in the recorder's office of the county

in which the land was situated, in violation of a pledge to the contrary and in fraud of the rights of the vendor, the instrument, as it stood upon the record, was regarded as a cloud upon the title of the latter, which upon bill filed for the purpose by the vendor against the vendee and his assignee, who had notice of the premises, a court of chancery would take jurisdiction to remove.

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

This was a bill filed by appellee against appellant and Tooke, in the Superior Court of Chicago, on the 3d day of August, 1869, to remove a cloud upon the title of appellee's land.

Bill alleges appellee's seizin in fee simple; that on the 22d January, 1869, Tooke, representing that he was agent of the Rock River College Association, and as such being about to purchase lands in the vicinity of those in question, obtained from appellee a proposition for sale of his lands as follows:

"CHICAGO, January 22, 1869.

"I will sell to M. M. Tooke, Sup't. Rock River College Association, the W. ½ of S. E. ¼ of section 21, 38, 14 south of R. I. Junction, for $500 per acre, ¼ cash, balance 1, 2 and 3 years, with interest 8 per cent. I further agree to wait until May 1, 1869, for first payment by purchaser giving bond with approved security for payment with interest 8 per cent as above."

"T. M. JORDAN."

The bill further alleges that Tooke, at that time, requested appellee to give him ten days' refusal upon those terms, which appellee refused to do, but did tell him that if within the next ten days after that date he received an offer to purchase the premises, he would advise Tooke of it before selling.

That appellee saw Tooke almost daily for ten days, and the latter did not notify him of any acceptance, but, on the 30th January, 1869, they met, and by mutual consent the proposition was abandoned, and on the 1st of February, 1869, appellee

contracted to sell an undivided half of the premises to another party, and on the 10th of the same month appellee had bound himself to grant five acres of the same premises to Cook county, for the purposes of a Normal school; that on the eighth same month the Park bill passed one branch of the legislature, and was expected to pass the other branch, which would greatly enhance the value of these premises; that on the seventeenth same month, Tooke offered to pay appellee $100 and take a contract for the land, which appellee declined, and declared the former proposal abandoned. On the eighteenth same month, Tooke wrote under the proposal given as aforesaid, "The above proposal accepted, and notice given February 18, 1869."

"M. M. TOOKE."

And afterward, on the twenty-sixth of March, caused the proposal and acceptance to be recorded in the recorder's office of Cook county, wherein the land was situate.

Tooke then assigned the contract to appellant, but who, it is alleged, had notice of the premises. Prayer that supposed contract might be declared null and void, and as a cloud upon the title, removed, and for general relief.

Appellant and Tooke answered. Replications to answers filed and cause heard upon pleadings, proofs and exhibits, and decree in favor of appellee, for the special relief prayed. The cause was thereupon brought to this court by appeal.

Mr. E. W. EVANS, for the appellant.

Mr. MILTON T. PETERS, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The instrument of the 22d of January, 1869, was but a simple proposition for a sale, without consideration, and not under seal.

If the proposer had limited the time for acceptance, as in the case of *The Boston & Maine Railroad* v. *Bartlett*, 3 Cush.

224, relied upon by appellant's counsel, still by that, as well as the general current of authorities, he would be at liberty to withdraw the offer at any time before acceptance, and, if not accepted within the time limited, he would not be bound unless he assented in his turn. Here no time was limited. The law therefore fixes a reasonable term, to be determined by the circumstances of the case.

"If the proposer fixes a time, he expresses his intention, and the other party knows precisely what it is. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have had in mind." 1 Pars. on Cont. 405, 406.

Appellee testified, that some seven or eight days after he made the proposition in question, Tooke called on and requested him to take stock in the college enterprise to the amount of $10,000; that he declined taking it, whereupon Tooke said that he had not received the encouragement to which he was entitled, from those owning property in that vicinity, and that he would abandon the whole project, and, as appellee says, to use Tooke's own words, "let it go by the board." That appellee replied that he was sorry he did not receive such encouragement, but that he, appellee, could not help it, and that *that* would end the matter between them, and in this respect appellee is corroborated by the evidence of two other witnesses. Tooke, in his evidence, admits having the interview at that time, and states that he said he had not received the encouragement that he expected in the sale of the stock and that he might have to give it up, "meaning," as he says, "the stock plan of the college," but he denies that he said that he would abandon the purchase of the land.

On cross-examination, he gives the language used by him on that occasion: "I said that I had not received the encouragement I had expected in regard to the sale of stock, and I did not know but that I would have to give it up." He does not

deny that appellee thereupon said, that *that* should end the matter between them; but says he did not hear it, which is but the negative evidence of one witness standing against the affirmative statements of three. If appellee revoked the offer before acceptance within a reasonable time, it is immaterial whether Tooke abandoned the purchase or not. The right of revocation did not depend upon his acquiescence.

No acceptance at the time in question, or at any time anterior to the acceptance supposed by the act of writing one on the paper, February 18, 1869, is pretended. If appellee did, in fact, declare a revocation of the offer on the 30th of January, as he claims, and on the 1st of February thereafter dealt with the property in a manner inconsistent with a willingness to continue the offer, then the presumption that the *aggregātio mentium* necessary to a contract herein occurred, is countervailed by the evidence.

But, disregarding that evidence entirely, then how does the case stand? When the time is limited, by the offer, during which it is to continue, then, if without any previous revocation the offer is accepted, the presumption of a meeting of minds would be conclusive, simply because the offer is presumed to have been renewed during every moment of the time limited, which signifies the assent of the vendor and the acceptance that of the vendee. So, if no time be limited, the offer, in the absence of evidence to the contrary, will be presumed to have been renewed every moment during a reasonable time and no longer. If, therefore, there be no acceptance within a reasonable time, there can be no presumption of a meeting of minds, because there can be none of a continuance of the offer to the time of acceptance.

At the time the proposition was made, circumstances existed, and were known to both parties, which made the property offered peculiarly liable to fluctuation in value. It is not rational to suppose that men of ordinary understanding and prudence would contemplate the continuance of an offer of this kind, under the circumstances of this transaction, for so

long a period as twenty-seven days. Indeed, the clear preponderance of the evidence is, that Tooke endeavored to get an extension of it for ten days, but appellee refused to give it.

Though the question as to what is a reasonable time for the continuance of such an offer may often be a difficult one to determine, yet we are satisfied that, under the circumstances here, it was not within the contemplation of the parties that the offer should continue for so long a period as elapsed before the supposed acceptance. It follows, from this view, that, even disregarding the evidence of revocation, there was no offer pending at the time of the supposed acceptance, and, therefore, there is no presumption of a meeting of the minds of the parties requisite to a contract. No action at law could be maintained upon it, nor would a court of equity compel specific performance of it as a contract.

Still, there can be no question but the instrument, as it stands upon record, constitutes a cloud upon appellee's title, and there is as little doubt that it was placed there in violation of a pledge to the contrary, and in fraud of appellee's rights. The jurisdiction of chancery in the premises is clear. The decree of the court below is fully supported by the evidence, and must, therefore, be affirmed.

Decree affirmed.

JAMES H. FOSTER *et al.*

v.

PHINEAS SMITH.

1. Where the contract of sale of goods delivered to the vendee, is rescinded by agreement between the parties, the vendor can not afterward recover in an action for the price of the goods.

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

This action was brought by Smith against Foster and others, to recover the price of a quantity of skates, alleged to have been sold and delivered to the defendants. The defendants contend there was never an absolute sale of the goods to them; that the firm of Barney & Berry, manufacturers of skates, at Springfield, Massachusetts, having claimed that the skate sold by the plaintiff was an infringement on their patent, the sale was made on condition the plaintiff would give to the defendants a satisfactory bond guaranteeing them from loss by reason of such claim, which the plaintiff failed to do. And that, even if there was a sale, the contract was afterward rescinded and the defendants released therefrom.

Mr. D. J. SCHUYLER and Mr. D. P. WILDER, for the appellants.

Messrs. BARBER & LACKNER, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee against appellants, to recover the price of a quantity of skates, alleged to have been sold and delivered to appellants. The declaration contained the common counts, and the only plea was the general issue.

The case was submitted to the court without the intervention of a jury, and the finding was for appellee.

The only assignment of error which we shall notice is, that the finding was against the law and the evidence.

We do not deem it necessary to recite in detail or comment on the evidence as to the sale; for, even if there was originally an absolute sale, we are of opinion that there was afterward a rescission of the contract of sale, assented to by both parties.

The last of the skates were received by appellants on the 30th of October, 1868. It was claimed that the skate of appellee was an infringement on the patent of Barney & Berry, of Springfield, Massachusetts; and on the 21st of November they served a written notice on appellants, forbidding them to buy, sell or use the skates in controversy, under the penalty of the law. On the 23d of November appellants forwarded the notice to appellee, in New York, and concluded their letter with the following language: "We, therefore, hold the skates shipped to us by you subject to your order and our charges." In reply, appellee, in a letter of date December 1, stated that he would not give any bond guaranteeing against loss by purchase of the skates, except the bond of himself and Messrs. E. H. & J. H. Dawson, and concluded as follows: "If, on the above conclusion, you do not desire to keep the goods, please inform me by return mail, and I will send an order and take them away." To this appellants replied, on the 5th of December: "We have to-day been served with a notice of garnishee in the case of *Ideson* v. *Smith*, in the superior court. With the exception of what the above may order to the contrary, the skates are subject to your order, as we positively decline having any thing whatever to do with them."

With this letter the correspondence closed, and the skates were boxed and put away in the store of appellants, subject to the order of appellee.

We think the evidence conclusively discloses a rescission of the contract of sale by the mutual consent of the parties. There was apprehension in regard to the title to the property. The purchaser feared trouble and loss, and though a bond of indemnity was proffered, it was not satisfactory. The seller then proposed to take back the goods, and this was assented to by the buyer, and the skates were boxed up and stored away, subject to the order of appellee and the demands of the law.

The judgment must be reversed, and the cause is remanded.

Judgment reversed.

The Chicago, Rock Island and Pacific Railroad Company

v.

John Collins.

1. Evidence — *of a co-conspirator.* In an action against a railroad company to recover the value of a trunk and its contents alleged to have belonged to the plaintiff as a passenger, and lost by the company, the evidence tended to show that the trunk belonged to a third person, who took it away from the depot without the knowledge of the agent of the company, and then procured the plaintiff to bring suit for its recovery. The evidence tending thus to show a community of interest and design between the plaintiff and such third person, it was *held,* a letter written by the latter to a stranger to the transaction, going to show the conspiracy, was admissible in evidence against the plaintiff.

2. Baggage — *what properly so considered.* A Chicago grocer, who went into the country in quest of butter, sought to recover of a railroad company the value of two revolvers, among other things, which he claimed were in his trunk as a part of his baggage, which was lost by the company: *Held,* with due regard to the habits and condition in life of the passenger, more than one revolver was not reasonably necessary for his personal use and protection.

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

This was an action of trover, brought by Collins against the railroad company, to recover for a trunk and its contents, alleged to have been delivered to the company as the baggage of the plaintiff, to be transported from Chicago to Walcott, in the State of Iowa.

The plaintiff testified in his own behalf, that on the 16th day of July, 1867, he received a check, which he exhibited, number 1,390, for his trunk, at the Chicago and Rock Island depot, in the city of Chicago, and that the trunk was checked to Walcott, Iowa. The witness stated that he had applied at the proper offices in Walcott and Chicago, for the trunk, but had

never received it. He stated what the trunk contained; among other articles, two revolvers, worth $25 each.

On cross-examination, the witness stated that he kept a grocery store in Chicago, and went to Walcott on the occasion mentioned, partly for his health, and to buy butter. He stated further, that on arriving at Walcott, on the 17th of July, he got dinner in a saloon near the depot, and went to a boarding house kept there by Pat. Manyon, and stayed there all night, and the next day went to Davenport. He did not know that he would know Manyon if he should see him. He thought the agent at Walcott was a large, thick set man. Witness stated that he did not know Thomas Duggan—never knew a man by that name in this country.

F. W. Kefferstein testified: He had been the station agent at Walcott for several years, but was absent on the seventeenth of July, the day the trunk arrived, his son being in charge of the depot. He stated he had never seen the plaintiff until the day of the trial, and that he had never at any time whatever called upon witness for the trunk. P. Manyon lived from a quarter to a half mile from the depot, and kept a kind of boarding house.

James Jordon, was baggage man on the train to Walcott on the seventeenth of July; kept a list of checks used on that train; the last time check number 1,390 was used was on that day; he did not know what the check was attached to.

John Kefferstein, son of the station agent at Walcott, and in charge on the seventeenth of July, remembered about the lost trunk; it was put off the morning train west. It was a large chest, round topped, like sailors use, painted blue. It was set on the platform, and, during his absence for ten minutes, it was stolen. Witness never saw the plaintiff before the trial. No one ever claimed the baggage that he knew of.

Patrick Manyon testified: That he lived at Walcott at the time referred to, and no one else lived there of the same name. He lived near the depot; did not keep a boarding house, but worked on a farm near there. Witness stated that he had

never seen the plaintiff before the trial; plaintiff did not stay at his house on the night of the seventeenth of July; witness was at home every night and would have seen the plaintiff if he had been there. Witness had a cousin named Thomas Duggan, who came to his home about that time, and stayed some time.

The witness here identified a letter produced by the defendant, purporting to be in the handwriting of Thomas Duggan, and addressed to the witness, which letter was, and is as follows:

"CHICAGO, Ill.

"Dear Cousin:

"I would like to have your answer of the last letter, but you never sent me the answer. You will please answer this letter as quick as possible. Patt, please to tell anybody in Walcott that comes across you that a man of the name of Collins stoped in your house; them checks that I took from Walcott belong to my chest. Collins took them in hand; therefore, you act as I tell you, he intends to make money on it; all that you got to say is, that a man of the name of Collins stoped in your house harvest months, so good day. From your affectionate cousin,

"THOMAS DUGGAN."

"Tell them it was about the 16th or 20th of July; be cautious who you will talk about the subject, and without you asked never mention anything about it. Collins and me intends to make money on it. Direct your letter to 257 North Market street to John Collins. Write back soon as ever you get this letter."

The defendant offered said letter in evidence; plaintiff objected to its being received; the court sustained said objection, and refused to allow the letter to be read. The defendant excepted.

Mary Manyon testified: My name is Mary Manyon. I lived in Walcott until the fall of 1867. I knew Thomas Duggan when he was a baby, but did not see him for about twenty years until he came to my son's house in July, 1867, about the middle; he stayed about six weeks; he had a sailor chest, painted a bluish color, with rope handles. I saw a leather string with, I think, two checks on; the children were playing with them. I told Thomas Duggan he should take those checks to the railroad, to the agent; he said he had no business to. I do not know what became of them; did not see them after he left; they must have been around if he did not take them away. I never have seen or heard of John Collins.

Mary Manyon, the younger, testified: My name is Mary Manyon, the wife of Patrick Manyon. I lived in July, 1867, in Walcott. I know Thomas Duggan, he is a cousin of my husband. I did not know him until he came to our house in July, 1867; I saw him at that time, he stayed about six weeks, working about the neighborhood; he came to my husband's house about the middle of July, 1867. He brought a sailor chest with handles on it, painted a dark bluish lead color, nothing else. He had a check (two) and a leather strap; the children played with same. He must have taken them away or we would have seen them again. I never knew John Collins, and he was never at our house.

A verdict was returned for the plaintiff for $403. The defendants appealed.

Mr. George C. Campbell, for the appellants.

Messrs. Runyan & Avery, for the appellee.

Mr. Justice Sheldon delivered the opinion of the Court:

The first point made in this case is, upon the exclusion of the following letter, addressed to Patrick Manyon, when offered in evidence in the court below:

"CHICAGO, ILL.

"*Dear Cousin:*

"I would like to have your answer of the last letter, but you never sent me the answer. You will please answer this letter as quick as possible. Patt, please to tell anybody in Walcott that comes across you that a man of the name of Collins stoped in your house; them checks that I took from Walcott belonged to my chest. Collins took them in hand, therefore, you act as I tell you; he intends to make money on it; all that you got to say is, that a man of the name of Collins stoped in your house harvest months, so good day.

"From your affectionate cousin,

"THOMAS DUGGAN."

"Tell them it was about the 16th or 20th of July; be cautious who you will talk about the subject, and without you asked never mention any thing about it. Collins and me intends to make money on it. Direct your letter to 257 North Market street to John Collins. Write back soon as ever you get this letter."

The letter was proved to be in the handwriting of Thomas Duggan. The evidence in the case tended strongly to show, that John Collins was only a nominal party, and that the real party in interest was Thomas Duggan; that Collins had testified falsely as to three material facts—as to the description of the trunk, as to calling for it at Walcott, and as to stopping at Patrick Manyon's house. Instead of Collins calling for the trunk at Walcott on the seventeenth of July, and staying at Manyon's the night of that day, as he testified, there was evidence that he never called for the trunk, and never was at Manyon's; but that Duggan was the man who took and carried away the trunk on that day from the platform of the station house at Walcott, in the absence of the station agent, with the check attached to the trunk, and brought it to Manyon's house, where he remained several weeks, having with him there two

checks, the strap check and the loose check which is delivered to the owner of the baggage when the strap check is attached to it.

There was sufficient evidence of a community of interest and design between Collins and Duggan to have rendered this letter of Duggan admissible in evidence as against Collins, to show a conspiracy between them to defraud the railroad company.

The fact of Duggan having in his possession at Walcott, the check, especially connects the parties together, as being in concert and acting in co-operation.

Another objection taken is, that among the contents of the trunk, as testified to, were two revolvers, and that a recovery was had for them, as baggage, $25 for each.

A common carrier of passengers is responsible for the baggage of a passenger.

But what shall be deemed baggage becomes, under some circumstances, a question of doubt. In *Woods* v. *Devin*, 13 Ill. 746, this court said that the term "baggage" "includes such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement or protection;" and that regard might be had to the habits and condition in life of the passenger.

The passenger, in this case, was a Chicago grocer, who had gone into the country, as he says, in quest of butter. His occupation or circumstances did not require that he should be furnished with any unusual store of deadly weapons, and we think he might have got along with one revolver. He should not have been allowed more than one revolver, as being reasonably necessary for his personal use or protection.

For error in both the above mentioned respects, the judgment is reversed and the cause remanded.

Judgment reversed.

ISAAC O. WOODRUFF *et al.*

v.

JAMES MCHARRY.

1. ACKNOWLEDGMENT OF DEEDS—*by whom to be taken.* In an action of ejectment, upon objection that one of the deeds under which the plaintiff claimed title was acknowledged before a person who described himself, in his certificate, as a clerk *pro tempore* of the United States circuit court for the southern district of Illinois, it was regarded as sufficient, if the person taking the acknowledgment was clerk *de facto*, without reference to the temporary character of his appointment.

2. PAYMENT OF TAXES—*what constitutes, under limitation act of* 1839. And the defendant setting up color of title and payment of taxes for seven years, but it appearing the land was sold one year during the seven, although bid in for the benefit of the defendant, the bid being paid with his money, it was *held*, this was not a payment of taxes, within the meaning of the statute.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

The opinion sufficiently states the case.

Mr. B. S. PRETTYMAN and Mr. WILLIAM DON MAUS, for the appellants.

Messrs. ROBERTS & GREEN, for the appellee.

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

This is an action of ejectment, in which the judgment in the circuit court was for the defendant, and the plaintiff appealed. The judgment was erroneous. The plaintiff showed a paramount title. The only objection taken to it by the counsel for appellee is, that one of the deeds was acknowledged before a

person who describes himself, in his certificate, as a clerk *pro tempore* of the United States circuit court for the southern district of Illinois. The objection is not well taken. It is sufficient, if the person taking the acknowledgment was clerk *de facto*, without reference to the temporary character of his appointment.

The defendant also sets up color of title and payment of taxes for seven years. But the land was sold one year during the seven, and although bid in for the benefit of the defendant, the bid being paid with his money, yet this was not a payment of taxes, within the statute, as has been repeatedly decided by this court. The judgment is reversed and the cause remanded.

Judgment reversed.

GEORGE F. HARDING

v.

GLASGOW PARSHALL.

1. PLEADING — *averment as to execution of a contract by an agent.* In a bill for the specific performance of a contract which was executed by an agent, it is not necessary to aver the manner of its execution in that regard, as that is only matter of proof. By the rules of pleading it is only required to aver facts, not the evidence.

2. SAME — *averment as to ratification of such a contract.* Nor is it necessary in such case, in averring that the principal ratified the agreement made by the agent, to allege that he did so by the receipt of a portion of the purchase money under the agreement. It is enough to aver that he did ratify it. The receipt of the money would be simply the evidence of that fact, and need not be averred.

3. RESCISSION OF CONTRACT — *placing parties in statu quo.* As a general rule, a party who becomes entitled to rescind an agreement, in order to avail of that right, should restore to the other party what has been received — in other words, place him in *statu quo*.

4. So, where one, claiming to be the agent of the owner of land, makes a contract of sale thereof, the owner cannot be permitted to repudiate the

contract on the ground of want of authority in the agent, without restoring money which he has received under the agreement, from the purchaser.

5. PAYMENT — *to one of several joint obligees.* A purchaser of land from two joint owners may make payment to either of them in discharge of his obligation, and the fact that he makes payment to one, after being notified by the other not to do so, will in nowise impair his rights under the contract.

6. SPECIFIC PERFORMANCE — *defective title.* Where there is a contract of sale of land, and an agreement on the part of the vendor to convey with certain specified covenants for title, it is the right of the purchaser to have a specific performance, notwithstanding the vendor's title, in view of the character of covenants he agreed to make, may be found to be defective.

7. SAME — *of joint owners — failure to fulfill their agreement with each other.* The right of a purchaser of land from two joint owners, to have a specific performance of the contract cannot be impaired by reason merely that one of the vendors has failed to comply with an agreement with the other in respect to the subject matter of the contract.

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

The opinion states the case.

Mr. J. N. BASSETT, for the appellant.

Messrs. FROST & TUNNICLIFF, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill brought by Parshall to enforce a specific performance of a contract and compel a conveyance from appellant and Paullin, of a tract of land in Mercer county. It alleges that the defendants claimed to be seized in fee of the land, and, on the 6th of April, 1864, contracted in writing to sell the land to complainant, for the sum of $1,400; that $20 were paid in hand, $600 to be paid on the 15th of May of that year, and the balance on the first Mondays in May, 1865 and 1866, with six per cent interest, and to pay all taxes. On payment being

made, he was to receive a deed with covenants of warranty against the patent title and the acts of grantors.

The bill further alleges that the contract was signed severally by both defendants. The contract set out in the bill closes with this language: "This contract is subject to the ratification of George F. Harding," and his name is signed by Paullin as his agent. It alleges that the contract was duly ratified by Harding in the month of May, 1864. A compliance with the terms of the contract by complainant is alleged in the bill, by the payment of the notes as they fell due and became payable.

It is alleged that defendants refuse to convey; prays answer and the execution of the contract. Paullin did not file an answer, but Harding answered.

In his answer he denies that he made or ratified the contract, and alleges that Paullin had no authority, either verbal or written, to make the contract, and sets up the statute of frauds. It denies that Parshall had performed the contract, or had made the payments to Harding, or to any one having authority to receive the money for him. It is admitted that he did refuse to make a conveyance, but denies that Harding and Paullin claimed to be seized of the land in fee, alleging that the land was owned by Harding and one Joseph S. Mathews.

With this answer Harding and Mathews filed a cross-bill. It alleges Harding and Mathews, on the 13th of October, 1862, owned the land and had occupied it for more than five years. That complainant in the original bill was their tenant on the land; that a suit in ejectment was then pending in the circuit court of the United States, in which Jedediah Paullin was plaintiff and Parshall was defendant; that Daniel Paullin was the real party in interest and had caused the suit to be brought. He at that time represented that the title was good and plaintiff would recover. That these representations were untrue and made to induce Harding to divide the land, and an agreement was entered into to dismiss the suit and divide the land.

The agreement is set out in the bill, and provides for the dismissal of the suit, and that Daniel Paullin should convey to complainants an undivided half of the land, for the consideration of $500, and with covenants of warranty, except against tax titles, and that Paullin should break thirty acres of the land within two years. That complainants, upon demand, should convey an undivided half of the land to Daniel Paullin by quit claim deed, only covenanting against their own acts. This agreement is under seal, and is signed by Paullin and Harding only; but the bill alleges that Harding acted for and as the agent of Mathews. The bill further alleges, that Harding and Mathews did, within thirty days, make and deliver the deed required by the contract. The bill charges that Paullin did not have the genuine patent title to the land, but had no title whatever, and he has not broken thirty acres of the land.

It is then charged that Paullin, claiming to be the agent of Harding, made a contract to sell the land to Parshall, but charges he had no authority to do so, and Harding had never ratified it, but notified Parshall that Paullin had no such authority, and he would only ratify it upon the condition that half of the purchase money be paid to Harding or Mathews and not to Paullin; that Paullin had never made a deed as required by the agreement, but gave notice that he could not and would not make it, and that he never had the patent title, and claimed that complainants would lose the land unless they furnished money to buy the title; that they had demanded the title more than two years previously, and that they notified Paullin if he failed to make the deed within ten days, the contract would be at an end, and he failing to do so, complainants terminated it, and so declared to Paullin; that Parshall was tenant on the land when these several contracts were entered into by the parties. The bill prays that both contracts be set aside; that Paullin pay Parshall his money and reconvey to complainants; and that Parshall's possession be decreed to complainants, and for general relief.

Paullin answered the cross-bill, and denies that Harding and Mathews owned the land when they agreed to divide it, and denies any knowledge of any ejectment suit then pending; denies that he was real plaintiff to it, or that he made the representations charged in the cross-bill. He admits the execution of the contract, but denies that Harding and Mathews performed it on their part, or made the deed with covenants against their own acts; but that they tendered a quit claim deed without any covenants. He denies that he failed to perform his part of the contract; but alleges performance by delivering a deed as required by the contract, and that he had the genuine patent title when the agreement was made. He alleges that he made the contract with Parshall, and insisted that he had authority, and that it was ratified by Harding after it was made. He admits that he failed to break the prairie, but sets up as an excuse, that he had sold the land before the time had expired.

He answers, that he had paid Harding $300, being half of the payment of May, 1864; that he had received from Parshall $1,471.75, but had paid nothing to Mathews; that he had bought what he believed to be the patent title, in June, 1861, but had never recorded the deed; that by the destruction of the record and death of the clerk, the evidence of his title by a foreclosure of a mortgage against O'Hara was lost, his title liable to be defeated and to litigation, and this led him to ask Harding to buy the O'Hara title with him after selling to Harding and Mathews. Replications were filed to the answers.

A hearing was had, when the court below rendered a decree, that Harding and Paullin, within forty days, execute a deed to Parshall as provided by the contract; and that Paullin pay to Harding and Mathews $400, when Harding shall join Paullin in the conveyance to Parshall; all other relief was denied. The case is brought to this court on appeal by Harding.

It is first urged that the bill fails to allege that Harding made the contract by an agent, but the language employed

implies that he executed it in person. We do not so understand the allegation. The contract, as set out, purports to have been executed by appellant's agent. But had it simply alleged that he made and executed the agreement it could not have been material, as a party is only required, by the rules of pleading, to aver facts and not the evidence. It was not material to aver the manner of its execution, as that was only matter of proof. This objection seems to be hypercritical and is without force.

It is next urged that Paullin had no authority to make the contract for appellant. The latter, in a letter to Paullin, says to him, "I think the land is worth $1,000. You may sell it at that rate; but it is best, if you agree with me, to have Joseph S. Mathews, of Aledo, who owns with me, sell it for us. Perhaps $800 is enough, he taking our title as it stands." And Parshall swears that appellant admitted to him that Paullin was authorized to make the sale, and Paullin swears that he was authorized by appellant. When we consider this evidence we can not entertain a doubt that authority was given. Appellant's letter gives it in explicit terms that will bear no other construction. It is true, he suggests that it would be better for Mathews to make the sale, but he by no means withdraws the authority already given. Appellant, however, says he saw Paullin subsequently, and before the sale, and withdrew the authority. Conceding this to be true, then the question arises, whether he subsequently ratified the contract.

In his deposition, Parshall swears that appellant fully recognized the contract as being binding, but appellant swears he informed Parshall that Paullin had no authority to make the agreement; and Mathews concurs with appellant in this statement. It does not appear that appellant denies that he ratified the contract, but on the contrary he received $300 of the purchase money from Paullin long after the contract was made, and, so far as we can see, he still retains it, never having offered to return it. This is strong evidence of ratification. But appellant and Mathews say the ratification was upon the

condition that one-half the purchase money should be paid to them, while Parshall states it was unconditional. But even conceding that it was conditional, appellant could waive the condition and permit Parshall to go on and carry out his part of the agreement. And he could waive the condition by express agreement or by acts equally binding. That it was unconditional is apparent from appellant's letter of June 11th, 1864, to Paullin. He there says, "I have just received your note in regard to the sale to Parshall. Mr. Mathews wrote me in regard to it some weeks ago, and I have ratified the sale. I saw Mr. Parshall and he exhibited his bond. It warrants, or rather calls on our deed to warrant, against patent titles only. His hesitation is not as to the patent but the tax title. On that account he wishes to be let off from the contract. Of course I declined to do so, and told him he was bound."

This fully and entirely corroborates Parshall's version of the ratification. Appellant does not allude to any condition in confirming the agreement.

As a general rule, a party who becomes entitled to rescind an agreement should restore to the other party what he has received, or in other words, place him in *statu quo*. If this ratification was conditional, as insisted, why did appellant, if he intended to insist upon a breach of the agreement, retain the $300 of Parshall's money received under the agreement?

We do not see that he returned, or offered to return it, to Parshall. Shall it be said that he shall have the land and retain Parshall's money? May he treat the contract as binding and claim what he has received under it, for that purpose only, and yet repudiate it so far as it binds him? Such can not be equity.

Had appellant intended to avail himself of the conditional ratification, he should have restored the money, or offered to do so, when he attempted to repudiate the contract. And to have done so, he should have acted within a reasonable time. He

could not lie by and permit Parshall to rest in supposed security for an unreasonable time and then repudiate the agreement to ratify. He should have acted within a reasonable time.

Again, we find that on the 21st of February, 1865, Paullin writes appellant and incloses him a deed to be executed to Parshall under the contract; and appellant in reply refuses to execute it, but places the refusal alone on the ground that Paullin had not conveyed the patent title to him. He does not, in the remotest manner, allude to the want of power on the part of Paullin to make the agreement or that he had refused to ratify it. He does not say, you were unauthorized to make the contract, and I therefore refuse to execute it, nor does he intimate any thing of the kind. He places his refusal on different grounds. Throughout this transaction, until it became apparent that he had not title, appellant recognized the contract as binding.

It is, however, said that it is not alleged in the bill that the contract was ratified by the receipt of a portion of the purchase money under the agreement. This does not matter. The bill alleges that appellant did ratify the agreement, and the receipt of the money was only evidence of the fact, and hence need not have been alleged. There is no force in this objection.

It is also urged that Parshall failed to meet his payments promptly as they fell due, but did not make them until some time afterward. Appellant does not seem to have notified him that he had rescinded the contract for that reason, or to have done any act indicating such a purpose, and Paullin received the money.

Nor can the fact that appellant notified Parshall not to pay the balance of the purchase money to Paullin, and his afterward paying it to him, in the least affect or impair his rights under the contract.

Under it he had the legal right to discharge himself by paying the money to either of the joint contractors. Nor could appellant change that right any more than he could any other provision it contained. That a payor or other obligor may pay

to either of several joint payees, and thereby become fully discharged, is a proposition so plain as to require the citation of no authority in its support. The only means of preventing it would have been by a properly framed bill for an injunction. There is no force in this objection.

We now come to the consideration of the question, whether Parshall has the right to insist upon a specific performance of the contract by receiving such title as appellant and Paullin have, with covenants which they agreed to make for title. Can they now insist that because they do not have such title as they agreed to sell that they are exonerated from the performance of their contract, and that Parshall shall only have a restoration of his money? It is clear, beyond question, that appellant and Paullin could not compel Parshall to perform the contract unless they could show that they were able to convey such a title as they had contracted to give. But in this case he is willing to risk their title and receive it as they hold it, with the covenants they agreed to make. That such is the rule of law seems to be apparent. Otherwise a party would have the right to insist on a rescission simply because he was unable to perform his agreement.

When parties enter into contracts they know that they do not have the option to rescind without the fault of the other party. This all business men know, and contract with a view to such a liability. The party who has performed or offered to perform his part of the agreement has the choice whether he will sue for and recover damages for a breach of the contract, or will insist upon its execution specifically, and take such a performance as the other party is capable of making.

While we have found no case which holds the vendee may compel a conveyance when the vendor has a defective title, being willing to rely upon such covenants for title as the vendor has agreed to give, yet many analogous cases may be cited which announce a rule that requires a specific performance. In the case of *Waters* v. *Travis*, 9 Johns. 450, a vendor, after entering into an agreement to sell the tract of land, sold and

conveyed a portion of the premises to an innocent purchaser. The vendee exercised the option of insisting upon a specific performance rather than resort to his remedy at law, and the court compelled the vendor to perform his contract, so far as he was able, by conveying to the vendee the portion he had not conveyed to the other purchaser. In Newland on Contracts, chap. 12, p. 228, it is said, that a vendee will be held to his bargain, notwithstanding the want of a usual, but not an absolutely necessary, step for perfecting the title of the vendor, particularly if the vendee knew of the objection at the time of the purchase, and yet accepted the title.

In the case of *Cotton* v. *Wilson*, 5 P. Wms. 190, it was *held* that the purchaser of an estate could not refuse to complete his contract because a will devising the estate to the vendors had not been proved in equity, although such proof was said to be usual, but not an essential step, because the purchaser had not insisted when he purchased, upon such proof, or that the heir should join the devisees in the conveyance.

In 2 Story's Eq. Jurisp., § 779, it is said, suits may also be brought by the purchaser for a specific performance, where the vendor is unable to make a complete title to all of the property sold, or where there has been a substantial misdescription in important particulars, or where the terms, as to the time and manner of performing the contract, have not been punctually or reasonably complied with by the vendor. In these and like cases, it would be unjust to permit the vendor to take advantage of his own wrong or default or misdescription, and courts of equity allow the purchaser an election, to proceed with the purchase *pro tanto*, or to abandon it altogether. Numerous other authorities might be referred to in support of the rules here announced; but these are deemed sufficient for their illustration. They clearly establish precedents for executing agreements in part, and in not permitting the vendor to set up and rely upon his own default or wrong as a defense.

Every day's observation teaches, that vendees accept conveyances of known defective titles, and rely alone on possession

and covenants for title. It is believed that this is a common usage. Nor is such a practice regarded as immoral or inequitable when fair and unaccompanied by fraud. In such a case, the vendor is willing to warrant a defective title, and the vendee is willing to risk it, with the covenants for title which the parties agree shall be inserted in the deed of conveyance. In fact, the covenants for title are inserted because the parties are not sure that it is perfect, and to indemnify the vendee against a failure of the title.

In this case, appellant and Paullin were willing to sell their title, and to covenant for title to the extent limited in their contract, and Parshall was willing to receive it, and they so agreed. And it is a familiar maxim of equity, that whatever is agreed to be done, and should be done, is considered as done. Then it was fairly agreed that the conveyance should be made by the vendors and received by the vendee, and, as the contract is not immoral or inequitable, why should it not be enforced as it is asked by the vendee, who alone could object to the imperfection of the title? He is willing to receive it, although defective. He is in possession and has been for many years, and, if the requirements of the statute of limitations have been observed, he can invoke its aid, as this defective title has become a complete shield against all outstanding titles, and if he has not obtained the statutory bar, or fails in the future to acquire it, he could then fall back on his covenants for title. This, we think, he has a right to choose and insist upon, rather than be left to his remedy at law, where, if there has been a large advance in the price of the land, he could not recover for that.

If the contract were rescinded and canceled, then the vendors would, if they acquired the bar of the statute, acquire all of the benefits growing out of the appreciation in the value of the land, and Parshall would but recover back his money, with six per cent interest, be required to account for rents and profits and allowed for improvements. He would thus be changed from a purchaser into a tenant, and to a money lender at a low rate of

interest, and for the reason only that appellant says his title is imperfect. He fails to set out the defect in his and Paullin's title, and hence we are left to rely alone on his conclusions as to its being defective. He does not show that they have no title or claim of title, which might present a different question. On the contrary, he asserts claim of title, and such title as to require Parshall to pay him rents and to surrender possession to him.

Whatever the misunderstanding or difficulties which may exist between appellant and Paullin as to their contract, it should not in the least affect Parshall. He has in nowise produced or contributed to them. He has fairly and faithfully performed his contract, not, perhaps, literally, but substantially, and has the right to compel a performance by the other parties.

As appellant is bound to warrant against patent titles, by his contract with Parshall, and as he must join in the specific performance, he is entitled, under the general prayer for relief, to a deed of conveyance from Paullin according to the terms of their contract. The decree of the court below should have required Paullin to make such a deed as is required by his contract with Harding. In reference to whatever title Mathews may hold, there is no decree, nor would it be proper to render any on the pleadings in the case. The decree of the court below is reversed and the cause remanded, the costs are equally divided between Harding and Paullin. The court below will require Paullin to execute to Harding and Mathews a deed in pursuance of and according to the terms of the agreement of the 13th of October, 1862.

Decree reversed.

The foregoing opinion was delivered at the September term, 1869. On the petition of the appellant, a rehearing was granted at the September term, 1870, whereupon the following additional opinion was delivered:

PER CURIAM: A rehearing was granted in this case because we became satisfied, on the petition for a rehearing, that the

decree of the court below should not have been reversed, or that Paullin should have been required to convey to Harding the undivided half of the premises, but that Harding should be left to seek such relief from Paullin as he may be disposed to pursue. After an attentive consideration of the petition for a rehearing, we have failed to perceive that Parshall is not entitled to the relief granted, and we are still satisfied with the reasons given in the opinion previously filed. It can not be held that Parshall shall suffer or be prevented from enforcing his contract against his vendors, because one of them has refused to keep his agreement with the other; and this is the ground for rescinding the agreement with Parshall, except a denial of authority to execute it, set up in the cross-bill. We held in the former opinion that Paullin had authority to execute the contract, or, if not, that Harding ratified its execution. We still adhere to the same conclusion. The cross-bill was properly dismissed, for the reasons given, and the decree of the court below is affirmed, for reasons assigned in the opinion previously filed in this case.

Decree affirmed.

FRANKLIN D. COSSITT

v.

JAMES B. HOBBS.

1. STATUTE OF FRAUDS—*sale of land—what constitutes a sufficient memorandum in writing.* The owner of a tract of land, who had given authority to a firm of real estate agents to sell the same, wrote upon the back of one of their business cards, as follows: "Will take for the north-west quarter section 23, 160 acres, less R. R. $300 per acre, one-third cash, balance one and two years, eight per cent," which was signed by him. On the same card, a person desiring to purchase, wrote: "Your terms are accepted," and signed the same: *Held,* in an action by the

purchaser against the vendor to recover damages for a failure on the part of the latter to perform his contract, this was a sufficient memorandum in writing to take the case out of the statute of frauds.

2. On the same day the purchaser thus accepted the terms proposed, the agents of the vendor signed and delivered to the purchaser this note or memorandum: "Received $1,000, on the sale to J. B. Hobbs, this 16th day of February, 1869, 10:40 A. M., the north-west quarter of section 23 on N. W. R. R. owned by D. F. Cossitt, at $300 an acre, third cash, and one and two years, eight per cent." This writing by the agents, however, gave no additional validity to the contract; the owner had written his terms and they were accepted, and thus an end was put to the bargain, and it required no subsequent ratification on his part.

3. DESCRIPTION *of the premises—how properly shown.* On the trial of the cause, in addition to the memoranda mentioned, the plaintiff gave in evidence an abstract of title to the premises and a certificate of the survey thereof, which had been delivered to him by defendant after the contract was made, and these were held to have been made out and delivered by force of the first memoranda, becoming a vital part of the contract, and leaving nothing of the description of the land sold to be supplied by parol.

4. SAME—*parol evidence.* But, independently of the abstract and survey, for the purpose of identifying the premises sold, resort might be had to parol proof.

5. INSTRUCTIONS not based upon the evidence may properly be refused.

6. And instructions, which are substantially embodied in others which are given, may be refused.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

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

Messrs. WALKER, DEXTER & SMITH, for the appellant.

Messrs. HOYNE, HORTON & HOYNE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, brought to the Superior Court of Chicago, by James B. Hobbs against Franklin D.

Cossitt, to recover damages for a failure to perform a contract for the sale and conveyance of a certain tract of land.

The issues were, non-assumpsit and the statute of frauds and perjuries. The jury found for the plaintiff, and the court rendered judgment thereon, a motion for a new trial by the defendant having been denied.

To reverse this judgment the defendant appeals.

The principal question is, was there a sufficient note or memorandum in writing, of this contract, to answer the requirements of the statute of frauds and perjuries? The provision of the statute is, that no action shall be brought upon any contract for the sale of lands, tenements or hereditaments, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. R. S., ch. 44, § 1.

This statute has been discussed by courts most fully, and these rules, among others, are deduced from it: Lawful authority may be conferred by parol. *Doty* v. *Wilder*, 15 Ill. 407; *Johnson* v. *Dodge*, 17 id. 433. There is no form of language necessary; any writing from which the intention can be gathered, as in other contracts, will be sufficient. Any kind of a writing, from a deed down to mere hasty notes or memoranda in books, papers or letters, will suffice. *McConnell* v. *Brillhart*, 17 id. 354. But the writings, notes or memoranda, or whatever they may be, must contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest or property, as will be capable of identification and separation from other of like kind, together with the terms, conditions (if there be any) and price to be paid, or other consideration to be given. Id. 361. The party to be charged, or his lawfully authorized agent, must sign it. Id. The contract, note or memorandum thereof must be signed with intent to enter into it, and it must be mutual, reciprocal,

and upon a good and valid consideration. Id. Do the writings in evidence fulfill these conditions? It is conceded that Whipple and True had authority to sell the land.

The defendant, on the back of one of the business cards of Whipple & True, real estate agents in Chicago, wrote with his own hand, the following:

"Will take for the N. W. quarter Sec. 23, 160 acres, less R. R., $300 per acre, one-third cash, bal. 1 and 2 years, 8 per cent. F. D. COSSITT."

On the same card, on the 16th February, 1869, at 10:40 A. M., the plaintiff caused to be written these words:

"Your terms are accepted. J. B. HOBBS."

On the same day, Whipple & True, as agents for the defendant, signed and delivered to the plaintiff this note or memorandum:

"Received $1,000 on the sale to J. B. Hobbs, this 16th day of February, 1869, 10:40 A. M., the N. W. ¼ of Sec. 23, on N. W. R. R., owned by F. D. Cossitt, at $300 an acre, ⅓ cash and 1 and 2 years, 8 per cent.

"WHIPPLE & TRUE, Agents for F. D. Cossitt."

It is objected by appellant, that in neither of these writings are the premises sufficiently described, though he admits that the capital letters "R. R.," in the first, would denote that it was on some railroad which occupied a portion of the tract, and "N. W. R. R.," in the second, that it was on the Northwestern Railroad, a road running north-west from Chicago, through the State of Wisconsin and into the State of Iowa. So far, then, as this goes, some locality is given to the quarter section, and to that extent is capable of identification and separation from any other quarter section not bearing those numbers. The names of the parties fully appear, that of the vendor to be charged, in his own handwriting, and the price and terms are no less distinct. It is mutual, for an action would lie against the plaintiff on his refusing to pay and perform, and the con-

sideration is valid, and that the contract was signed by the party to be charged, with the full intent, at the time of signing it, to perform it, is neither doubted nor denied, and that he signed it voluntarily and knowingly is not questioned.

In *Doty* v. *Wilder*, *supra*, which was a bill for the specific performance of a contract for the sale of a house and lot belonging to Wilder, the entry on the auctioneer's sale book was, "house and lot adjoining southern depot, on Clark street, owner R. Wilder, amount $4,700, purchaser, T. Doty. Remarks, one-half cash, one-half in one year."

This court held this entry was a sufficient memorandum of the contract of sale. It states the names of the vendor and vendee, the amount of the purchase money, and the time of payment. It also contains a sufficient description of the property. It is described as a house and lot owned by the defendant, adjoining the southern depot, on Clark street. There are references in this description by which the lot can be identified and distinguished.

It is also held in this case, that the memorandum of the auctioneer must, on its face, or in connection with some other writing, contain every thing necessary to show the contract between the parties, so that there be no need of parol proof to ascertain the terms of sale and the intention of the parties.

It was also said that the bill alleges that the lot was the only one with a house upon it adjoining the depot, and that the defendant owned no other lot answering to this description. If the defendant had conveyed the lot by the same description there could not be a doubt but that his grantee would hold the property.

The third count in the declaration alleges, that the defendant was to deliver an abstract of title to the premises within ten days after the 16th of February, 1869, and then avers that on that day he paid to defendant $1,000 earnest money on account of the purchase and of the one-third cash payment, and that in part performance of his bargain, on the 17th of February, 1869, the defendant furnished plaintiff an abstract of

title to the premises, and also delivered to the plaintiff a certificate of the survey thereof.

On the trial of the cause these memoranda, this abstract of title and this certificate of the survey of the land bargained for, were put in evidence without objection, and as the two latter instruments of evidence were in writing, and connected with the first memoranda, in fact made out and delivered by the defendant, by force of those memoranda, they become a vital part of the contract, and leave nothing of this description of the land sold to be supplied by parol. The written documents furnished by the defendant himself identify, beyond all question, the tract of land sold, and must conclude him. This proof would justify a demand for a specific performance, had a bill been exhibited for such purpose.

But, independent of this, for the purpose of identifying the premises sold, resort might be had to parol proof, as in *Whittaker* v. *Sumner*, 9 Pick. 311. There it was held, that an attachment on mesne process of all the interest of the defendant to a certain parcel of land situate on Pleasant street, in Boston, is sufficiently certain, if the defendant was interested in only one parcel in such street, and parol evidence was admissible to show the parcel to which such description was intended to apply.

This court, in *McConnell* v. *Brillhart*, *supra*, while saying that contracts within the statute of frauds were no more subject to change or alteration, or proof of their contents, than other written contracts, and that the same degree of certainty required in other written contracts was sufficient in contracts under the statute, and that the maxim, "*id certum est, quod certum reddi potest*," was equally applicable to both, also held, that latent ambiguities might be explained by parol.

In this case, the contract rested wholly in letters passing between the vendor and vendee, the complainant, and described the land as "a half section — terms cash in hand." This letter was written in response to one from Dr. Michener, acting as the agent of the purchaser, inquiring if he would dispose of

some land lying contiguous to his, and on what terms? The court say, the description of the land as a half section contiguous to Dr. Michener's is susceptible of identification by parol, by showing that the half section described in the bill had been entered by McConnells, father and son; that it lay adjoining the only land owned by witness, or was the only land owned by them adjoining any land of witness. On this point, reference is made by the court to *Venable* v. *McDonald*, 4 Dana, 336, where it was held, that extraneous facts, referred to in the description of a tract of land in a deed, as, "land on which A. B. then resided," may be proved by parol, and the identity of the land, or whether a particular tract is or is not within the description of the deed, is matter of fact for the jury to determine.

In the case before us, the jury have found the facts for the plaintiff, on evidence to which no objection was made.

Cases are too numerous in the books to allow of citation, where parol evidence has been admitted to supply a defective description of property sold. Those cited are deemed sufficient on this occasion.

Some effort was made by appellant to show that this tract of land had been sold by another agent employed by appellant, a few minutes prior to the hour at which the bargain was closed by paying $1,000 earnest money by appellee, and that a contract to sell was to be subject to the approval of appellant; but it seems to us, this sale was substantially made by the appellant himself, by his writing on the back of the card. The subsequent writing by the agents did not give the contract any additional validity. Appellant wrote his terms, and they were accepted, and thus an end was put to the bargain. No ratification on his part was necessary. It is absurd to contend appellant's approval was necessary, when he made his own terms, and they were promptly approved. From that moment there was no loop-hole of retreat.

Exceptions have been taken to some of the instructions withheld from the defendant.

Six instructions were given for the appellant, which appear to us to embody all the law applicable to the facts of the case, to which appellant was entitled, and placed his case in an attitude before the jury as favorable as he could demand. The instructions refused, numbered two, three, four, seven, eleven and twelve, were properly refused. In regard to the second and third, the introductory parts thereof were doubtless good law, but other matters were incorporated about which there was no evidence. The matters contained in the fourth were substantially given to the jury in other instructions. As to the seventh, we do not find any evidence in the record that appellant had, prior to the sale to appellee, revoked the authority given to Whipple to sell, and was properly refused. The eleventh instruction is not discussed by appellant. The twelfth he insists should have been given. We think it was substantially given in the third instruction for the defendant, and which appears to us to cover the whole case. That instruction is as follows:

"Although the jury shall find, from the evidence, that the defendant, Cossitt, authorized the firm of Whipple & True to sell for him the premises in question, for three hundred dollars ($300) per acre, one-third cash and the balance in one and two years, with interest at the rate of eight per cent per annum, yet, if they shall also find, from the evidence, that the said Cossitt reserved to himself the right of disposing of said premises by himself, or through other agents, then, although you shall find, from the evidence, that the said Whipple did subsequently sell said premises to the said plaintiff, upon the terms authorized, and made a contract in writing to that effect, with the said plaintiff, yet, if you shall further find, from the evidence, that before the said Whipple had made any note or memorandum in writing, of said sale, to the said plaintiff, the said Cossitt, or any lawfully authorized agent for him, had made a valid sale of said premises, and notified said Whipple of such sale, then the said Whipple had no right subsequently to enter into a written contract with the said plaintiff for the sale of said premises.

And if the jury believe, from the evidence, that the written contract or memorandum in writing, read in evidence, was made under such circumstances, and after the said Whipple had been informed by said Cossitt, that said premises had been sold, then such memorandum or contract is not binding upon said Cossitt, and the jury must find for defendant."

The question, whether a sale to be effected by Whipple, was to be submitted to the approval of appellant, was plainly put to the jury by this instruction. Whipple testifies he was not required to do so, while appellant testifies he was. The jury have settled that by their finding under this instruction. The question of notice to Whipple of the sale by Rees was also before the jury, and they have found that it was not received until after Whipple had made the contract with appellee.

In looking at the whole case, as it appears in the record, the declaration of appellant that Hobbs ought to have the land, that it was fairly his, the furnishing by appellant on the next day after the sale the abstract of title and copy of the survey, leaves little room for doubt as to the intention of the parties, and that the justice of the case is with the verdict is very evident.

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

Judgment affirmed.

BENJAMIN GOODWIN

v.

DANIEL DURHAM.

1. NEW TRIAL — *verdict against the evidence.* In this case the verdict of the jury being manifestly against the weight of the evidence the judgment is reversed that a new trial may be had.

Syllabus. Opinion of the Court.

2. INSTRUCTIONS must be based upon the evidence.

3. BILL OF EXCEPTIONS — *aided by certificate of the judge.* The certificate of the judge who tried a cause below, that the bill of exceptions contains all the evidence, is conclusive, and a suggestion of counsel that the record in such case does not contain all the evidence will not be considered by this court.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion states the case.

Messrs. W. H. and H. L. RICHARDSON, for the appellant.

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

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of trespass, brought by the appellee against the appellant to recover damages for injuries committed by the stock of appellant.

A trial was had at the April term of said court, and resulted in a verdict for appellee for the sum of $226.

The defendant below brings the cause to this court by appeal, and assigns, among others, two causes of error, viz.:

First. That the court erred in refusing to grant a new trial, because the verdict is against the weight of evidence.

Second. That the court erred in giving the plaintiff's instructions.

We think that these errors are well assigned.

We have carefully examined the evidence preserved in this record, and are unable to find evidence to sustain the verdict to any thing like the amount found by the jury. It strikes us at first blush that the verdict in this case is manifestly against the weight of evidence. In such case, it is the well established rule in this court to award a new trial. The sixth instruction asked by the plaintiff below should not have been given.

Even if it stated the law correctly, there is no evidence in the record upon which it could properly be based. It is suggested by the counsel for the appellee that this record does not contain all the evidence. We can not consider this suggestion. The judge who tried the cause certifies that the bill of exceptions contains all the evidence. His certificate is conclusive. The judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.

ANDREW WHEELER

v.

STEPHEN P. MATHER.

1. ACTION — VENDOR AND PURCHASER — *right of the latter to recover back purchase money paid, after a rescission of the contract by the former.* Under a contract for the sale of land, providing that time, in respect to the payment of the several installments of the purchase money, shall be regarded as of the essence of the contract, and that, in case of default in prompt payment of any one installment, the vendor shall have the right to declare a forfeiture of the contract, if the vendee enters upon its performance, paying part of the purchase money, but makes default as to another part, which is inexcusable, and the vendor, being without fault, exercises the right given by the contract to declare the same terminated, and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid; and this is the rule, notwithstanding the contract does not provide that the vendor may retain the money paid in case of a forfeiture of the contract: Mr. JUSTICE SCOTT and Mr. CHIEF JUSTICE LAWRENCE, dissenting.

2. But a vendor who is himself in fault, for fraud or violation of his contract, can not exercise the power so given, without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase money received, and the equitable action for money had and received would lie to recover it.

Syllabus. Brief for the appellant.

3. REMEDY *of the vendee, under other circumstances.* There may be, however, cases where a vendee, chargeable with a technical default, under such a contract, might, under particular circumstances, be entitled to other relief. As, in a case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident, or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments or improvements, and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done, or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations adjusted according to the circumstances of each case.

4. RESCISSION OF CONTRACTS—*placing the parties in statu quo.* It is a general rule that, where the parties to a contract have not themselves prescribed the right of rescission and the circumstances under which it may be exercised, neither of them can declare a rescission for failure of the other to perform his part of the contract, without first placing the latter *in statu quo.*

5. But where the parties to a contract for the sale of land, agree that in case of a failure on the part of the vendee to make his payments at the specified times, the vendor may declare the contract forfeited, the right of the latter to declare the forfeiture does not depend upon his restoring to the vendee such of the purchase money as the latter may have paid under the contract.

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

The opinion states the case.

Messrs. VALLETTE, PARKS & BEAVER, for the appellant.

We insist, the vendee can not, upon the facts in this case, recover back the purchase money he has paid, the contract having been rescinded by reason of his default.

The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate, where the contract has been rescinded, are well stated by Judge WELLES, in the case of *Battle* v. *The Rochester City Bank*, 5 Barb. 414:

"First. Where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either.

"Second. Where the vendor is incapable or unwilling to perform the contract on his part.

"Third. Where the vendor has been guilty of fraud in making the contract."

No case can be found where a recovery was allowed, unless it was upon one of the grounds stated in these propositions. The case at bar clearly would not fall within either of the supposed cases.

There are *two* principles, well established upon reason and authority, which, if applied to the facts in this case, will defeat a recovery.

First. A vendee can not recover back money paid upon a contract for the purchase of land, where the rescission is caused by his *default* or *wrong*.

Second. A vendee can not recover back money paid upon a contract, when he can not, or does not, place the other party *in statu quo*.

The case of *Ketchum* v. *Evertson*, 13 Johns. 163, is in point upon our first proposition, and decisive of this case. See, also, *Haynes* v. *Hart*, 42 Barb. 58, and *Hansbrough* v. *Peck*, 5 Wall.

The leading case in support of our second proposition is *Silk* v. *Hunt*, 5 East, 449. That case has been followed by all the courts in this country, and the principle adopted by this court in a number of cases that have been decided here.

In that case the tenant paid £10 upon a contract to lease a house, which the landlord agreed should be repaired in ten days. The tenant went into possession and occupied the premises for ten days and over, but the landlord failed to make the repairs, by reason of which the tenant left the place, and brought suit to recover back the money he had paid.

Lord ELLENBOROUGH decided that the action could not be maintained, for the reason that the tenant had received *some*

benefit from the contract, and that, therefore, the parties could not be left *in statu quo*.

To the same effect are the cases of *Hogan* v. *Myer*, 5 Hill, 389; *Peters* v. *Gooch*, 4 Blackf. 516; *Green* v. *Green*, 9 Cow. 49; *Masson* v. *Bovet*, 1 Denio, 74.

This court recognized the same principle in *Bowen et al.* v. *Schuler*, 41 Ill. 194; *Ryan* v. *Brant*, 42 id. 78; *Gehr* v. *Hagerman*, 26 id. 441; *Smith* v. *Lamb*, id. 398; *Buchenau* v. *Horney*, 12 id. 336; *Smith et al.* v. *Doty*, 24 id. 165; *Jennings* v. *Gage*, 13 id. 610. See, also, *Dowdle* v. *Camp*, 12 Johns. 450; *Hudson* v. *Swift*, 12 id. 26; *Richards* v. *Allen*, 5 Shep. 296; 5 Monr. (Ky.) 190.

Mr. H. SNAPP, for the appellee, contended the action would lie; that the right of rescission by the vendor could not be exercised except the vendee be placed *in statu quo*, citing, *Chrisman* v. *Miller*, 21 Ill. 235; *Moore* v. *Smith*, 24 id. 515; *Smith* v. *Lamb*, 26 id. 398; *Gehr* v. *Hagerman*, id. 441; *Murphy* v. *Lockwood*, 21 id. 619; *Smith* v. *Doty*, 24 id. 165; *Jennings* v. *Gage*, 13 id. 612; *Buchenau* v. *Horney*, 12 id. 338; *Foster* v. *Jared*, 12 id. 455; *Trimble* v. *Reeves*, 25 id. 214; *Anderson* v. *White*, 27 id. 57; 2 Hill (N. Y.) 293; 5 id. 390; *Bowen* v. *Schuler*, 41 Ill. 192; *Ryan* v. *Brant*, 42 id. 84.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This case is again before the court upon a rehearing granted at the instance of appellee. It has received an extended and careful reconsideration. But the court finds no reason for varying from the conclusion arrived at in the first instance. In order to a proper appreciation of the additional reasons and authorities given, it is necessary that a re-statement of the case should be given. It is an action of assumpsit, upon the common counts, brought by a purchaser of real estate, to recover back money which he had paid the vendor, and

the case was this: The appellee, plaintiff below, was the only witness on his behalf. He introduced in evidence articles of agreement under seal, bearing date April 1, 1861, whereby appellant, as party of the first part, in consideration of the prompt payment of the money to be paid by appellee, agreed to sell appellee lands therein described, subject to a mortgage, appellee covenanting to pay for them $1,892 as follows: $550 cash at the time of making the contract, $550 on the 1st day of June, A. D. 1861, and the balance, $792, on the 1st day of April, 1862. Time was made of the essence of the contract. Appellant covenanted that, on the payment of the principal and interest as specified, he would, without delay, convey all his right, title and interest in the premises by deed with full covenants of warranty. The articles contained the proviso that they were upon the express condition that, in case of failure of the party of the second part (appellee) in the performance of all or either of the covenants on his part to be performed, the party of the first part (appellant) should have the right to declare the contract void, and take immediate possession of the premises.

Appellee then produced in evidence a notice signed by appellant, dated August 2, 1862, and served on him about that time, which, after describing the contract, and reciting appellee's failure in making his payments, notified him that appellant declared the contract void and terminated.

From his own testimony, it appears that appellee had paid only part of the installment of $550 due June 1, A. D. 1861, and no part of that of $792, due April 1, 1862. Nor did he offer any excuse for such default, or claim that there was any fraud or default on the part of appellant, but says he never demanded any deed from him. Under this state of facts the court, on behalf of plaintiff below, instructed the jury:

"1. That unless the contract between the plaintiff and defendant, offered in evidence, provides that the plaintiff shall forfeit all that he had paid upon the rescission of said con-

tract; and if they shall further believe from the evidence that defendant declared a forfeiture of said contract at his option under said contract, and that said contract had not been rescinded by the plaintiff, then there was no forfeiture of the amount paid by the plaintiff to the defendant, and plaintiff has a right of action to recover back whatever he paid to defendant on said contract."

"2. That if the jury believe, from the evidence, that the contract of sale of the land mentioned in the articles of agreement offered in evidence by the plaintiff was rescinded by the defendant, then the plaintiff can recover from the defendant the sum or sums paid upon said land."

These instructions base the right of recovery upon the mere fact of appellant having declared the contract terminated, without reference to any question whether appellee was in fault or appellant without fault; and which, for this reason, were erroneous and must have misled the jury. There is no theory upon which this action can be sustained, if at all, except that of an implied promise.

If appellant had violated the contract, or it had been rescinded by mutual consent, then the law would imply a promise on his part to pay back the consideration received. *Faxon* v. *Mansfield*, 2 Mass. 147; *Seymour* v. *Bennet*, 14 id. 266.

But this contract was not rescinded by mutual consent. Appellee violated it, and then, as a consequence, appellant declared it terminated; and it was no breach of the contract on his part to do so. In *Battle* v. *The Rochester City Bank*, 3 Comst. 88, where the contract contained a similar provision and the right was exercised, the court said: "The rescission of the contract in question by the bank was not a breach of it, but was in pursuance of a provision contained in it; and the defendants are chargeable with no violation of it whatever."

We believe it to be a sound principle, supported alike by reason, authority and good morals, that no man can make his own infraction of his agreement the basis of an implied under-

taking in his favor, or of an action for money had and received against the other party who stands fair and innocent. It was upon this principle that the right of recovery was denied in the case of *Ketchum* v. *Evertson*, 13 Johns. 359, cited in the original opinion in this case. "It would," said the court, "be an alarming doctrine, to hold that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

In *Green* v. *Green*, 9 Cow. 47, Chief Justice SAVAGE reviewed all the former cases in New York on the subject, and closes his review by saying: "I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded has not shown a breach of the contract on the other side, or what was equal to it."

The case of *Battle* v. *The Rochester City Bank*, 5 Barb. 414, involved the precise question in the case at bar. The contract contained the proviso that the vendors might declare it void for default of the vendee in making his payments. Default was made, the right was exercised, and the vendee sued to recover back what he had paid. WELLS, Justice, who delivered the opinion of the court (and it was afterward affirmed by the court of appeals, 3 Comst., *supra*), said, "in the case at bar it is not pretended that the defendants have not fulfilled to the letter every part of the agreement on their part to be fulfilled, and the plaintiff, by his counsel, in his opening, admits that he neglected to pay the first of the annual installments mentioned in the contract. I confess myself entirely unable to find, in any elementary treatise or reported case, a principle recognized, which would allow the plaintiff to recover."

Stark v. *Parker*, 2 Pick. 267, is a case where the plaintiff had agreed to work for the defendant a year for $120; worked part of the time, then quit without any fault on the part of

defendant, and sued upon a *quantum meruit* for what he had done. LINCOLN, Justice, in delivering the opinion of the court, uses this language: "Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it."

Rounds v. *Baxter*, 4 Greenlf. 454, is very similar in its facts to the case of *Ketchum* v. *Evertson, supra*, and the court there said: "The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own wrong or neglect. The principle is founded in the highest reason. The defendant never made an express promise to repay the money in question, and why should the law imply one in favor of a man who has violated his contract on the part of one who stands fair and innocent? If a man gives his neighbor $100 he can not by law recover it back; no promise of re-payment is implied, and when the plaintiff concluded not to perform his contract, but abandon it, we must consider him as waiving all claim to what he had paid, as much as if he had given it without any pretense of consideration received."

In the case of *Hansbrough* v. *Peck*, in the supreme court of the United States, the contract contained a similar power, and also a clause authorizing the vendor to retain such purchase money as had been paid. The court, however, does not place the decision upon that ground; because, that being a case in chancery, such a clause, if it operated as mere forfeiture, would receive but little countenance from a court of equity. But recognizing the rule as laid down in *Ketchum* v. *Evertson, supra*, the court said, "and no rule in respect to the contract is better settled than this: That the party who has advanced

money or done an act in part performance of the agreement and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has been advanced or done." 5 Wall.

The cases of *Smith* v. *Lamb*, and *Same* v. *Powell*, 26 Ill. 396, are in perfect harmony with the principles above enunciated. There the vendor was in fault, and the vendees were not. The first three payments had been made and accepted, and, if not made in time, the vendor had made no objection; but, when the time came to make the last payment, he refused to convey, declared his inability to convey a good title for the reason that he had none and never had, and the court said: "Then it appeared that the vendor was not entitled to, and could not receive, the purchase money, and he had no right to claim a tender of money which he had no right to receive. The purchaser had a right to repudiate the contracts as forfeited by the vendor, or rather, as never having been rightfully executed by him, because he had no right to make them. The plaintiffs had a right to say, you have received our money wrongfully, and even fraudulently, and you must pay it back to us as if you had never made these contracts which you can not perform, and which you should never have made."

So of the case of *Gehr* v. *Hagerman*, 26 Ill. 438. The right of rescission on the part of the vendee was based upon an alleged breach of the contract by the vendor. And so far from recognizing the right of a vendee who had made part performance and then stopped short and refused to go farther, the court said: "The plaintiff, before he could rescind, was bound to restore the property, or at least offer to restore it, to the defendant, *after having performed or offered to perform* his part of the agreement." This is far from recognizing the doctrine that the vendee may violate the agreement on his part, and recover of the vendor what has been paid, even though the latter has not violated any part of his agreement.

The case of *Murphy* v. *Lockwood*, 21 Ill. 611, is cited to show that appellant, in the case at bar, could not declare the contract forfeited without a return of what had been paid. A single sentence from the opinion of the court will show that the contract in that case was essentially different: "Another objection equally fatal to the offer of performance by the vendor is found in the fact, that the contract nowhere imposes a forfeiture on default in any of the payments; and, therefore, the vendor, before he could rescind, should put the vendee in the same condition as before the making of the contract."

The absence of a provision in the contract making the time of performance or punctuality in the payments an essential condition, and of one authorizing the vendor to declare it forfeited for a failure to make punctual payments, is specifically noticed in this opinion, and constitutes an essential distinction between that case and the one at bar. Courts of law are not to amend or alter the contracts of parties; and where they agree, in unambiguous language, that, in case of a failure of the vendee to make his payments at the specified time, the vendor may declare the contract forfeited, we are unable to perceive upon what principle the courts can superadd a condition which the parties themselves did not see fit to impose. There is no question as to the general principle that where the parties have not themselves prescribed the right of rescission and the circumstances under which it may be exercised, restoration must be made. All of the other cases cited by appellee's counsel are of this latter class. And none of them tend to support the position that a vendee shall be permitted in a court of justice to obtain indemnity against the consequences of his own mere default.

From the authorities above cited, and others of like weight and respectability, we may deduce these rules: Where the vendee enters upon the performance of such a contract, and, paying part of the purchase money, makes default which is inexcusable, and the vendor, being without fault, exercises the right given by the contract of declaring the same terminated,

and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid. But a vendor, who is himself in fault, for fraud or violation of his contract, can not exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase money received, and the equitable action for money had and received lie to recover it.

We do not, however, hold, or mean to be understood as holding, that these rules cover the entire subject matter. There may be cases where a vendee, chargeable with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in a case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments and improvements; and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done, or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations adjusted according to the circumstances of each case.

The case at bar presents no grounds for the action for money had and received, or relief in equity, within any of the above rules. The judgment of the court below must therefore be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCOTT, dissenting:

The rule sought to be established by the majority opinion of the court seems to me to be so different from the rule heretofore uniformly recognized by this court that I can not concur in it. I can never yield my assent to a rule that will permit a

party to rescind a contract for non-performance on the part of the vendee, whether this contract relates to the sale of real or personal property, and take back that which he had parted with, and yet retain that which he had received under the contract. I am persuaded that the cases heretofore adjudged by this court, hold a sounder and better rule, and one more in consonance with our sense of justice.

It is not doubted, and never has been, that a party can not "make his own infraction of his agreement, the basis of an implied undertaking in his favor, or of an action for money had and received against the other party who stands fair and innocent." But if the vendor seeks to avail of the default of the vendee to rescind the contract and say that there is no contract existing between them, then, because there is no contract between the parties, the vendor holds that which he has received under the contract to the use of the vendee, and the law implies a promise to return it.

If the parties choose to contract for the forfeiture to the vendor of all that has been paid under the contract in case of non-performance, while it would in many cases be a hard and unconscionable contract that equity would not enforce, still the law would leave the vendee to the consequences of his own contract.

But that is not the case presented in the record in this case. The appellant did not contract for a forfeiture of what had been paid under the contract in case of non-performance on the part of the appellee. The contract between the parties was an executory contract, and the appellant chose to avail of a provision in the contract to rescind for non-payment according to the terms of the agreement. The provisions in the agreement, that authorized the vendor to rescind the contract in case of non-payment, gave the appellant no higher or greater power than the law invested him with in the absence of the agreement.

The appellee did not perform his contract promptly according to the terms of the agreement, but he never repudiated or

rescinded the contract, or sought to do so. The appellant voluntarily put an end to the contract against the protest of the appellee. A party ought not to be permitted to repudiate the contract and say that it is rescinded, and yet retain, at the same time, all that he has received under the contract. It has been so repeatedly held by this court. The law has afforded the vendor an ample remedy in case of non-performance on the part of the vendee. The vendor may hold himself in readiness to comply with his contract, and may file his bill in equity for a vendor's lien, and may have a decree for the unpaid purchase money, and, in default of payment, may have the premises sold to satisfy the same, or he may proceed at law to enforce the payment of his debt. But if the vendor elects to avail of the failure or neglect of the vendee to perform his contract, and put an end to the entire contract, before he can exercise this extraordinary power he must place the vendee *in statu quo*, and restore that which he has received under the contract, unless the vendor has contracted for a forfeiture, in which event, the law will leave the vendee to the consequences of his own contract.

I understand these views to be fully supported by the following cases: *Jennings* v. *Gage*, 13 Ill. 610; *Gehr* v. *Hagerman*, 26 id. 438; *Smith* v. *Lamb*, id. 396; *Murphy* v. *Lockwood*, 21 id. 611; *Staley* v. *Murphy*, 47 id. 241; *Buchenau* v. *Horney*, 12 id. 336.

It is no answer to this view of the law to say that the vendee, in many instances, has received rents and profits for which he ought to account to the vendor. The action for money had and received is an equitable action, and the equities between the parties may be adjusted in such an action. In such an action the vendor may recoup from the amount due the vendee any rents that the vendee may have received, or any damages that the vendor may have sustained by reason of the breach of the contract, and thus complete justice will be done between the parties.

No doubt there are cases where the vendor would be justi-

fied in reselling the property to a third party, without first tendering back the consideration received from the vendee, but in all such cases he must hold the advanced payments for the use of the vendee, or until the equities between the parties, growing out of the contract and its violation, can be adjusted. *Thompson* v. *Bruen*, 46 Ill. 125.

I am therefore of opinion, on the facts contained in this record, that the appellee is entitled to recover.

Mr. CHIEF JUSTICE LAWRENCE: I agree with Mr. Justice SCOTT in the opinion, that in cases like that before the court, in which the contract does not provide for a forfeiture of the money paid, when the vendor has rescinded for non-performance by the vendee, the vendee may maintain an action at law for money had and received, and recover the money paid, less the rents and profits of the land while occupied by the vendee, and such damages as the vendor has suffered in consequence of the failure of the vendee to perform his contract.

SIMON STRAUSS *et al.*

v.

F. KRANERT, impleaded, etc.

1. FRAUD — *presumption — proof of fraud.* While it is true, that the law never presumes fraud without some evidence, the legal presumption existing that every man is innocent of intentional wrong, and is honest of purpose, until the contrary is proven, yet, in order to show fraud, direct and positive proof is not required; but it may be inferred from circumstantial evidence.

2. Where a party obtained goods from another, on credit, by false and fraudulent representations in regard to his responsibility, and subsequently mortgaged them to a third person, the mortgagee afterward taking possession of the goods, by authority of the mortgage, in an action of replevin

by the vendor to recover possession of the goods, it was *held*, in determining the fairness of the transaction between the mortgagor and the mortgagee, if the jury believed, from the evidence, that the latter took the mortgage on the goods for a sum larger than the amount actually owing him by the former, and knew when he took the mortgage that the mortgagor was insolvent at the time he obtained the goods of the plaintiff, and that they were not paid for, such facts and circumstances were proper elements for their consideration.

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

The opinion states the case.

Messrs. PARKS & ANNIS, for the appellants.

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

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellants brought an action of replevin against appellees, for a quantity of goods. The sheriff replevied a part of the property, and returned not found as to a portion. Thereupon appellants filed a count in trover. The plea of not guilty was filed to the count in trover, and *non cepit*, *non detinet*, and property in defendant Kranert, to the count in replevin.

Upon a trial, the judgment was for the appellees.

As the judgment must be reversed, we shall only refer to a portion of the evidence, for the purpose of determining the correctness of the instructions.

It is an admitted fact that Buttner obtained the goods, from appellants, by false and fraudulent representations, and paid nothing for them. They were purchased in Chicago, and from thence shipped to Aurora, on the 9th of September, 1868. On the 13th of September, Buttner executed and delivered to Kranert, a chattel mortgage on the goods, of the usual character. Buttner retained possession and sold from the stock,

until the 16th of September, on which day Kranert took possession, by authority of the mortgage.

There was evidence tending to prove that the notes secured by the mortgage were for a greater sum than the actual indebtedness; that Buttner, at the time of the purchase, was wholly insolvent; that Kranert well knew the pecuniary condition of Buttner, and expressed surprise that he could obtain any credit in Chicago; that these parties were upon intimate and confidential terms, and that the indebtedness between them existed prior to the purchase of the goods.

The court refused the following instruction asked by appellants:

"The jury are instructed, as matter of law, that fraud may be proved by circumstantial evidence as well as positive proof. Where fraud is charged express proof is not required. It may be inferred from strong presumptive circumstances, and if the jury believe, from the evidence, that Buttner got possession of the goods from plaintiffs by fraudulent representations in regard to his responsibility, and that, upon the arrival of the goods at Aurora, Kranert took a mortgage upon the whole stock for a sum larger than the amount actually owing from Buttner to him, and that Kranert knew that Buttner was insolvent at the time he obtained the goods of plaintiff, and that they were not paid for, and that Kranert knew it when he took the mortgage, all these facts and circumstances may be taken into consideration by the jury in determining whether Kranert was a *bona fide* mortgagee of the goods."

It is a familiar principle, that a sale and delivery of property procured by the fraud of the vendee, pass no title, as between the parties. From the admitted facts, the sale of the goods by appellants to Buttner transferred no title to the latter. Was Kranert an innocent purchaser, or had he notice of the fraud of his mortgagor? In determining the fairness of the transaction between the mortgagor and mortgagee of the chattel mortgage, all the facts recited in the refused

instruction were eminently proper for the consideration of the jury.

The court, in refusing the instruction referred to, seemed to have adopted as a maxim the phrase, "the law never presumes fraud." This is but the mere expression of the abhorrence with which the law regards fraud, and its unwillingness to believe that any person could be guilty of conduct so base. It is true, that the law never presumes fraud without some evidence. The legal presumption exists, that every man is innocent of intentional wrong, and is honest of purpose, until the contrary is proven. But it is not true that the law will never imply fraud without direct and positive proof. Under a rule so stringent, fraud would rarely be proved. It loves deceit and stratagem; and its inextricable windings can often only be traced by circumstances. The refused instruction, therefore, should have been given. It was refused by the court in every form in which it was presented.

The judgment is reversed and cause remanded.

Judgment reversed.

HARRIET STEELE *et al.*

v.

SUSANNA THATCHER, Administratrix, etc.

EVIDENCE — *of its sufficiency — to recover counsel fees in suit on injunction bond.* In a suit on an injunction bond, conditioned for the payment of all such damages as the defendants might sustain, the only claim for damages was for counsel fees in the injunction suit, and the only proof offered in support of the claim was the opinion of attorneys as to what the services rendered were worth. In the absence of any evidence as to the amount actually paid for their services, it was *held*, in addition to proof of what such services were worth, in order to entitle the plaintiffs to recover, it should at least have been shown that the solicitors were retained upon a *quantum meruit*.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

The opinion states the case.

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

Mr. J. N. BARKER, Mr. WILLIAM HOPKINS and Mr. T. J. TULEY, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit upon an injunction bond, wherein a verdict was found and judgment rendered against the appellants for $350 in the court below.

The condition of the bond was in the following words: "Now, therefore, if the above bounden Harriet Steele shall well and truly pay all costs that may be adjudged against her on the dissolution of said injunction, together with all such damages as the said David C. Thatcher *et al.*, or either of them, may sustain, or which may be assessed and awarded by the court, by reason of the issuing of said injunction, in case the same shall be dissolved, then," etc.

The only claim for damages was for counsel fees in the injunction suit, and the only proof offered by the plaintiffs below in support of the claim, was the opinions of attorneys as to what the services rendered by the solicitors in the injunction case were worth.

The value of such services might have been one sum, and the cost of them to the defendants a much less sum. The condition of the bond was, to pay all such damages as the defendants might sustain, and they were entitled to recover only to the extent of the damages really sustained by necessary expenditure, or by liability incurred, in litigating the injunction case. One of the solicitors for the defendants in the suit in which the injunction bond was given, was himself a witness,

and all the testimony he gave upon the subject was, that he considered those services worth $500.

In addition to such proof, it should at least have been shown that the solicitors were retained upon a *quantum meruit*, in order to recover upon such evidence, under the circumstances of this case, on an injunction bond, for actual damages sustained.

We are inclined in this case to regard the evidence as insufficient to sustain the verdict.

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

Judgment reversed.

PARKER R. MASON

v.

RICHARD B. OWENS *et al.*

1. SPECIFIC PERFORMANCE—*laches.* On the 5th of October, 1868, a purchaser of land from the agent of the owner, paid $100 on the purchase price, which was $2,917; $1,017 to be paid in cash, and the balance in one and two years. Title to be satisfactory and proved to be so. Objection being taken, however, to the power of attorney under which he proposed to make the deed, a sufficient power was obtained on the 20th of January, 1869, and three times a week, for three successive weeks, he called on the purchaser's attorney through whom the business had been transacted, and offered to make the deed upon receiving the balance of the cash payment; but the purchaser had withdrawn his money from the hands of his attorney, and the latter finally declined to act any further. On the 18th of February, 1869, the agent of the vendor wrote to the purchaser where he then was, some eighty miles from the residence of the former, requesting him to complete the contract. After waiting eleven days and receiving no answer, he again tendered a deed to the attorney, who refused it, and the vendor then sold to a third person: *Held*, the vendee was guilty of such *laches* as to deprive him of any right to a specific performance.

2. SAME — *duty of the vendor to return the money paid, before re-selling.* It was not required of the vendor, under such circumstances, to refund the $100 paid, in order to be justified in re-selling. It was paid rather as earnest money for which the purchaser was to have credit on the completion of the contract, and the failure to return it did not give to the vendee an equitable right to a specific performance.

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

The opinion states the case.

Mr. EDWARD ROBY, for the appellant.

Mr. JAMES GOGGIN, for the appellees.

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

This was a bill for specific performance, brought by Mason against Owens, on the following memorandum:

"CHICAGO, Oct. 5, 1868.

"Rec'd from Parker R. Mason one hundred dollars on account of sale to him of the undivided five one-sixth (5-6) of the West ten (10) acres of the North East quarter of the South West quarter of Section 9, Town 39, Range 13, being 8½ acres, located on Lake street just East of Austin Depot, price Twenty Nine hundred and Seventeen dollars; One Thousand Seventeen to be paid in cash (including the one hundred dollars paid as above), balance in two equal sums at one and two years at 8 per cent interest. If title not satisfactory money to be refunded.

"RICHARD B. OWENS
"By Thomas Evans, his agent."

The cause was heard on the bill, answers, and a stipulation by counsel. The court below dismissed the bill.

The decree was correct. The complainant, instead of having been prompt in the performance of his own part of the agreement, was guilty of such gross laches as to justify the defendant in supposing he had either deliberately abandoned the contract, or was endeavoring to keep it open for speculative purposes, without, however, paying any thing further upon the first or cash payment. The abstract of title was furnished by the defendant's agent, and was satisfactory. When objection was taken to the power of attorney under which the agent proposed to make the deed, a new and unobjectionable power was obtained. This was received by defendant's agent on the 20th of January, 1869, and three times a week, for three successive weeks, he called at the office of complainant's attorney, through whom the business had been transacted, and offered to make the deed on payment of the amount to be paid in hand by the terms of the contract. But the complainant had withdrawn the money from his attorney's hands, and the latter finally informed defendant's agent he had no money of complainant in his possession, and did not wish to be further troubled about the matter. The defendant's agent then procured from the attorney complainant's address, which was at Clintonville, in Kane county, about eighty miles from Chicago, and wrote him, requesting him to complete the contract. After waiting eleven days and receiving no answer, he again called on the attorney and tendered a deed. The attorney declined to receive the deed and make the payment, and thereupon the defendant sold to a third person.

The complainant has no claim whatever to the aid of the court. He was either unable to carry out his contract, or was acting in bad faith, while the defendant showed himself not merely prompt, but eager to perform. A court of chancery will never decree specific performance in the face of such extreme and unexplained *laches* as is disclosed by this record.

It is, however, urged that defendant should have returned the $100 that had been paid to him. We said in *Staley* v. *Murphy*, 47 Ill. 244, that there were undoubtedly

cases, where the purchaser had been guilty of gross *laches*, in which the vendor would be justified in re-selling without first tendering back the money paid, but holding it either subject to the purchaser's order or to an adjustment of the equities between them. This principle was also recognized in *Thompson* v. *Bruen*, 46 Ill. 125, and a majority of the court has decided, at the present term, in *Wheeler* v. *Mather*, *ante*, p. 241, that a rescission of the contract by the vendor, for non-performance by the purchaser, does not necessarily give the latter the right to recover back the money paid. In this case, the $100 were paid rather as earnest money, for which the purchaser was to have credit on the completion of the contract, and the failure to return it does not require us to say that the complainant has an equitable right to specific performance.

Decree affirmed.

ASAHEL GAGE

v.

ULRICH ROHRBACH.

1. APPEAL — *at what stage of a cause it will lie.* The order of a court simply overruling a demurrer to a bill in chancery, although the demurrer goes to the merits of the bill, is not a final order or decree from which an appeal will lie; and an appeal unadvisedly prayed for and allowed, and perfected by the filing of a bond, at that stage of the cause, would have no effect whatever in staying further proceedings in the cause, but, notwithstanding such appeal, the court could properly render a final decree on the demurrer, and proceed to a hearing as to other defendants.

2. PAYMENT *of a judgment on a special assessment — its effect.* A judgment was rendered upon a special assessment levied upon a lot of ground, and a precept issued thereon, after which the owner paid the amount of the judgment, and costs, to the collector, notwithstanding which, the latter proceeded to sell the lot under color of the judgment, having, in error, credited the money paid, upon the adjacent premises: *Held*, the payment operated to extinguish the judgment, and the subsequent proceedings under it — the sale and certificate of purchase issued thereon — were absolutely void.

Syllabus. Opinion of the Court.

3. CLOUD UPON TITLE — *claim under a void sale on special assessment.* In such case the owner of the lot so improperly sold may, under the general jurisdiction in chancery, if he is in actual possession, or, under the statute, * whether in the occupancy of the premises or not, resort to his bill in equity to remove the cloud upon his title occasioned by such illegal proceedings, by having them declared invalid, and enjoining any further action under them. Nor is the jurisdiction in chancery, in that regard, at all affected by the fact that the owner could, as provided by statute, on presenting his receipt for the money paid upon the judgment, have the collector mark opposite his lot on the list of lots sold, "sold in mistake."

WRIT OF ERROR to the Superior Court of Chicago.

The opinion states the case.

Mr. EDWARD ROBY, for the plaintiff in error.

Messrs. ROSENTHAL & PENCE, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that defendant in error was the owner of the premises in question, and was in possession when he filed his bill in this case. He had purchased the property of one Mayer, in April, 1869. But on the 28th day of October previously a special assessment for paving Canal street, in Chicago, had been assessed against the lot, and a judgment had been rendered against the property for the amount of the assessment and costs. A precept had been issued, and on the 17th day of March, 1869, Mayer paid the amount of the judgment and costs to the collector of the city, who gave the credit to an adjoining lot instead of the lot in question. On the 20th of March, 1869, the collector sold the premises, under the precept, to plaintiff in error, notwithstanding the judgment for the amount of the assessment had been paid. Plaintiff in error at the time received a certificate of purchase therefor, and refused

* See act March 27, 1869, Sess. Acts, p. 356; Gross' Stat. 75, § 53, and act of March 15, 1872, Sess. Acts, p. 337, § 50; Gross' Stat. vol. 2, p. 36.

to surrender or cancel the same, unless defendant in error would pay him the redemption money, which would have amounted to about $1,000 in addition to the $500 which he had already paid to release the property from the assessment.

Defendant in error thereupon filed a bill to have the sale canceled and to have the amount paid to satisfy the judgment for the assessment credited upon and in satisfaction of the assessment, and to enjoin plaintiff in error from transferring the certificate of purchase, and the city from issuing a deed to the premises. Plaintiff in error filed a demurrer to the bill, which the court overruled, and from that decision an appeal was prayed and granted. The city filed an answer, and Proudfoot, as guardian *ad litem*, filed an answer for the minor defendants, and Mayer was defaulted. Heald, Eichner and Becker also answered. A rule was taken on plaintiff in error for an answer, but failing to comply with the rule, a default was entered against him. All of these proceedings were had after the demurrer by plaintiff in error was overruled. The court, at a subsequent term, heard the case on bill, answers, replications, *pro confesso* orders and proofs, and granted the relief sought. The record is filed in this court, and errors assigned by plaintiff in error.

It is first urged that the court below erred in proceeding with the case after overruling the demurrer of plaintiff in error; that the demurrer went to the merits of the case, and, the court deciding the bill to be sufficient to authorize the relief, further steps should have been arrested, and that a hearing could not be had after the appeal was granted.

In this case the appeal was wrongfully allowed, as there was no final decree from which to appeal. The effort to do so was a nullity and was not binding on the court or on the other parties to the suit. The appeal staid no decree, because none had been rendered. If it could have any possible effect it was only to stay the execution of the order overruling the demurrer and preventing the court from rendering a decree on the demurrer. And this seems to have been the view taken by

the court, inasmuch as plaintiff in error was subsequently ruled to answer, and was defaulted for a non-compliance with the rule. But, there being nothing to appeal from, the filing of the bond or the granting of the appeal was an inoperative and idle ceremony, having no effect upon the case.

After overruling the demurrer, the court, without any further steps against plaintiff, unless he had asked and obtained leave to answer, had the undoubted right to decree the relief against plaintiff in error, on the demurrer, which admitted the truth of the allegations of the bill, and the court might then have rendered a final decree granting relief against him. But there being other defendants, some of whom had answered, some had demurred, and others having taken no steps, the usual practice justified the court in reserving the decree on the demurrer until there was a final hearing and disposition of the case. As plaintiff in error abided by his demurrer, he could not, by praying an appeal and filing his bond, prevent the court from rendering a final decree on the demurrer, against him, nor could he thus arrest the progress of the case as to the other defendants. The practice does not warrant the granting and perfecting of such appeals, and they should be denied as useless and increasing unnecessarily the costs.

When a tax or assessment is fully paid, there can be no question but the lien created on the land by its levy is discharged. This proposition is so elementary and axiomatic, that neither authority nor reasoning is required for its demonstration. Its mere statement is conclusive. And when a judgment has been recovered for the sale of premises on which a tax has been imposed, for its collection, and the judgment and costs are fully paid, it becomes satisfied and the lien released. This proposition is equally obvious. And assessments being imposed and enforced in the same manner, and being, when imposed, a like lien as a tax, on the land, the payment of the assessment, or a judgment for its recovery, discharges the assessment, or judgment, and lien, to the same extent and in the same manner as the payment of a tax, and for the same obvious rea-

sons. When, then, this judgment for this assessment was paid to the collector, the judgment was extinguished and the lien upon this lot was released and discharged, and the subsequent sale was wholly unauthorized and void, for the want of a judgment to support it. It was equally so as if the judgment, paid as it was, had never been rendered. The sale created or revived no lien, nor did it confer any title or interest in the land that could ever, of its own vigor, ripen into a title.

In what, then, consists the claim of plaintiff in error? He has simply a certificate of purchase of a lot of ground wrongfully sold for an assessment that had been discharged, under a judgment which had been paid. Defendant had done all things required of him by the law. He paid the assessment and took a receipt. He had no power to enter satisfaction of the judgment, and if plaintiff in error desires redress, let him pursue it against the officer who perpetrated the wrong, or the city, if it has wrongfully received the money of plaintiff in error. It would be inequitable and unjust in the extreme to compel defendant in error to redeem, or even refund the money to plaintiff in error.

It is urged that a bill *quia timet* will not lie in such a case, because the remedy at law is complete. The same may be said in general of bills of this character. Defendant in error is in possession, and might no doubt, if sued, successfully defend against such a title. But should he be required to wait until plaintiff shall see proper to bring ejectment, with this cloud hanging over his title? Courts of equity have determined that persons in possession need not wait, but may proceed to have the cloud removed; and a recent statute has extended the right to persons not in possession, to obtain the same redress. It is urged that defendant in error might, under the statute, present the receipt to the collector, and have an entry made opposite the lot on the list of lots then sold, "sold in mistake." It is true, he could, but still it would leave the sale uncanceled; it would only be, as the statute has declared, evidence.

It has been the uniform practice of courts of equity to enjoin the collection of a satisfied judgment, although the court has jurisdiction, on proper motion, to enter satisfaction; and to restrain a sale of property under an execution issued upon a satisfied judgment, although under our statute the judge may, in vacation, stay the sale by order until a motion to quash the execution can be heard. In such proceedings in our courts the jurisdiction is concurrent in the two courts. And the court of equity will not refuse to exercise jurisdiction, because the statute has conferred jurisdiction. It is no doubt true, defendant in error could have had the collector note the fact on the record, that the sale was made in error; but that would not have been so complete a remedy as a decree restraining the assertion of any claim under the sale. If a party, having a summary, cheap and effectual remedy at law, will insist upon invoking the aid of the chancellor, the fact that he has resorted to the more expensive mode should be considered in decreeing costs, but not as preventing the court from exercising jurisdiction when it is concurrent.

That the facts in this case required the court to grant the relief we have no doubt. The certificate in the hands of plaintiff in error is negotiable, and might be used for the purpose of imposing upon purchasers, and when the time for redemption has expired he could, unless restrained, procure a deed with which he could obtain money either from the innocent, supposing they were acquiring title, or the vicious, who, knowing the title to be worthless, would purchase it for the purpose of extorting money from defendant in error. Again, it is a cloud on the title, worthless, it is true, but such as is calculated to depreciate the value of the property, from fear of litigation and annoyance. This being the case, as shown by the allegations of the bill, defendant in error was entitled to the relief sought, and the court below did right in rendering the decree, and it must be affirmed.

Decree affirmed.

Syllabus. Statement of the case.

HENRY H. GAGE

v.

LAURA L. BILLINGS *et al.*

1. CLOUD UPON TITLE, *arising on a tax deed—jurisdiction in chancery.* A court of equity has power to remove a cloud upon the title of a party in possession of land, claiming to be the owner, such cloud arising upon a collector's deed on a sale for taxes, when the taxes had been, in fact, paid before the sale.

2. Although the party in possession can defend an action of ejectment, if one be brought against him by the holder of the tax deed, yet such an action may be so long delayed as to place the defending party at great disadvantage. And such party can not be said to have a remedy at law, though he may have a defense at law.

APPEAL from the Superior Court of Chicago.

This was a bill in chancery filed by Laura L. and Samuel Billings, Henry H. Gage being made defendant, to set aside a judgment of the county court of Cook county, for taxes, and that the sale thereunder, together with the deed to the premises made in pursuance thereof, and all proceedings connected therewith, might be declared null and void.

It is complained that the county treasurer filed a pretended delinquent list, defective in its particulars; that he published notice of application for judgment, in which the premises in question were not included; that he did not, with the county clerk, correct his delinquent list, and make the necessary affidavit on the first day of the term; that, notwithstanding all this, he sued for and obtained judgment and precept against said lands, and sold them, and issued the usual certificate, which was afterward assigned to William H. Haase, to whom the sheriff issued a deed upon an affidavit, which, it is alleged, does not show compliance with the requirements of law; and that the executor of said Haase deeded to the defendant.

In the description of each item, the bill refers to the records and files of the county clerk's office, for a more complete inspection of their infirmities; also alleging that the complainants are the owners in fee and in possession of the premises, and that the tax deed is a cloud upon their title.

Defendant demurred for want of equity, and because complainants had a clear and adequate remedy at law. The demurrer was overruled, and the defendant electing to abide by his demurrer, and failing to answer the bill of complaint, the bill was taken as confessed, and the cause submitted upon the following stipulation:

"The counsel for the respective parties hereto, in open court, stipulate, that the title and possession of the land in question may be assumed to be, and to have been, in the complainant, Laura L. Billings, and her grantors, direct and remote, as in said bill is stated, and that all taxes due upon said premises have been paid, and that, by and from the files and records of the county court of Cook county, and of the office of the recorder of deeds in said county, appear the matters and things in said bill stated and alleged concerning the delinquent list, the collector's notice, the application for judgment, his oath to the delinquent list, the judgment, precept, return, certificate of sale, notice of purchase by assignee of certificate, affidavit of service of such notice, deed of the sheriff on said tax certificate, and the deed to the defendant, and that all such matters may be considered as proven by the said records and files, the production thereof being waived, and the foregoing being all the evidence given in said cause."

The court decreed according to the prayer of the bill. The defendant appeals.

Mr. EDWARD ROBY, for the appellant.

Mr. SANFORD B. PERRY, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This case is in all important particulars like the preceding case of *Gage* v. *Rohrbach.*

In that, we held a court of equity had power to remove a cloud upon the title of a party in possession of land, claiming to be the owner, such claim arising from a collector's deed on a sale for taxes, when the taxes had been, in fact, paid before the sale.

It is true, as argued by appellant, the party in possession can defend an action of ejectment, if one be brought against him by the holder of the tax deed; but such an action may be so long delayed as to place the defending party at great disadvantage. Such a party can not be said to have a remedy at law, though he may have a defense at law. We think the power of a court of equity is properly invoked in such a case.

The decree of the court below must be affirmed.

Decree affirmed.

CITY OF AURORA

v.

PETER PULFER.

1. HIGHWAYS — *municipal corporations — of the duty of a city to keep open a traveled way.* In a private action against a city, to recover for injuries alleged to have been received by the plaintiff, by reason of the erection of a fence across a road or traveled way, claimed by the plaintiff to be a street, which it was the duty of the city to keep free from such obstructions, it appeared the place where the accident occurred was remote from the business portion of the city, and although the road had been a traveled way for some years before the ground which it passed over was embraced within the city limits, it was very questionable whether it ever was a legal highway, and certainly had never been opened or recognized as such by the city authorities. The owner of the ground,

Syllabus. Statement of the case.

denying the existence of the way as a public highway, erected the fence in question: *Held*, that, although the public necessities required a highway at or near that locality, the mere fact that the right of the city to use the way as a street was brought in doubt by the evidence, would, of itself, vest the city with a discretion, for the exercise of which it could not be held answerable, when, if at all, it would proceed to open it.

2. A municipal corporation can not be held liable for every accident that may happen where the public convenience may require a street shall be opened. Such corporations are invested with a discretionary power, when, if at all, they will proceed to open new streets in distant parts of the city; and they can not be held liable for simply failing to use this discretionary power; and they have a discretion as to when they will make improvements on unfrequented streets, and they are not liable for every accident that may occur for the want of such repairs.

3. SAME — *liability of cities for injuries resulting from defective highway.* If a person receive an injury as the combined result of an accident and a defect in the street or sidewalk, and the accident would not have occurred but for such defect, and the danger could not have been foreseen or avoided by ordinary care and prudence, the corporation will be liable to the party injured.

4. But a corporation can not be held liable for every mere accident that may occur within its limits. So where a person in attempting, in the night time, to get over a fence which had been erected across a traveled way, slipped and received severe personal injuries, he being fully aware that the fence was there, and it not appearing the fence was at all dangerous in the manner of its construction, it was *held*, the corporation was not liable, the injury being attributable rather to a mere casualty than to the obstruction in the road.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

This was an action brought by Pulfer against the city of Aurora, to recover for injuries to the plaintiff occasioned, as alleged, by the negligence of the defendant in permitting obstructions in a street of the city. A trial by jury resulted in a verdict for the plaintiff, upon which the court entered judgment, and the defendant appeals.

Mr. N. F. NICHOLS and Mr. EUGENE CANFIELD, for the appellant.

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

Mr. JUSTICE SCOTT delivered the opinion of the Court:

It is very questionable, from the evidence, whether there was in fact any legal highway at the place where the appellee received the injuries complained of. It was within no addition to the city, and there is no pretense that a street had ever been opened at that point by the city authorities. If any legal highway did exist there, it was established by the town authorities, or by prescription, before the city was incorporated, in 1857. The existence of the highway was denied by Groch, who owned the land at the locality where the accident occurred, and it is very doubtful whether the city could have successfully maintained the highway and compelled the owner to keep it open.

The accident occurred in what was formerly called the "big woods," a timbered tract of country, in the vicinity of the city. At an earlier period a net work of roads crossed these lands in every conceivable direction. After the city was incorporated and these lands were included within its limits, they were gradually cleared up and improved. Fences were erected across these roads without any reference whatever to them. No one seemed to regard them as legal highways, or paid the least attention to them in making their improvements. Groch purchased the land where the accident occurred. It had for many years been used for the purposes of a brick-yard. Traveled roads, used for the convenience of the neighborhood, crossed it, and approached it from almost every direction wherever persons chose to travel. It is insisted by the appellee that the town authorities, previous to the incorporation of the city, had established a road across these premises, and if the highway was not legally established, that the public had certainly acquired the right of way across the same by prescription and user, and because the limits of the city had been extended so as to include this road, that it thereby became a

street of the city, and that the city was bound to keep it open for the use of the public and free from dangerous obstructions.

Soon after Groch purchased the land, he fenced it up and placed gates on either side, at the points where it is alleged the road entered and left his premises. This is the obstruction complained of.

It can not be denied, in view of the evidence, that the right of the city to a street across the premises of Groch, is questionable, to say the least of it. The witnesses disagree as to the line of the survey alleged to have been made, and also as to the place of the traveled track. The owner of the land denied the existence of any highway across his premises, and fenced across the supposed street. Under these circumstances, was it the duty of the city to assert this questionable right and to enter upon a litigation, the result of which might be uncertain, or to be liable for the consequences that might ensue? It seems to us that this would be requiring too much of a municipal corporation. It is apparent that the public necessities require a highway at or near the place where it is alleged one now exists. But a municipal corporation can not be held liable for every accident that may happen where the public convenience may require that a street should be opened. Such corporations are invested with a discretionary power when, if at all, they proceed to open new streets in distant parts of the city, and they can not be held liable for simply failing to use this discretionary power. *The City of Joliet* v. *Verley*, 35 Ill. 58.

This doctrine was recognized in the case of *The City of Chicago* v. *Martin*, 49 Ill. 241. It was *held*, in that case, that a municipal corporation has a discretion as to when they will make improvements on unfrequented streets, and they are not liable for every accident that may occur for the want of such repairs.

The place where the injury occurred, of which the appellee complains, was distant from the main portion of the city. It seems that there were no houses nearer the place of the accident than twenty rods. It was not the duty of the city to

move in the matter of opening this street unless its right to do so was reasonably certain. They were not bound to incur the expenses of uncertain and tedious litigation. It would certainly be extending the liability of municipal corporations to a very extraordinary extent to hold that they were liable for not asserting every uncertain right. If the right of the city was clear and unequivocal it would be the plain duty of the city to keep it open and free from obstruction for the use of the public, or answer in damages for the consequences.

We will not undertake in this case to determine, with accuracy, whether there was a street at the place where the accident occurred or not. That question can better be determined by a direct proceeding on the part of the city to open the street. It is sufficient, for the purposes of this case, that the right of the city to the use of the street at the locality in question is brought in doubt by the evidence. That fact alone would invest the city with a discretion when, if at all, they proceed to open it.

But if it be conceded that there was a street at the place where the accident occurred, and that it was the plain duty of the city to cause the obstruction to be removed, would the facts presented in this record entitle the appellee to a recovery? A brief history of the events attending the accident may be given.

It appears that the appellee had been to church in the morning, and in the afternoon he went to the beer garden, some distance from his home. It was on the afternoon of Sunday. He remained at the house of the proprietor of the garden until about nine o'clock P. M., and then started for his home, alone. The night was dark, and the region over which he had to pass was rough and hilly, and there was no well-traveled track for his use. It was rather a difficult undertaking for a man of his age, but he was perfectly familiar with the route and the difficulties that he would necessarily encounter. He had been drinking some beer in the afternoon, but was not unduly affected by it. When he reached the point where the fences of Groch obstruct

the alleged highway or street he tried to open the gate, but found it fastened. He then moved to one side, and in attempting to get over the fence slipped and fell. In the fall his leg was broken, and it was afterward amputated. It is not alleged that the fence was insecure, or that it gave way, causing the injury. The injury seems to have been the result of the merest accident. The appellee, or any other person, might have crossed the fence a hundred times, and received no injury. The fence was not, in its character, a dangerous obstruction to any one passing on foot. A person approaching the fence would be fully advised of the nature of the obstruction that he was about to encounter. It is wholly unlike a defect in the sidewalk or in the street that could not be readily detected. The fence was an ordinary board fence, the boards having been nailed on horizontally, and it is a matter of common observation that it is not dangerous to undertake to get over such a fence, even in the night-time, if it is of sufficient strength to bear the weight of the person. It seems impossible that the appellee could have been injured in getting over the fence, if he had been in the exercise of due care and caution. If the accident was the result of his own negligence and want of proper care, the law is well settled that he can not recover. He was fully advised, when he approached the fence, of the nature of the obstruction he was about to encounter, and that fact itself would impose upon him the necessity of exercising due care and caution in passing it. The appellee was bound to exercise such a degree of care, and if for the want of it he sustained the injury, the law can afford no remedy.

There was nothing in the character of the obstruction itself that rendered it at all dangerous. It was open and visible. The appellee did not come on it suddenly and unawares, for he well knew it was there, and when he approached it he deliberately attempted to cross over. There was certainly no sort of danger in the undertaking if he exercised ordinary care and prudence. If he was even reckless it is difficult to conceive how the accident could have been produced. It must,

therefore, be accredited to one of those accidents which no human wisdom can account for. The slightest misstep in the darkness of that night, in any part of the route over which he passed, might have produced the same result. It is not infrequent that the slightest obstruction in a street may be the cause of an accident. But it is not possible that a municipal corporation can be held liable for every accident that occurs within its corporate limits from the most trifling causes.

The obstructions or defects in the streets or sidewalks of a city, to make the corporation liable, must be of such a nature that they are in themselves dangerous, or such that a person, exercising ordinary prudence, can not avoid danger or injury in passing them; in general, such defects as can not be readily detected. It would be extending the liability quite too far to hold that a municipal corporation is liable for every mere accident that may occur within its limits. It would be a most disastrous rule to adopt.

If the injury is the combined result of an accident and a defect in the street or walk, and the accident would not have occurred but for such defect, and the danger could not have been foreseen or avoided by ordinary care and prudence, then such a corporation will be liable to the party injured. *The City of Joliet* v. *Verley*, 35 Ill. 58; *The City of Bloomington* v. *Bay*, 42 id. 503.

It was error in the court not to award a new trial, and the judgment must be reversed and the cause remanded.

Judgment reversed.

Syllabus.

SAMUEL P. WALKER

v.

THE CITY OF CHICAGO.

1. CONSTRUCTION OF STATUTES. Where the intent is plain to confer a privilege upon those whose rights are to be affected by a statutory proceeding in derogation of the rights of property, and the language is doubtful as to the extent of the privilege, it is the duty of courts to give to it the largest construction in favor of the privilege which the language employed will fairly permit.

2. ASSESSORS, BOARD OF, *in Chicago — of the duration of their sessions — construction of the city charter.* So the provision in the charter of the city of Chicago, which, after requiring the board of assessors to fix a day for their meeting to revise and correct the assessments, declares that "they shall continue in session during the business hours of each and every secular day for a period of twenty successive days," must be construed as meaning twenty successive secular days.

3. EVIDENCE — *in suit for taxes, in city of Chicago.* In a suit, under the charter of the city of Chicago, for taxes, the defendant objected that the real estate tax list, which, with the warrant attached thereto, was the basis of the suit, was not a copy of the tax list as revised by the board of assessors; that the list as revised, and after the time fixed by statute for its revision had expired, was changed, amended, abated and altered; and that the warrant was materially altered after it was received by the city collector: *Held*, it was competent for the defendant to inquire of the collector and tax commissioner, called by him as witnesses, as to their knowledge of such alterations, whether or not any had been made; whether the list and warrant had been so changed as to the description and valuation of any of the property in any respect, and if so, what changes had been made. Such material alteration might have been made as would vitiate the tax of the defendant, and the *onus probandi* being on him, he had the right to prove it. If abuses had crept in, from which the tax lists were altered after the revision was completed, no matter by whom done, the defendant had the right, and it was the duty of the court to permit him, to investigate and expose them. Such inquiries were competent for the purpose of showing that alterations had been made, so affecting the rights of the defendant as to require the production of the original books, assessment roll and warrant to complete the proof, and to lay the proper foundation for their compulsory production; and if the books were already in court, then as preliminary to the investigation.

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

The opinion states the case.

Mr. JOHN BORDEN and Mr. JOHN P. WILSON, for the appellant.

Mr. M. F. TULEY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a suit, under the charter of the city of Chicago, for taxes of 1869. Judgment was rendered by the superior court, against the property of appellant, upon the warrant returned by the city collector, in a sum exceeding $25,000.00, and the case is brought here by appeal. The importance of the case is apparent.

To the recovery of the judgment the appellant filed, among others, in apt time, the following objections:

1st. That the real estate tax list for the year 1869, and which, with the warrant thereto attached, is the basis of this suit, is not a copy of the tax list for said year as revised by the board of assessors.

2d. Said tax list was changed, amended, abated and altered after the said board of assessors had ceased to meet as required by law.

3d. The tax warrant was materially altered after it was received by the city collector.

Upon the hearing, appellant's counsel called the city collector as a witness, and interrogated him as to whether that real estate tax list, with the warrant attached, was in the same condition as it was when he received it? Whether or not any changes had been made in the said real estate tax list and warrant attached, after they came into his hands? Whether the tax list and warrant had been changed as to the description and

valuation of the property in any respect, and in respect to any of the property, since they came into his hands? and, if so, what changes had been made? Whether any person out of his office, and not connected with it, had been allowed by him, or those under his charge, to make any correction in the warrant, or alteration. To these questions and others of a similar tendency, the corporation counsel interposed a general objection, which the court sustained, and appellant's counsel excepted.

These questions, it will be perceived, were all directed to alterations made after the warrant was received by the collector, and, of course, after the whole amount to be raised by taxation had been fixed by the common council, the amount apportioned by the city clerk, and the sum against each parcel of property extended. In such case, the materiality of an alteration might be different from that of an alteration made at any time between the close of the period prescribed by statute for the revision of assessments by the board of assessors and that of the apportionment by the clerk.

The statute requires the board of assessors to fix a day for their meeting to revise the assessments, and declares that "they shall continue in session during the business hours of each and every secular day for the period of twenty successive days." Appellant's counsel insist that this means twenty successive days, including Sundays. We think it is to be construed as meaning twenty successive secular days. Not to give it this construction would be to abridge a privilege intended for the benefit of property owners. Where the intent is plain, to confer a privilege upon those whose rights are to be affected by a statutory proceeding, in derogation of the rights of private property, and the language is doubtful as to the extent of the privilege, it is the duty of courts to give to it the largest construction, in favor of the privilege, which the language employed will fairly permit. The time fixed by the board for the revision to commence was the 1st of September, 1869. They met, as the evidence shows, on that day, and on

every business day between that, to and inclusive of the twenty-third, same month.

The tax commissioner, who is a member of that board, was called as a witness on behalf of appellant, and was asked to state whether or not any alterations, and, if so, what, were made in the assessors' books after the 23d of September, 1869? Whether or not the revised book or books of the assessors, as revised, are now in the same condition that they were immediately after the 23d day of September, 1869? These questions were likewise objected to by the corporation counsel; the objection was sustained by the court, and exception taken by appellant.

After the schedules of the assessors have been revised by the board of assessors, and the time of revision given by statute elapsed, it is the duty of the clerk, under the direction of the assessors, to transcribe the lists, with the valuation, into a book or books, with appropriate columns. When so transcribed, they are to be signed by the proper assessors, and then these books constitute the tax lists for that year. After the close of the twenty days for revision, no person or officer has any more right or authority to make alterations of the tax lists, or valuation, than of the amount of a judgment of a court after the close of the term at which it was rendered. When the amount to be raised by taxation is fixed, and the levy made by the common council, and the apportionment made as to each parcel of real estate in the tax list, and the proper warrant issued and attached to the proper lists, the amount of tax upon each parcel is deemed due and owing, and authority is given to make it of the goods and chattels of the respective owners. The evidence of the indebtedness, and process for its collection, together with all the proceedings through which the obligation was created, are in the possession of the appellee, its officers and agents. It has been the rigid and inflexible rule of the common law of England, at least since *Pigot's case*, 11 Rep. 27, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger,

without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing a pen through a line or through the midst of any material word, the deed thereby becomes void. The principle of this rigid rule, which has been somewhat relaxed in this country, is, that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state; and it has been said by the courts that it is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to.

The importance of preserving the purity of the instruments of taxation is as great, if not greater, than in the case of contracts between individuals. If we were to hold that material alterations of the tax lists, before apportionment, and of the warrant and amount of taxes of the individual objecting, after they were received by the collector, did not vitiate, it would soon happen that honest men alone would bear the burden of city taxes. The statute itself, which provides for the twenty days to make revision by the board of assessors, declares that "thereafter no change, amendment, abatement or alteration shall be made, nor shall any tax or portion thereof be refunded."

We do not decide here as to what would be a material alteration that would vitiate the tax of any particular objector; but only that there may be such, and, if so, when the proper objection is made, the objector, being subject to the *onus probándi*, has the right to prove it. If abuses have crept in, from which tax lists are altered, after the revision is completed, no matter by whom done, the appellant had the right, and it was the undoubted duty of the court below to permit him, to investigate and expose them. If no such thing were true, why not permit the witnesses to answer and negative the implication of the questions? The questions were entirely competent. It is but sticking in the bark, to say that it could be proved only by sworn copies of the originals. The questions were merely preliminary; and by excluding them the objector could get no

starting point. If he had had the sworn copies alluded to, in his pocket, he had a right to have these questions answered.

Brier v. *Woodbury*, 1 Pick. 362, was where an execution was altered after it was issued, by fraudulently inserting a direction to a constable, when it was originally directed to the sheriff. The execution being returned, it was objected that being a record, it was not competent to show the alteration by parol. PARKER, Ch. J., after stating the objection, said: "That it could not be doubted that any thing produced as a record may be shown to be forged or altered; if it were not so, great mischief might arise. That a record was conclusive, but what is or what is not a record is matter of evidence, and may be proved like other facts; otherwise there would be no remedy. On a plea of *nul tiel record*, the fact is to be judged of by the court, who, no doubt, would examine witnesses, upon a suggestion that there had been an interpolation; and, where the question comes up incidently, on an issue to a jury, the same species of evidence must be given to them." No doubt, but to complete the proof, the production of the original books, or roll and warrant, would be necessary. Suppose the books had been in court, so long as there could be no difficulty in the identification of the subject matter of the inquiry, would not the questions asked be proper as preliminary inquiries? And would not the objection go merely to the order of proof, which the court can not control, so long as it is competent and pertinent in other respects? Suppose these witnesses were cognizant of the fact, that the board of assessors, or some other officer, or a person, had, in fact, made alterations, as to the valuation of various parcels of property, upon the tax lists, after the time for revision, and before the apportionment was made, would not their statement of such alterations show, with sufficient certainty, that appellant's rights were affected by it, to require the production of the original books, assessment roll and warrant, if not already in court?

Such a mode of laying the foundation for their production is far more satisfactory than by affidavit, because, by the former

course, the appellee would have the benefit of cross-examination; by the latter, not. If the books were in court, then the evidence was competent, as preliminary to the investigation. The tax list comprised eleven bulky books. The knowledge of the collector and tax commissioner, of the books, might be requisite, to finding where the alterations were made. If not in court, then it was competent to lay the proper foundation for their compulsory production. To lay such foundation, when necessary, is a legal right. The exclusion of the evidence tending to do so was a denial of that right, and was error.

We have fully considered the other points made, but do not think any of them well taken.

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

Judgment reversed.

P. F. W. PECK *et al.* AND AZEL DORATHY

v.

THE CITY OF CHICAGO.*

APPEALS from the Superior Court of Chicago.

These were suits in the court below, for taxes, in which judgments were rendered against the several defendants, who thereupon took these appeals.

* This and thirteen other cases against the city of Chicago, all involving the same questions, were considered together. The parties appealing in the other cases were as follows: Charles Follansbee; Cornelia W. Storey et al.; Potter Palmer et al.; Azel Dorathy; S. J. McCormick et al. and Martin O. Walker; John C. Haines et al.; William Wheeler et al. and Edgar Loomis et al.; Moses Grey and W. H. Adams; N. B. Smith et al. and A. D. Rich; R. McClelland et al. and Martin O. Walker; L. C. P. Freer and Azel Dorathy; Martin O. Walker et al.; Martin O. Walker.

Per CURIAM: All the questions presented by the records in these cases, and discussed, are decided in the case of *Dunham* v. *The City of Chicago*, 55 Ill. 357, and must be disposed of in the same way.

Judgment affirmed.

TIMOTHY WRIGHT

v.

THE CITY OF CHICAGO.

APPEAL from the Superior Court of Chicago.

This was a suit in the court below, for taxes, in the city of Chicago, in which a judgment was rendered against Wright, the appellant.

Mr. DANIEL L. SHOREY, for the appellant.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: All of the questions raised in this case were considered in the cases of *Dunham* v. *The City of Chicago*, 55 Ill. 357, and *Samuel J. Walker* v. *The same, ante, p.* 277, and decided adversely to appellant. The court perceiving no error in this record the judgment of the court below is affirmed.

Judgment affirmed.

Syllabus.

ROBERT NAYLOR

v.

THE CITY OF GALESBURG.

1. REPEAL OF ORDINANCES—*repugnance.* A city had adopted the following ordinances respecting the sale of liquor:

"Whoever shall, by himself, his clerk, agent or servant, sell any alcoholic or intoxicating drink whatever, or any intoxicating liquor, in any quantity, or shall deliver or give away the same, to be drank or used as a beverage, shall be subject to a penalty of not less than fifty dollars.

"The sale, barter, exchange or giving away of all intoxicating drinks or liquors is prohibited, except by licensed druggists, and only allowed by them for sacramental, mechanical, medicinal, chemical purposes, and for a second or subsequent convictions under this division, the party offending shall be subject to a penalty of not less than seventy-five dollars."

After which the following:

"Whoever, except a licensed druggist, shall, by himself, his clerk, agent or servant, sell any alcoholic or intoxicating drink whatever, or any intoxicating liquor, in any quantity, or in any house, room or place where such liquors are kept, stored or delivered, give away the same to any person for use as a beverage, shall be subject to a penalty of not less than fifty dollars." *Held*, there was such a repugnance between them that the last ordinance must operate to repeal the former.

2. SAME—*effect of repeal upon pending proceedings.* The repeal of an ordinance of a town or city which prescribes a penalty for its violation, pending a prosecution under such ordinance, will operate to put an end to such prosecution, unless saved by a clause in the repealing ordinance.

3. SAME—*construction of the act of* 1859. This rule of the common law prevails as to ordinances of a town, notwithstanding the statute of 1859 in relation to the repeal of laws by implication. That act applies solely to statutes enacted by the legislature, and not to the laws or ordinances of a corporation.

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

This was a prosecution against Naylor, to recover the penalty for an alleged violation of an ordinance of the city of

Galesburg, prohibiting the sale of spirituous liquor. The proceedings were commenced before a justice of the peace, and removed into the circuit court by appeal, where a trial resulted in favor of the city.

Mr. FREDERICK A. WILLOUGHBY, for the appellant.

Messrs. KITCHELL & ARNOLD, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This was a proceeding, under an ordinance of the city of Galesburg, imposing a penalty for the sale of intoxicating liquor.

The city proved, on the trial, that appellant had, at one time, sold two gallons of whisky, and at another time, three gallons; and then offered the following ordinances:

"§ 3. Whoever shall, by himself, his clerk, agent or servant, sell any alcoholic, or intoxicating drink whatever, or any intoxicating liquor, in any quantity, or shall deliver or give away the same to be drank, or used as a beverage, shall be subject to a penalty of not less than fifty dollars.

"§ 7. The sale, barter, exchange, or giving away of all intoxicating drinks, or liquors, is prohibited, except by licensed druggists, and only allowed by them for sacramental, mechanical, medicinal, chemical purposes, and for a second or subsequent convictions under this division, the party offending shall be subject to a penalty of not less than seventy-five dollars."

Appellant then introduced this ordinance:

"Whoever, except a licensed druggist, shall, by himself, his clerk, agent or servant, sell any alcoholic or intoxicating drink whatever, or any intoxicating liquor, in any quantity, or in any house, room or place where such liquors are kept, stored or delivered, give away the same to any person for use as a beverage, shall be subject to a penalty of not less than fifty dollars."

It was admitted that the ordinances offered by appellant had been adopted subsequently to the commencement of the prosecution, and prior to the trial in the circuit court.

There is such a repugnance between these ordinances, that the last must operate as a repeal of the former. In the latter, licensed druggists are excepted from the penalty. It also contains additional words of limitation; and there is no evidence of any saving clause.

This is a *quasi* criminal prosecution, and the law is too well settled to require argument, that the repeal of an ordinance puts an end to all proceedings growing out of it, and pending at the time of repeal, unless saved by a clause in the repealing ordinance. The subsequent ordinance is clearly a revision of the first, and a substitute for it. The one against which the offense was committed was not subsisting at the time of the trial in the circuit court. *Board of Trustees, etc.*, v. *City of Chicago*, 14 Ill. 334.

This rule of the common law prevails as to ordinances of a town, notwithstanding the statute of 1859, in relation to the repeal of laws by implication. Sess. Laws of 1859, p. 52.

That act applies solely to statutes enacted by the legislature, and not to the laws of a corporation; and we cannot extend its operation to ordinances.

The other questions presented by the instructions and in the argument do not now arise.

The judgment of the circuit court is reversed.

Judgment reversed.

WILLIAM KELSEY REED *et al.*

v.

JAMES E. TYLER *et al.*, Trustees, etc.

1. RETURN UPON PROCESS—*in suit against an incorporated company.* The return upon a summons in chancery, issued against an incorporated company, showed service upon the cashier of the company, and stated: "The president not found in my county, he being a non-resident:" *Held*, this was sufficient to show that the president was a non-resident of the county of the officer who made the return, and to whom the writ was directed, and that being the county in which the suit was brought, the return was sufficient.

2. CLOUD UPON TITLE—*tax deed—jurisdiction in chancery.* A party in possession of land may maintain a bill in chancery against one out of possession, to set aside as invalid, and a cloud upon complainants' title, a sale of the land for taxes and a deed thereunder.

3. SAME—*jurisdiction in chancery, generally.* The rule seems to be, in such cases, that where the claim of an adverse party to land is valid upon the face of the instrument, or the proceedings sought to be set aside, and it requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere to set it aside as a cloud upon the real title to the land, and order the same to be delivered up and canceled.

4. SAME—*remedy at law.* A party in the actual occupancy of land can not maintain ejectment against one out of possession, who only claims title to the land. The former can bring no suit at law to test the title.

5. SAME—*of the terms of relief.* In this case, which was a bill to set aside, as invalid and a cloud upon complainants' title, a sale of the land for taxes and a deed thereunder, it appeared, the complainants claiming to own the land, and neglecting to pay the taxes thereon, permitted it to go to sale: *Held*, the relief should be granted only upon condition that all the taxes paid by the party claiming under the tax sale should be refunded to him.

6. TAX TITLE—*condition upon which it may be questioned—validity of act of* 1861. The act of 1861, which requires the payment of the redemption money and interest as therein named, as a condition precedent to questioning the validity of a tax deed, except for certain specified causes, is unconstitutional, the effect of it being to compel a party to buy justice.

APPEAL from the Superior Court of Chicago.

Statement of the case. Opinion of the Court.

This was a suit in chancery, instituted by James E. Tyler, George Field and John F. Eberhart, trustees of the Norwood Land and Building Association, against George W. Reed, William Kelsey Reed and the Illinois Land and Loan Company, a corporation, to set aside, as invalid and a cloud upon the complainants' title, a sale for taxes, and a deed thereunder, of a certain tract of land, described as follows: "Except the railroad, south of McHenry road, fractional north-west quarter of section six, township forty north, range thirteen east of the third principal meridian, situated in Cook county, State of Illinois."

It appears, the complainants were in possession of the land, claiming to own the same, and permitted it to be sold, in August, 1866, for the unpaid State and county taxes due for the year 1865. George W. Reed became the purchaser at the tax sale, and having assigned the certificate of purchase to William Kelsey Reed, a tax deed was issued to the latter, who subsequently conveyed to the Illinois Land and Loan Company. Upon the final hearing, the court below decreed that the tax sale, the deed executed in pursuance thereof to William Kelsey Reed, and the deed from him to the Illinois Land and Loan Company, being a cloud upon the title of the complainants, be declared null and void.

The defendants thereupon took this appeal. The specific grounds of error assigned are set forth in the opinion of the court.

Mr. GEORGE SCOVILLE, for the appellants.

Mr. GWYNN GARNETT, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in equity, to set aside, as invalid and a cloud upon the complainants' title, a sale for taxes, and a deed thereunder, of certain real estate in Cook county, owned by the complainants and of which they were in possession, on the ground

of certain irregularities in the proceedings whereby the tax deed was acquired, the bill alleging that the Illinois Land and Loan Company claimed the land in fee under the tax deed.

The first error assigned is, that the return of service was insufficient to authorize the entry of the default of the Illinois Land and Loan Company. The sheriff's return on the summons is: "Served this writ by reading to the within named William Kelsey Reed and to George W. Reed, and to William Kelsey Reed, cashier of the Illinois Land and Loan Company, the president not found in my county, he being a non-resident, and delivered to each of them a copy thereof, March 25, 1870." The statutory requirement in cases of this kind is, that "process shall be served upon the president of such company, if he reside in the county in which suit is brought, and if such president be absent from the county, or does not reside in the county, then the summons shall be served by the proper officer, by leaving a copy thereof with any clerk, cashier," etc. Gross' Stat. 506.

The objection taken is, that the return does not show that the president did not reside in the county. The whole return is to be taken together. The sheriff of Cook county, to whom the writ was directed, had just mentioned "my county" in his return, and when he undertakes to tell why the president was not found in his county, by stating that he was a non-resident, he could mean nothing else than that he was a non-resident of Cook county. That such was the reasonable and proper construction of the return we have no doubt. Words may be implied in an officer's return, as well as in other written evidence, where such implication is justified by what is expressed. *Farnsworth* v. *Strasler*, 12 Ill. 482.

All the defendants were properly in court, and the bill was regularly taken for confessed against them.

The next error assigned is, that a court of equity should not take jurisdiction of a case of this kind, but should leave the party to his remedy at law.

The appellants' counsel, in support of his position, insists

that it is the province of a court of law, and not of equity, to try the validity of a tax title; that the complainants had an immediate remedy at law; that they might have brought an action of ejectment to test their title at once against the Illinois Land and Loan Company, although the latter were not in possession and reference is made to the decisions of different courts, under statutes similar to our own, that ejectment will lie against a party out of possession, where he *claims title* to unoccupied land. Admitting that to be the construction of our statute in the case of unoccupied lands, we do not understand that ordinarily a party in the actual occupation of land can maintain ejectment against one out of possession, who only *claims title* to the land. The specific relief of canceling the deed could not be had at law. Although contradictory decisions are to be found on the point of jurisdiction, it appears to be now fully established, that where the claim of an adverse party to land is valid upon the face of the instrument or the proceedings sought to be set aside, and it requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere to set it aside, as a cloud upon the real title to the land, and order the same to be delivered up and canceled. *Hamilton* v. *Cummings*, 1 Johns. Ch. 517; *Pettit* v. *Shepherd*, 5 Paige, 493; 9 id. 388; *Piersall* v. *Elliott*, 6 Pet. 95; *Ward* v. *Dewey*, 16 N. Y. 519. In the present case, the only inquiry involved is the regularity of a tax sale proceeding and a deed thereunder; by the showing of the bill the deed is void. No defense is attempted to be made in its favor, but the bill is taken as confessed. The complainants, being in actual occupation, can bring no suit at law to test the title; the defendants will not do so, conscious of the invalidity of their title, and by the lapse of time vital proof may be lost. The deed is good on its face; its presence on the record would be likely to have the effect to deter from the purchase and impair the market value of the land; it is useless in the hands of the holder, except as a means of annoyance and extortion; and it

seems a fit case for the interposition of the power of a court of chancery to deprive the instrument of its means of mischief, by its cancellation.

Although two former decisions of this court have been referred to, which seem opposed to the exercise of this jurisdiction, it has been directly asserted in recent decisions of the court, from which we do not feel disposed to depart. *Gage* v. *Rohrbach*, *ante*, p. 262; *Gage* v. *Billings et al.*, *ante*, 268, decided at the present term.

Before filing the bill, the complainants tendered to the defendants the amount of redemption money, and ten per cent interest, in pursuance of an act of the general assembly, approved February 21, 1861, requiring the same as a prerequisite to questioning the validity of the deed (Sess. Laws, 1861, 170); and it is assigned for error, that the court erred in not requiring the complainants to keep their tender good by bringing the money into court for the use of the defendants, or some of them, and in not requiring any money to be refunded to the defendants.

In *Wilson et al.* v. *McKenna*, 52 Ill. 44, it was held, that the provision of the general revenue law (Rev. Stat. 448, § 73), requiring payment of all the taxes due and assessed upon land before a tax title to it can be questioned, was unconstitutional, the effect of it being to compel a party to buy justice. For the same reason, the requirement in the act of 1861, of the payment of the redemption money and interest, as therein named, as a condition precedent to questioning the validity of a tax deed, must be held to be nugatory. The redemption money and interest, although tendered, was not brought into court; and the mere tender of it would not create a liability to pay it, where none existed before, and in this respect no error is perceived.

But the interference of a court of equity, in such a case, is a matter of discretion, and the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require, the maxim here being emphatically

applied, that he who seeks equity must do equity (2 Story's Eq. Jur., § 693); and the condition of relief in this case should have been the refunding to the Illinois Land and Loan Company of all taxes paid on the land.

It is lastly assigned for error, that the court should have done equity to all parties by its decree, and should not have declared void the deed from William Kelsey Reed to the Illinois Land and Loan Company, without at the same time decreeing a return of the consideration paid by the company to Reed.

It is sufficient to say, that it does not appear that any consideration was paid, nor that there were any covenants in the deed.

For the error before indicated, the decree is reversed, and the cause remanded for further proceedings, in conformity with this opinion.

Decree reversed.

Mr. Justice Walker: I am not able to concur in the decision of the above case.

Michigan Southern & Northern Indiana Railroad Company

v.

Catharine Oehm.

1. Baggage — *what constitutes — necessity of notice to the carrier.* A railroad company, on December 24, 1868, received from a passenger at Chicago two trunks, and checked them as personal baggage to South Bend, Indiana. In an action against the company to recover damages, alleged to have been sustained by the failure of the defendants to deliver one of the trunks at the latter place within a reasonable time, it appeared the trunks contained

masquerade costumes, which the plaintiff had undertaken to furnish for use at a ball, on the evening of the following day; but one of the trunks failed to arrive in time, whereby the plaintiff lost the benefit of her contract: *Held*, in order to recover, it was necessary for the plaintiff to show she informed defendants' servants of the contents of the trunks, and that they would be required the next day.

2. The plaintiff having shipped as personal baggage merchandise to be used in her trade, and in no sense whatever capable of being considered personal baggage, on the principle announced in the case of the *Cincinnati & Chicago Railroad Company* v. *Marcus*, 38 Ill. 223, the company, not having notice of the contents of the trunks, were released from their liability as common carriers.

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

The opinion states the case.

Mr. GEORGE C. CAMPBELL, for the appellants.

Messrs. BARBER & LACKNER, for the appellee.

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

The plaintiff in this case had undertaken to furnish masquerade costumes to be used at a ball on the evening of December 25, 1868, at South Bend, Indiana. On the 24th she bought a passenger ticket on defendants' road from Chicago to South Bend, and checked, as luggage, two large trunks containing the costumes, paying $1.75 for extra weight. One of the trunks did not arrive at South Bend in time for the ball, and the plaintiff lost the benefit of her contract. The trunk was returned to her, in a few days, at Chicago, with its contents wholly uninjured. This suit was brought to recover for the loss of profits, and the plaintiff recovered judgment for $500.

This judgment can not be sustained upon the evidence in the record. In order to recover, it was necessary for the plaintiff

to show she informed defendants' servants of the contents of the trunks, and that they would be required the next day. Instead of doing this, the plaintiff checked the trunks as personal baggage. She is now endeavoring to hold the company responsible for a liability which it never consciously assumed. The company undertook to carry certain trunks as personal baggage, and to be accountable for their non-delivery in a reasonable time, but the plaintiff is seeking to charge it for the non-delivery of merchandise shipped to be used in the plaintiff's trade, and in no sense whatever capable of being considered personal baggage. The case is in principle like the *Cincinnati and Chicago R. R. Co.* v. *Marcus*, 38 Ill. 223.

An attempt was made in this case to charge the defendants with notice, but the evidence is wholly insufficient for that purpose. The plaintiff, by her own evidence, merely told the baggageman who checked her trunks, in reply to his question where she was going, that she was going to the masquerade at South Bend. She does not state she gave the slightest information as to their contents, and the man himself swears he did not know their contents, or what business the plaintiff followed, although he knew her. We are wholly unable to see why he should have inferred, from what passed between them, that her trunks contained any thing besides personal baggage. The verdict is wholly unsustained by the evidence.

Reversed and remanded.

JAMES K. LAKE *et al.*

v.

WALTER G. NEWHOFF.

NEW TRIAL — *verdict against the evidence.* In this case the verdict is not sustained by the evidence, and the judgment is for that reason reversed.

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

This was an action of assumpsit, brought by Walter G. Newhoff, the appellee, in the Cook county circuit court, against James K. Lake and Charles B. Farwell, as copartners, the appellants, to recover for work and labor alleged to have been done by him for them on the Washington street tunnel, in Chicago. The declaration contained the common counts for work and labor. The defendants filed the general issue, and, at the September term, 1869, a trial was had before the court and a jury, which resulted in a verdict for the plaintiff for $100.

The defendants appealed.

Messrs. STORY & KING, for the appellants.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

We have carefully examined the record in this case, and fail to find evidence that supports the verdict. It appears that appellee was employed by Colborn one day, and was fully paid for the labor thus performed. Appellant, seeing appellee at work in the forenoon of the day he was employed, inquired how he came there, and, on being informed, said as he had commenced, he might finish out the day, but told Colborn to inform appellee that he would not be wanted longer. Appellant during the day notified him that he would not be employed longer than that day, and the foreman on this work did the same. He was not subsequently employed by appellant, or by any one for him having authority to engage his services.

If appellee did any thing after he was discharged, it was to assist Colborn to make the calculations he was employed to make, and for which he was paid by appellant. Appellee testified that he was idle most of the time, and that his services con-

sisted, the greater part of the time, in occupying a seat in appellants' office; and he admits that he was notified that his services were not wanted, on Monday next after he had worked on the previous Saturday. But he says he was ready to do any thing, if required. He only testified to having computed the number of feet of lumber necessary to construct a small boat, and says it may have taken five minutes time. All the evidence considered, appellee's claim seems to be wholly baseless and entirely unsupported by evidence. As the verdict is not sustained by the testimony, the judgment must be reversed and the cause remanded.

Judgment reversed.

ASAHEL GAGE

v.

PETER EICH *et al.*

APPEAL — *at what stage of a cause it will lie.* An appeal will not lie from an order of the court, simply overruling a demurrer to a bill in chancery. Such an order is not final. An appeal will not lie from any interlocutory order merely, either in a suit in chancery or an action at law.

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

This was a suit in chancery, brought by Peter and John Eich against Asahel Gage, to remove a cloud, in the shape of a tax deed to the defendant, upon complainants' title to certain premises. The defendant filed a demurrer to the bill of complaint, which was overruled by the court. Whereupon the defendant prayed an appeal to this court, which was allowed upon his filing an appeal bond within ten days, in the penalty of

$250, with approved security. Appeal bond filed; and afterward the following order was entered of record:

This cause having heretofore been brought on to be heard upon the bill of complaint filed therein, and the demurrer thereto of the defendant, and upon consideration thereof, William T. Butler, of counsel for said complainants, and E. Roby, of counsel for said defendant, being heard, the said demurrer being overruled, and the said defendant electing to stand by his said demurrer, and the said bill of complaint being therefore taken as confessed by the said defendant, and, it appearing satisfactorily to the court, from the proofs adduced herein, that all the material facts alleged in said bill of complaint are true, and that the said complainants are justly and equitably entitled to the relief therein prayed for, on notice of said Wm. T. Butler, of counsel for said complainants, it is ordered, and this court, by virtue of the power and authority therein vested, doth order, that it be and it hereby is referred to one of the masters of this court to compute and ascertain the amount justly due and owing to the defendant for principal and interest on account of the taxes and costs paid by him, as set forth in said bill of complaint, and report the same to this court with all convenient speed.

The defendant brings the record to the court, and assigns the following errors: The court erred, 1st. In overruling the said demurrer; 2d. In proceeding in said cause after an appeal had been allowed and perfected.

Mr. EDWARD ROBY, for the appellant.

Mr. WILLIAM T. BUTLER, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It is a well settled rule in equity practice, as well as in proceedings at common law, that no appeal lies from any interlocutory order merely, in either court. There must be a final decree, order or judgment, to justify an appeal.

In this case, there has been no final decree; nothing, indeed, but overruling a demurrer to the bill and a reference to the master to state an account and to report the same to the court. The case is yet *in fieri*, and no appeal can lie. 2 Dan. Ch. Pr. 1543, and the case cited in note 1.

For these reasons the appeal must be dismissed.

Appeal dismissed.

The People of the State of Illinois *ex rel.* George A. Shufeldt, Jr.,

v.

Joseph N. Barker.

1. Attorney and client — *confidential communications.* Communications made to a counselor, attorney or solicitor, when made to him in the character of a legal adviser, are to be protected, as the privilege of the party asking the advice. The courts will never compel, or even allow, an attorney to disclose facts thus communicated to him by his client. Such protection from disclosure is the privilege of the client, not of the attorney, and will be extended to all communications passing between attorney and client, where the latter seeks professional advice, whether the subject of advice is pending in suit or not.

2. Same — *release by one of a firm.* Where an attorney has received confidential communications from a partnership firm, one member of the firm can not release him from his obligation of secrecy. It is the privilege of all, and, before the attorney can properly disclose such communications, he must have the consent of every member of the firm.

3. Same — *mal-conduct on the part of an attorney — degree of proof required.* The name of an attorney should not be stricken from the roll for alleged misconduct in office, except upon a clear preponderance of proof against him. Consequences so serious should not be visited upon him in a doubtful case, or upon a mere preponderance of evidence.

4. An attorney at law had been doing business in that capacity for a party, and also negotiated a loan for the latter, for which the attorney became personally liable. During the time of some of these transactions, the attorney learned from such party certain facts concerning his private

business affairs, which he disclosed in his testimony in a suit by a third person against his client. In a proceeding to strike the name of the attorney from the roll, for alleged misconduct in making such disclosure, on the allegation that the matters were confided to him in his character as an attorney, by his client, it was *held,* the testimony was not sufficient to support the prosecution, as it left the question in doubt whether the facts disclosed came to the attorney's knowledge while the relation of client and attorney existed, or while the relation of debtor and creditor alone existed between the parties.

5. In case of uncertainty, however, as to the capacity in which the attorney learned the facts about which he proposed to testify, or if any doubt would arise in the mind of a reasonable person as to the propriety of making the disclosure, he should, at least, have submitted the question to the court for its advice.

APPLICATION to strike the name of an attorney at law, from the roll, for alleged misconduct in office.

Mr. GEORGE A. SHUFELDT, Jr., the relator, *pro se.*

Mr. S. A. IRVIN, for the respondent.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

We know of no exception to the rule, that communications made to a counselor, attorney or solicitor, when made to him in the character of a legal adviser, are to be protected, as the privilege of the party asking the advice. The rule is founded on principles of public policy. It has been found necessary to the protection of persons surrounded and embarrassed by difficulty, to the end that they may have the advice and counsel of persons skilled in the law, upon a complete disclosure of all that pertains to the transaction that affects their interest, property or liberty, with the full assurance that the communications thus made are as safe with their legal adviser as within their own breasts. The courts will never compel, or even allow, an attorney to disclose facts thus communicated to him by his client.

It has uniformly been held, that facts communicated to a legal adviser are the privilege of the client, and not that of the attorney. This protection will be extended to all communications passing between attorney and client, where the client seeks professional advice, whether the subject of advice is pending in suit or not. *Greenough* v. *Gaskell*, 1 Myl. & Keen. 98.

If an attorney should so far forget his professional duty as to voluntarily offer to give in testimony facts communicated to him by his client, without the express consent of the client so to do, "a short way of preventing him would be by striking him off the roll." Earl Cholmondeley's Case, 19 Ves. 261.

For any willful breach of professional obligation on the part of an attorney, the court has undoubtedly the right to strike the name of such attorney from the roll. The court has not only this power, but it is its duty, when a proper case is presented, to exercise this power. *Emory* v. *Long*, 9 East, 481; 1 Myl. & Keen. 98; *Jackson* v. *French*, 3 Wend. 337; *Coveney* v. *Tannahill*, 1 Hill, 33; *Ex parte Burr*, 9 Wheat. 529.

One member of a firm can not release an attorney from his obligation. It is the privilege of all, and, before he can properly testify, the attorney must have the release and consent of every member of the firm.

The relator has exhibited but one single charge against the respondent, viz.: professional misconduct in willfully disclosing confidential facts confided to him in his character as an attorney by his clients.

We have looked carefully into the affidavits presented, to ascertain whether the respondent is guilty or not.

The evidence thus presented shows that the respondent was at one time the advising counsel of the firm of A. F. Croskey & Co., of which firm the relator, Shufeldt, was formerly a member. In that capacity he did learn many of the details of the private business of that firm.

It also appears, from the affidavits, that the respondent at one time negotiated a loan for the firm of A. F. Croskey &

Co., for which he became personally liable; that he experienced much difficulty in getting his debt paid, and, in endeavoring to do so, he did learn many facts concerning the private business transactions of the firm.

The evidence leaves it doubtful whether the facts stated in the testimony of the respondent, of which complaint is made, were obtained by him while the relation of client and attorney existed between the parties, or whether he learned the facts to which he testified while the relation of debtor and creditor, only, existed between them. The evidence on this question is by no means harmonious and satisfactory.

Under this uncertain state of facts, it would unquestionably have been in better taste for the respondent to have declined to testify, unless compelled to do so by the court. The position of an attorney thus situated is a delicate one, and if any doubt existed or could exist, in the mind of any reasonable man, as to the propriety of his giving testimony under the circumstances, he ought at least to have submitted the question to the court for its advice. It was, perhaps, after all, only a question of propriety with himself, in which, however, we think he greatly erred, in the questionable position that he occupied, in his decision. We cannot say, however, that we find any moral turpitude in his conduct. The respondent may have honestly believed that he learned all the facts to which he testified before the master, from the firm of A. F. Croskey & Co., while the relation of debtor and creditor alone, existed, between them. The proof shows that such a relation did exist between the parties, and it is possible that the respondent did so learn all the facts to which he testified.

The respondent, in express terms, denies the charge exhibited against him, and to overcome this express denial there ought to be required more than a mere preponderance of evidence. A charge so grave in its character, and so fatal in its consequences, ought, certainly, to be proved by what the law denominates a clear preponderance of the evidence. Such evidence is wanting in this case.

The consequences of a conviction in a case like this are most disastrous to the party accused, and no slight evidence will warrant the conviction. Even if we should hold that the party has been guilty of some slight indiscretion, it does not follow that his name ought to be stricken from the roll of attorneys.

A man's profession is sometimes all his means of a livelihood. It has cost him much labor, and intense study through many weary years. It is to him valuable capital, and he ought not to be denied the right to exercise its duties and receive the emoluments attached thereto, except upon clear proof of willful and corrupt professional misconduct.

The case of *Ex parte Burr*, 9 Wheat. 530, is so exactly in point, that we adopt the language of the court. In delivering the opinion of the court, Mr. CHIEF JUSTICE MARSHALL says: "On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained and that its harmony with the bench should be preserved. For these objects some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment, but it must be exercised."

Whenever a proper case has been presented to this court, it has not hesitated to exercise this power, however painful the duty. *The People, etc.*, v. *Ford*, 54 Ill. 520. We fail to find in this record, evidence of that clear and positive character that the law undoubtedly requires to establish a charge so grave in its nature as the one exhibited against the respondent, and while we may be of opinion that, under all the circumstances, it was in bad taste for the respondent to offer himself as a witness, we can not hold that he was thereby guilty of any willful professional misconduct.

The rule must be discharged.

Rule discharged.

Planing Mill Lumber Company *et al.* and David Kreigh

v.

The City of Chicago.*

1. Placita — *necessity thereof.* Where the record in the court below, as shown by the transcript filed in this court, contains no *placita* or convening order of the court, such defect is ground for reversal.

2. Same — *whether aided by bill of exceptions.* Nor could the defect be aided by the bill of exceptions. A bill of exceptions is really and practically no part of the record till after judgment, and it would be a perversion of its uses to make it aid the defects of the judgment record.

3. Bill of exceptions should be sealed by the judge who tried the cause.

Appeals from the Superior Court of Chicago.

The opinion states the case.

Mr. Edward Roby, for the appellants.

Mr. M. F. Tuley, for the appellee.

* This case and the following thirty cases were considered in the same opinion: *Lawrence Young et al.* and *Obadiah Jackson* v. *The City of Chicago*; *Henry Ulrich et al.* and *Walter N. Woodruff* v. *Same*; *Governor et al.* and *Benjamin Wilder* v. *Same*; *C. C. & I. C. R. R. Co. et al.* and *Nicholas B. Rapplege et al.* v. *Same*; *E. Blackman et al.* and *T. S. Fitch et al.* v. *Same*; *E. Blackman et al.* and *Obadiah Jackson* v. *Same*; *Daniel Thompson* v. *Same*; *Chicago & Great Eastern Railroad Co.* and *Anna Cooper* v. *Same*; *Charles Follansbee* v. *Same*; *J. Kinnard et al.* and *Obadiah Jackson* v. *Same*; *A. Shultz et al.* and *Clara S. Mason* v. *Same*; *Isaac Crosby* v. *Same*; *Henry Ulrich et al.* and *Martin O. Walker* v. *Same*; *Samuel M. Nickerson* v. *Same*; *Estate G. W. Ewing et al.* and *John C. Haines* v. *Same*; *Lawrence Young et al.* and *S. C. Benham* v. *Same*; *Clara S. Mason* v. *Same*; *Charles A. Gregory* v. *Same*; *Timothy S. Fitch* and *John Fitch* v. *Same*; *Hart L. Stewart* v. *Same*; *Elijah M. Haines et al.* v. *Same*; *Obadiah Jackson* v. *Same*; *George A. Bickerdike* v. *Same*; *W. S. Johnston et al.* and *William T. Johnston* v. *Same*; *O. L. Mann et al.* and *Jane Beauchamp* v. *Same*; *William S. Johnston* v. *Same*; *Charles V. Dyer* v. *Same*; *Walter W. Allport* v. *Same*; *G. W. Miller et al.* and *W. W. Allport* v. *Same*; and *Martin O. Walker* and *Robert Hill* v. *Same.*

Mr. Justice McAllister delivered the opinion of the Court:

It is a singular circumstance, that, in all the thirty-one foregoing cases, there is not one record which contains a *placita* or convening order of the court. The same defect is apparent, also, in twenty-two other cases, brought from the same court, to, and decided at, the present term of this court. *Rich and others* v. *The City of Chicago.* Thus making fifty-three cases at one term; all coming from the same clerk's office, in which the records are all wanting in this obvious requirement of a good record.

It is a matter of regret that we are compelled to reverse these cases for such a defect. But the records are submitted to us in this condition, and the point made. We must therefore reverse, or say that we will dispense altogether with a requirement of the common law, as old as the law itself. So long as justice is administered under the common law, we must adhere to all the substantial forms of that system, except so far as they have been abolished by the legislative department of the State. The experience and wisdom of ages have taught, that these forms are necessary to prevent legal proceedings from degenerating into such looseness and confusion as to render rights acquired under them insecure, and the salutary maxim that a man shall not be twice vexed for one and the same cause, difficult, if not wholly impracticable, of application.

The counsel for the appellee has suggested, that the defect may be aided by the bill of exceptions. This can not be so. The reason why the judgment is not valid is, because it does not appear that there was the proper organization of a court by which a lawful judgment could be rendered. If there were no authority, so far as the record shows, to render the judgment, where is there any to make a valid bill of exceptions? We take judicial notice that the Superior Court of Chicago was, at the time of these proceedings, composed of three judges. The report of the collector is addressed to three judges. Each judge is authorized to hold a separate branch of the court,

at the same time. In such case the bill of exceptions should be sealed by the judge who tried the cause. *Law* v. *Jackson*, 8 Cow. 747. There is nothing in either bill of exceptions, or any part of any of the records, to show that the cases were tried before the judge who signed the bills of exceptions. When the record proper is complete, showing the organization of the court, and jurisdiction, presumptions will be indulged. But here, the proposition is, to supply a defective record by a defective bill of exceptions.

It is not the office of a bill of exceptions to supply any part of the record proper. It is to preserve the rulings of the court upon matters of law, for the purpose of having them reviewed by the appellate court. It is authorized by statute, because without it those matters would form no part of the record. By the English practice, though the bill of exceptions was required to be tendered at the time of trial and sealed by the judge in court, yet the original bill was carried into the court of errors, and there annexed to the record.

By our practice, the bill of exceptions is filed in the court below. The statute is: "If during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow the said exception, and to sign and seal the same, and the said exception shall thereupon become a part of the record of such cause." Scates' Comp. 263. But whether it shall become a part of the record of the cause, before judgment, and in the court below, the statute does not say.

Under the English practice, the bill of exceptions was regarded as no part of the record till after judgment. *Gardner* v. *Baillie*, 1 Bos. & Pull. 32; 2 Tidd's. Pr. 865.

Notwithstanding the practice here, of filing the bill of exceptions in the court below, and sending a transcript, instead of the original, to the appellate court, it is difficult to see how it has any operation as a part of the record till after judgment. In a large majority of the cases, it is never signed and sealed

till after judgment. But, if actually done during the progress of the trial, it performs no office whatever in that court; the cause proceeds and judgment is given as if there were no bill of exceptions. If the jury fail to agree, or a mis-trial occur for any other reason, so that judgment does not follow, it goes for naught, and would be of no avail before or after judgment had, upon another trial. If it be a part of the record before judgment, it must become so the instant it is signed and sealed by the judge and filed by the clerk. To-day, while the cause is on trial, it is a part of the record. To-morrow, when the jury fail to agree and are discharged, it ceases to be any thing but a void paper. The more reasonable conclusion is, that it is really and practically no part of the record till after judgment; and, if so, with what propriety can it be used in aid of the record of the judgment? In *Wilber* v. *Widner*, 1 Wend. 56, which was an action of slander, the declaration throughout was in the name of *David* K. Widner, and the judgment was in favor of *Daniel* K. Widner, so that, upon the face of the record, *Daniel* had recovered a judgment against the defendant for a slander uttered against *David*. Sutherland, Justice, said: "No doubt it was a mistake, and enough appears in the bill of exceptions to authorize the amendment, on a proper application for that purpose; but the bill of exceptions can not be used in aid of the record, and there is nothing in the record to amend by."

Bay v. *Gunn*, 1 Denio, 108, was an action against two; *non assumpsit* was pleaded by each, and infancy by one. There was an issue upon the question of ratification of the promise; the entry of the record showed a verdict for plaintiff on the issue of *non assumpsit*, but did not notice the other issue, and there was judgment against both defendants. Bronson, Ch. J., said: "We know by the bill of exceptions that the question of ratification was tried; but that can not aid the defect in the judgment record. It there appears that the court below gave judgment in the plaintiff's favor, when the jury had passed upon only one of the two issues, in both of which

he held the affirmative. The bill of exceptions furnishes evidence that the record ought to be amended; but that is no better than evidence by affidavit."

We are satisfied that it would be a perversion of the uses of a bill of exceptions to make it aid the defects of the judgment record.

For this defect the judgments must be reversed and the causes remanded.

Judgments reversed.

Toledo, Peoria & Warsaw Railway Company

v.

George Pineo.

Evidence — *of its sufficiency to prove stock was killed on a railroad.* In an action against a railroad company, to recover the value of a cow alleged to have been killed on the defendants' road, it was proven by the plaintiff that he found the animal the day after she was injured, in a field, about twenty or thirty feet from the track, and there were marks on the track indicating such an accident. Another witness saw the cow in the same situation soon after a train had passed, and an employee of the company, while riding on the engine, saw a cow thrown from the track at about the same place, during the month the cow was found dead. It was *held*, the evidence was sufficient to connect the company with the injury.

Appeal from the Circuit Court of Iroquois county; the Hon. Charles H. Wood, Judge, presiding.

This was an action brought by Pineo against the railroad company, to recover the value of a cow belonging to the plaintiff, alleged to have been killed on the defendants' road. A trial by jury, at the June term, 1869, of said court, resulted in a verdict and judgment for the plaintiff. The defendants appeal, and assign for error, that the evidence fails to connect them with the injury.

Statement of the case.

The plaintiff testified, that in October, 1868, he had a cow killed on the railroad, about two miles west of Sheldon, in Iroquois county, Illinois. The cow was worth $30; did not see the cow when she received the injury; the cow was running out at the time upon the commons; the cow appeared to have been struck by a train going west, just east of where a fence crossed the track north and south; there was a culvert across the road there; there were some marks on the track, some hair on the culvert, which looked like she had been hit on the outside and knocked inside; there was no public road crossing where the cow was killed; there was one one-half or three-quarters of a mile east of where she was killed; there were no cattle guards at the crossing on the sides of the public road; the railroad was not fenced between the place where the cow was killed and the road crossing east; there was nothing to prevent cattle, horses, sheep and hogs from getting on the track; it was necessary to fence it; there was no town, city or village where she was killed; Sheldon was the nearest; there was a settlement close all around on both sides of the track; he saw the cow the next day after she was injured; she lay twenty or thirty feet inside of the field, by the side of the track, on the south side.

Michael Netterville testified, that he saw a lot of cattle feeding around on both sides of the track, outside of the field, before he went to dinner; a train went west; when he came back, he saw a cow lying on the inside of the field, on the south side; she appeared to have been knocked off from the outside into the field; was section boss for the railroad company; could'nt tell exactly when the cow was killed; it was some time last fall; might have been October; recollects the circumstances; did not know whose cow she was; the road was not fenced east of the field; a fence was necessary; there was no road crossing there.

Geo. Enslen testified: I was last summer and fall in the employ of the Toledo, Peoria and Warsaw Railway Company; some time in October last was on a train going west,

on the company's railroad; I was riding with the engineer, on the engine; it was on engine twenty-two; about two miles west of Sheldon, we struck a cow, and knocked her inside of a field; she was just coming up on the track to cross over when the engine struck her; I just got sight of her as the engine struck her; I remember the engineer laughed at the time, and said to me, "I knocked her clean inside of the field;" we were running pretty fast at the time; east of that field there is no fence for over two miles; cattle can get on the road anywhere along there; no city, town or village there, and no road crossing; I know plaintiff; he is a farmer, and lives a little way east and north of the railroad; the railroad has been in operation for eight or nine years.

The above was all the evidence offered in the case.

Messrs. Bryan & Cochran, for the appellants.

Messrs. Blades & Kay, for the appellee.

Mr. Justice Thornton delivered the opinion of the Court:

The only error assigned in this case is, that the evidence does not connect appellants with the injury.

The railway company was sued for killing the cow of appellee.

From the evidence in the record, there can not be even a reasonable doubt that the cow was killed by the train of appellants. Such is the fair, if not necessary, inference.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Syllabus.

ASAHEL GAGE

v.

E. L. CHAPMAN *et al.*

1. APPEAL — *at what stage of a cause it will lie.* An appeal does not lie from an order of court overruling a demurrer merely, and where such an appeal has been improvidently granted, and the appeal perfected, the court may treat it as a nullity, and still go on and render a final decree in the cause.

2. CLOUD UPON TITLE — *arising upon a sale for taxes — jurisdiction in chancery.* In the case of a tax certificate, issued upon an illegal sale of land for taxes, a court of equity will take jurisdiction to annul the sale, and cancel the tax certificate, and thus remove a cloud upon the title of the land.

3. PARTIES — *joinder of parties in chancery.* Where the several owners of certain lots of ground, on which special assessments had been illegally levied, and the lots severally sold therefor, and certificates issued to the purchaser, joined in a bill in chancery, the certificates of purchase being all held by the same person, to annul the several judgments against the lots, and vacate the sales made in pursuance thereof, and compel the surrender of the certificates of purchase, for the reason that they were clouds upon the titles of the complainants, it was *held*, although the complainants had a several, and not a joint, interest in the lots sold, and each one might have filed his separate bill, yet having one common interest touching the matter of the bill, and one common ground of relief, and the tax sales all sought to be impeached upon one and the same ground of invalidity, there could be no objection to the complainants uniting in one suit.

4. COSTS — *in chancery.* In a suit in chancery, wherein it was sought to annul certain judgments for special assessments, levied by the town of Hyde Park, because the assessments were illegal, and to vacate the sales made in pursuance thereof, and compel the surrender of the certificates of purchase, the purchaser at the tax sales, the assignee of the certificate of purchase and the town of Hyde Park being made defendants; upon the bill being taken as confessed against the two latter, and dismissed as to the former, upon his disclaimer, the court entered a decree as prayed by the bill, and also decreed that the holder of certificates pay the costs; upon appeal to this court, no reason was perceived to interfere with the discretion of the court below in awarding costs.

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

This was a bill in chancery to annul certain judgments for special assessments, and to vacate the sales made in pursuance thereof, and compel the surrender of the certificates of purchase, for the reason that they were clouds upon the respective titles of the complainants.

It is claimed the assessments were illegal, and the proceedings thereunder void, for the reason that they were made, as alleged in the bill, on the several lots by the town of Hyde Park for local improvements in said town, each of the lots respectively being assessed as and for the amount which the whole of each lot was deemed benefited by the improvements; when, in fact, the several lots were, either in whole or in part, without the limits of said town and within the limits of the city of Chicago.

Mr. EDWARD ROBY, for the appellant.

Messrs. WILSON, MARTIN & MONTGOMERY, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in equity, filed to annul certain judgments for special assessments, and vacate the sales made in pursuance thereof, and compel the surrender of the certificates of purchase, for the reason that they were clouds upon the title of appellees.

The bill alleges that, in a certain subdivision, E. L. Chapman, one of the plaintiffs, is the absolute owner in fee simple, and in possession of sub-lots one and two.

Samuel Pike, another plaintiff, is the absolute owner and in possession of sub-lot three and part of lot four.

Mary Ann Pike, another plaintiff, is the absolute owner in fee simple of the other part of sub-lot four.

And Benjamin S. Halsey, another plaintiff, is the absolute owner in fee simple, and in possession of sub-lot six. Sub-lots one and two are wholly in the city of Chicago, and the boundary line between Chicago and the town of Hyde Park cuts the other sub-lots in halves, so that about one-half of each is in Chicago and the other half in Hyde Park.

This subdivision was made May 1, 1867, and was a re-subdivision of lots five, six and seven of block five in Cleaverville; which lots were cut by the town line so that part of each was in Hyde Park and the other part in Chicago.

In the fall of 1867, said original lot five was assessed, by the authorities of the town of Hyde Park, for a public improvement; said original lots six and seven were severally charged with four Hyde Park special assessments. Upon all which such proceedings were had, that several judgments were rendered against the lots severally, for the several special assessments, and the lots or fractions thereof were severally sold therefor, and the certificates were issued to the purchaser, who, it is alleged, has assigned them to the appellant. Each of the assessments purported to be made upon real estate in said town of Hyde Park. But they, inadvertently, included lots five, six and seven, in block five, in Cleaverville, part of which lots were within and part without the town of Hyde Park. The assessment being upon said lots respectively, as and for the amount which the whole of each lot was deemed benefited, and not as or for the benefits to any part or parts less than the whole of each of said lots respectively.

The improvements for which the special assessments were made are all within the town of Hyde Park, and without the city of Chicago.

The complainants have frequently demanded the surrender of the certificates, and offered to pay appellant their first cost, but refuse to pay him any thing more; and he claims the right to one hundred per cent, etc.

The town of Hyde Park and the original purchaser are also made defendants.

To this bill appellant demurred for want of equity; the demurrer was overruled, and appeal therefrom prayed, allowed, and perfected at the December term.

Afterward, at the July term, appellant refusing to answer further, the court took the bill for confessed against him, and against the town of Hyde Park, which was defaulted, and dismissed the bill as against the original purchaser upon his disclaimer, and thereupon entered a decree as prayed, decreeing also that the costs of the suit be paid by said Asahel Gage, from which final decree Gage appealed.

The errors assigned are:

Overruling appellant's demurrer.

Proceeding in the cause after appeal had been perfected, from the judgment overruling the demurrer.

Entering a decree in manner and form appearing in the record.

Ordering the costs of the suit to be paid by appellant.

In the recent case of *Gage* v. *Rohrback*, *ante*, p. 262, it was decided by this court that, under our practice, an appeal does not lie from an order of court overruling a demurrer; and that where such an appeal has been improvidently granted and the appeal perfected, the court may treat it as a nullity, and still go on and render a final decree in the cause; and it was also decided, that, in the case of a tax certificate issued upon an illegal sale of land for taxes, a court of equity would take jurisdiction to annul the sale and cancel the tax certificate, and thus remove a cloud upon the title of the land; and we dismiss the consideration of those points which have been here raised by a reference to that decision, and *Reed* v. *Tyler*, *ante*, p. 288.

The objection of multifariousness or misjoinder of plaintiffs, we do not regard as well taken to the bill.

Although the plaintiffs have a several and not a joint interest in the lots sold for the assessments, they have one common interest touching the matter of the bill, and one common ground of relief. Each one of the plaintiffs might file his separate bill, but, as all the tax sales are sought to be im-

peached upon one and the same ground of invalidity, no valid objection is perceived to the plaintiffs uniting in one suit. We do not see that it would be productive of any inconvenience, and it tends to prevent a multiplicity of suits, and avoid unnecessary expenses, and we think it warranted by the rules of chancery practice. Story's Eq. Pl., §§ 285, 533, 539.

It is quite clear that the town of Hyde Park had no lawful authority to assess and sell any lands outside of its territorial limits, for the purpose of constructing public improvements within its own bounds.

The facts stated in the complainants' bill are sufficient to entitle them to the relief asked for and granted by the court below.

We see no reason to interfere with the discretion of that court in awarding costs.

The decree of the superior court is affirmed.

Decree affirmed.

FREDERICK N. HAMLIN

v.

JOSEPH H. MARTIN.

EXCESSIVE DAMAGES—*for an unlawful arrest and imprisonment.* A private person procured the arrest of a party on a charge of larceny. The arrest was made about noon, and the prisoner was kept in confinement until about eight o'clock the same day, when he was released on bail. Several days afterward he was examined before a magistrate and dis charged. In an action by the accused, against the party procuring his arrest, for an alleged unlawful arrest and imprisonment, it was shown by the proof that the defendant fully believed the plaintiff was guilty, and had some strong circumstantial grounds for so believing, and caused the arrest in entire good faith: *Held*, a verdict for the plaintiff for $2,000 was altogether unreasonable and excessive, and for that cause the judgment was reversed.

APPEAL from the Superior Court of Chicago; the Hon. WM. A. PORTER, Judge, presiding.

The opinion states the case.

Messrs. HIGGINS, SWETT & QUIGG, for the appellant.

Mr. ROBERT HERVEY and Mr. GEORGE A. MEECH, for the appellee.

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

This was an action of trespass, to recover damages for an unlawful arrest and imprisonment on a charge of larceny. The plaintiff was arrested by a policeman, under the direction of defendant, about noon, and kept in confinement until about eight o'clock, when he was released on bail. Several days afterward he was examined before a magistrate and discharged.

The defendant pleaded only the general issue. On this issue the plaintiff was, of course, entitled to a verdict, but the damages which the jury gave, namely, $2,000, we are constrained to say are altogether unreasonable and excessive. As we send the case before another jury, we forbear from commenting, in detail, upon the evidence, and will only say, it clearly shows, however innocent the plaintiff may in fact have been, the defendant fully believed he was guilty, and had some strong circumstantial grounds for so believing, and caused his arrest in entire good faith. There is no pretense for saying he was actuated by any malicious motive, though he may have acted hastily. To hold that a person who causes another to be arrested, under the full and not unreasonable belief that he has committed a crime, is to be held liable to several thousand dollars damages if he fails to sustain the prosecution, when he has acted throughout in good faith, and with no malice, would

be to establish a rule rendering it so perilous to prosecute, that the community would often think it better to submit quietly to crime than to undertake to punish the criminal. The judgment is reversed and the cause remanded.

Judgment reversed.

ANDREW J. BROWN

HARVEY B. HURD *et al.*

1. CHANCERY—*new trial at law.* To entitle a party to apply to a court of chancery for a new trial at law, it must appear that the judgment against which the relief is sought was the result of accident, mistake, or fraud.

2. In an action at law against several partners, one of the defendants escaped liability upon his denial of having given authority to the other partners to execute the note in respect to which the suit was brought, in the name of the firm, and judgment was rendered accordingly. Afterward the act of 1867 was passed, making parties to suits competent witnesses, whereupon the plaintiff exhibited his bill in chancery, asking a new trial in the suit at law, alleging that, since the act removing the common law disabilities of parties as witnesses, he could prove, by the other partners, that such authority was given, and thereby establish the liability of all the partners. But the relief was denied, it being regarded like any other case where the party was unable to establish his cause of action by competent testimony.

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

This was a bill in chancery filed by Brown against Hurd, Dunlop and Wright, for a new trial in an action at law. The bill was dismissed in the court below on a demurrer by Hurd. The complainant appeals.

Mr. ANDREW J. BROWN and Mr. W. T. BURGESS, for the appellant.

Mr. H. B. HURD, *pro se.*

Mr. JUSTICE WALKER delivered the opinion of the Court:

It is with reluctance that we feel compelled to affirm the decree of the court below in this case. And on the record as now presented, we should feel inclined to grant the relief if admissible under the well recognized rules of law. But to entitle a party to a decree for a new trial at law, it must appear that there was accident, mistake or fraud in obtaining it. In this case there was no mistake of the parties, no accident that prevented appellant from proving his case. Nor is there any fraud on the part of Hurd, that authorizes a court of chancery to interpose its powers, to grant relief. It is charged that Hurd was liable as one of three partners for the payment of a debt to a bank, and that he authorized the other two partners to execute a note in the name of the firm to appellant for the purpose of raising the necessary means for its payment, and thus procured appellant to indorse the note, and the money was thus raised and the debt paid; that appellant was compelled to take up the note, which has never been paid him, and Hurd has escaped liability because his firm had been dissolved, and he denied giving authority to his former partners to sign the name of the firm.

When the case was previously and lastly before this court, it was *held*, that the partners of Hurd, who were jointly liable with him for the debt, were not competent witnesses to prove the authority given by Hurd to use the firm name to the note. 41 Ill. 121. It is, however, insisted, that as the general assembly has since removed the common law disability of witnesses and permits parties to the record to testify, Hurd's liability can be proved by his former partners, and for that reason a new trial should be decreed under this bill. If this relief were granted,

it would lead to great confusion, and more injury than benefit, as parties would apply for and obtain new trials, in many, if not in a majority of cases, that have been tried within the last five years and before the passage of the act of 1867, which renders parties competent witnesses; thus overturning sales made under such judgments and unsettling many titles obtained under sales upon such judgments.

This case is like any other in which the party has no evidence, or, if he has, the fact is unknown to him at the trial. Such has not, so far as we are aware, ever been held to be a ground for chancery to grant a new trial. It is the misfortune of a party, much to be regretted, but which can not be relieved against. Judgments must have more stability and binding effect than to be set aside merely because of newly discovered evidence, years after they have been rendered. However much we may regret that we must refuse to reverse this decree, we, nevertheless, feel compelled to act otherwise. The decree of the court below is affirmed.

Decree affirmed.

The Western Union Telegraph Company

v.

James M. Quinn *et al.*

Comparative negligence. In an action against a telegraph company for the loss of the plaintiff's horse and wagon, occasioned by the alleged negligence of the defendants' servants, while engaged in repairing a telegraph line on one of the streets in the city of Chicago, in so handling a broken wire as to strike the horse, thereby frightening him and causing him to run, resulting in his death, it appeared the driver had left the horse, attached to a wagon, standing loose in the street, and, if the accident was attributable to the cause alleged, the negligence of the driver, in failing to secure the horse properly, or have him under his control, was so much greater than that of the defendants, that there could be no recovery.

Appeal from the Circuit Court of Cook County; the Hon. Erastus S. Williams, Judge, presiding.

The opinion states the case.

Messrs. Dent & Black, for the appellants.

Mr. Thomas Shirley, for the appellees.

Mr. Justice Breese delivered the opinion of the Court:

This was an action on the case, in the Cook circuit court, to recover damages against the Western Union Telegraph Company, for the loss of a horse and wagon belonging to the plaintiffs, occasioned by the negligence of the defendants in so handling a broken telegraph wire, as to strike the horse, thereby frightening him and causing him to run, resulting in his death.

The jury found for the plaintiffs, and the court rendered a judgment on the verdict, to reverse which the defendants appeal, assigning the common errors.

We have directed our attention to one only of the points made by appellants, that being decisive of the case, and that is, the negligence of the appellees; the question arising thereon being, was their negligence in leaving the horse, attached to the wagon, loose in a public, busy street of Chicago, so much less than that of appellants, as to entitle them to a verdict.

The doctrine of comparative negligence is the doctrine of this court, and is now well understood. The inquiry must first be, in this case, were the appellants guilty of negligence in repairing the wire.

The evidence fails to show any negligence. Due care and circumspection were used by the workmen engaged in the repair. The preponderance of the evidence is, that no wire was cut or broken by the workmen so engaged, which, by falling and striking the horse, caused him to start and run.

But, if the fact was, such an accident did occur, the workmen using all proper care, it is very clear if the horse had been secured or under the control of his driver, no injury could have been caused by it. The driver left him loose in the street, and by so doing was guilty of great negligence.

It may be said it is not possible to hitch a horse attached to a wagon when it is backed up to the curb-stone to receive its load; that the head of the horse must be in the street, where it would be impracticable to provide hitching posts. This may be so, but the care of the driver can always be given to the animal, and, when danger is near, such care should not be withheld. It is in proof the owners of this property saw what was going on by the workmen of appellants, and that their property was more or less exposed to danger. It was their duty, then, to have removed the horse and wagon, or so have secured them that the rattling or falling of a telegraph wire could have produced no injury.

The proof seems to us to establish great negligence on the part of appellees — so great as to preclude them from recovery.

The judgment of the court below is reversed, and the cause remanded in order that a new trial may be had.

Judgment reversed.

MICHAEL BYRNE

v.

THE ÆTNA INSURANCE COMPANY.

1. PLEADING — *variance.* Although an instrument sued on may be misdescribed in some of the counts in the declaration, in respect to the date of the instrument, yet if it is correctly described in any one count, it is admissible in evidence under that count.

Syllabus.

2. SAME — *variance as to description of a party to the instrument.* Where a count described the instrument sued on as having been executed to "the Ætna Insurance Company," and the instrument was in fact given to "the Ætna Insurance Company, of Hartford:" *Held*, there was no variance in respect to the name of the insurance company, the words "of Hartford" being regarded as simply designating the principal place of business of the corporation.

3. DEMAND — *whether necessary.* In an action against the surety in a bond, conditioned that the principal, who was about being employed as the agent of an insurance company, should faithfully perform all and singular the duties of said agency, it was *held*, a demand was not necessary, in order to create a liability on the part of the surety. The bond did not, in terms, provide for a demand, and, as a general rule, the bringing of the suit is a sufficient demand.

4. SURETY — *extent of his liability.* A bond was given to the Ætna Insurance Company, conditioned, "that whereas the above named E. B. Mason having been appointed agent of the Ætna Insurance Company, in the city of La Salle, county of La Salle, and State of Illinois, who will receive as such agent sums of money for premiums, payment of losses, salvages, collections or otherwise, for goods, chattels, and other property, for said Ætna Insurance Company, and being bound to keep true and correct account of the same, and make regular reports of the business transacted by him to the said Ætna Insurance Company, and in every way faithfully perform the duties as agent, in compliance with the instructions of the company through its proper officers; and at the end of the agency, by any cause whatever, deliver up to the authorized agent of the said company, all its moneys, books and property due or in possession: now if said agent shall faithfully perform all and singular the duties of said agency, then this obligation shall be null and void, otherwise to remain in full force and virtue:" *Held*, the liability of the surety on such bond was limited to the premiums received by the agent, less his usual commission; his liability could not be enlarged, so as to embrace a premium, which he had not received, but for which he had improperly given credit to a party getting insurance.

APPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

This was an action of debt, brought in the court below by the Ætna Insurance Company against Michael Byrne, as surety upon the following bond:

Statement of the case.

"Know all men by these presents, that we, E. B. Mason, as principal, and M. Byrne and W. T. Mason, as sureties, all of La Salle county, and State of Illinois, are individually and separately held and firmly bound unto the Ætna Insurance Company, of Hartford, each in the sum of $1,000, lawful money of the United States, to be paid unto the said Ætna Insurance Company or their attorney, agent or legal representatives; which payment, well and truly to be made, we each respectively and individually bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this day of January, one thousand eight hundred and sixty-four.

"The condition of this obligation is such, that whereas, the above named E. B. Mason, having been appointed agent of the Ætna Insurance Company, in the city of La Salle, county of La Salle, and State of Illinois, who will receive, as such agent, sums of money for premiums, payment of losses, salvages, collections or otherwise, for goods, chattels and other property, for the said Ætna Insurance Company, and being bound to keep true and correct account of the same, and make regular reports of the business transacted by him to the said Ætna Insurance Company, and in every way faithfully perform the duties as agent, in compliance with the instructions of the company through its proper officers; and at the end of the agency, by any cause whatever, deliver up to the authorized agent of the said company all its moneys, books and property due or in possession: Now, if said agent shall faithfully perform all and singular the duties of said agency, then this obligation shall be null and void; otherwise, to remain in full force and virtue.

E. B. MASON, [L. S.]
M. BYRNE, [L. S.]
W. T. MASON, [L. S.]"

One count in the declaration sets out the bond *in hæc verba.*

In another it is averred that Mason continued as agent from January 30, 1864, until May 20, 1868; that he received money for plaintiff, and that he did not deliver up and pay over the moneys due from him on balance of accounts when requested, and that the same remains unpaid. Third count of declaration avers that January 30, 1864, Mason was employed by plaintiff as agent; that it demanded security of him, and that defendant executed a bond of that date, with conditions substantially the same as above. The breach alleged is, that Mason did not pay over to plaintiff the amount due from him on balance of account.

On the trial, *James S. Gadsden*, the State agent of the company, testified: that the returns from Mason showed a balance due the company, not allowing commissions, of $809.76. The usual commission allowed to agents was fifteen per cent on premiums received.

Defendant called *John Garity* as a witness, who testified in substance: I had a policy in plaintiff's company; I had been carrying insurance on $3,200, the premium being $112. Mason was in the habit of renewing my policies when they expired without saying any thing to me about it. My policy in plaintiff's company expired 19th of March, 1868, when Mason brought me my bill for renewal of my policy. I told him I did not wish to carry so much insurance; gave him $50, and told him that was all I wanted to carry. If I had paid him for a full policy it would have cost me $62 more. Mason said, never mind, let it stand as it was at present; and he would arrange it; but he never did so. Mr. Holbrook, the general agent of the plaintiff, came to me and told me not to pay any more money to Mason. I told him I did not intend to; and I did not. This was about the time the agency was taken away from Mason.

The jury assessed the damages of the plaintiff at $803.30, and judgment was rendered accordingly. The defendant appealed, and assigns as one of the grounds of error that the verdict was for too large a sum.

The grounds of other assignments of error are set forth in the opinion of the court.

Messrs. BULL and FOLLETT, for the appellant.

Mr. WASHINGTON BUSHNELL and Mr. J. C. CHAMPLIN, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of debt, brought by the appellee against the appellant, as one of the several makers of a bond to the appellee to secure the faithful performance of the duties of one E. B. Mason, agent of the appellee at the city of La Salle.

The declaration contains several counts, in one of which the obligation is set out *in hæc verba*. The appellant filed the several pleas of *nil debet*, *non est factum*, and *nul tiel corporation*, on which issues were joined, and also seven other pleas, to all of which a demurrer was sustained.

A trial was had in the circuit court, which resulted in a verdict for the appellee for the debt named in the obligation, and the sum of $803.30 damages. The appellant brings the cause to this court, and suggests, on the assignment of errors, four grounds on which he seeks a reversal of the judgment: 1st. That there is a variance between the bond declared on and the one adduced in evidence. 2d. That the verdict is for too much. 3d. That no demand was made for the balance due, before the suit was instituted. 4th. That the instructions given at the instance of the appellee were erroneous.

It is objected, that it is averred in the declaration that the bond on which the action was brought was dated "the 30th day of January, 1864," and that the one adduced in evidence bears date "the day of January, 1864," and, therefore, that there was a variance between the declaration and the proof offered. This objection might have been available to some of the counts in the declaration, but it certainly was not

tenable when the bond was offered under the second count. In that count, the bond upon which the action was brought was set out literally, and when the copy offered in evidence is inspected it is found to correspond exactly.

The second objection to the admission of the bond as evidence is equally untenable. We are unable to perceive any difference in the name of the appellee as used in bringing the suit, and the name as used in the bond. The words "of Hartford," following the corporate name of the appellee in the bond, may be regarded as simply designating the principal place of business of the corporation. There was, therefore, no variance between the declaration and the bond offered in evidence.

No demand was necessary before bringing the suit. The bond does not, in express terms, provide for a demand, to create the liability. The liability becomes fixed on a breach of the conditions. No reason is perceived for making a distinction between this and other writings obligatory. As a general rule, the bringing of the suit is a sufficient demand, and we can see nothing in this case to require the application of a different rule.

We think the second and fourth suggestions of error are well founded.

The verdict includes the whole amount received and in the hands of Mason, less $6.45. The verdict also includes the sum of $62, the balance of an unearned premium, never received by Mason. It is in proof that the agent of the appellee expressly forbade the assured to pay any more money to Mason. If this verdict includes the $62, and it certainly does, it is erroneous to that extent.

The undertaking of the appellant, as security for Mason, was only to the extent that he would faithfully account to the appellee for all that was properly due. The liability of the surety ought not to be enlarged on account of the *laches* of the agent. Only the amount of the premiums received, less the agent's usual commissions, was properly due to the appellee. The surety on the bond may be presumed to have contracted

in view of that fact. If the commissions are not allowed, the appellant's liability is enlarged by some unfaithfulness of the principal, to that extent. This can not be done.

The instructions were, therefore, erroneous, in not telling the jury that the appellant was only liable on the bond for the total amount of premiums received by Mason in his capacity of agent for the appellee, less the usual commissions to the agent.

It was error in the court to refuse to award a new trial, and the judgment must be reversed and the cause remanded.

Judgment reversed.

THE CITY OF CHICAGO

v.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* HIRAM NORTON *et al.*

1. MANDAMUS *against a city to pay — effect of stipulation.* In a proceeding by mandamus to compel a city to pay a claim alleged to be due to the relator, a peremptory writ was awarded, requiring the city to pay the claim. It was objected that the command should have been to levy a tax to pay the claim, not a peremptory order to pay. But the parties had stipulated that if, upon a decision of the cause, the court should be of opinion the relator was entitled to any relief against the city, by any remedy, then a peremptory writ might issue for the sum claimed, the writ to be in such form as the court might think proper, and this obviated the objection taken.

2. SPECIAL ASSESSMENTS IN CHICAGO — *of a new assessment.* Where the proceeds of a special assessment, levied for the purpose of constructing public improvements in the city of Chicago, become insufficient for the purpose indicated, by reason of the failure of the city to collect the amount assessed upon particular property, there can be no new assessment upon the other property embraced in the original assessment, which is not delinquent, to supply such deficiency — not under section 36 of chapter 7 of the city charter, because that section confines the new assessment to delinquent property.

3. Nor under the 35th section of the same chapter, because the commissioners of the board of public works and the common council, the tribunal appointed by the city charter to determine in the first instance what proportion of the cost of the contemplated improvement should be assessed, in the way of special benefits, upon each piece of property, having acted, and the property owners acquiesced and paid the amount, the same tribunal can not be allowed to review their own action for the purpose of supplying such deficiency.

4. CONTRACTS *with a city — where the specific mode of payment can not be made available.* An individual entered into a contract with the city of Chicago, to execute certain public improvements, in the way of curbing, filling and macadamizing a street, the city agreeing to pay for the same when the work was completed and accepted, and when the special assessment, levied or to be levied for the same, should be collected. A part of the assessment could not be collected, for the reason that the city had, by contract with the owner of the property upon which it was levied, expressly exempted it from such assessments, and the assessment was, therefore, to that extent void: *Held*, the condition of the contract to pay when the assessment should be collected being impossible and void, the promise, to that extent, was single and absolute, and the contractor having no notice of such void assessment at the time he assented to such condition, would have his remedy against the city to recover what he would have been entitled to had the entire assessment been valid.

5. If a person promise to pay a sum of money when he shall collect his demands of another, then, if it appear that he had no demands, or if he have, and fail to use due diligence to collect them, in either case the promise may be enforced as absolute.

6. SAME — *effect of certain provisions of the charter of the city of Chicago.* Section 17 of chapter 6 of the charter provides, that "any persons taking any contracts with the city, and who agree to be paid from special assessments, shall have no claim or lien upon the city in any event, except from the collections of the special assessments made for the work contracted for." But this does not preclude the courts from determining the legal effect of a contract to be, that where the city has no such assessments as it purports to have, the party is to be deemed as not so agreeing.

7. Nor does the construction, that the contractor does not agree to be paid out of assessments which can not be collected, operate to render the contract void, under a clause of the same section, which declares that "no work to be paid for by a special assessment shall be let, except to a contractor who will so agree." That clause is merely directory.

8. INTEREST — *against a municipal corporation.* A municipal corporation is not liable to pay interest, except by express agreement so to do.

9. SAME — *what amounts to an agreement to pay interest.* Where a person took a contract to do certain work for a city, and to be paid therefor from special assessments, an agreement by the city, that the contractor should receive the damages which the city might collect of the property owners in respect of such assessments, is not equivalent to an agreement to pay interest.

APPEAL from the Superior Court of Chicago.

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

Mr. M. F. TULEY, for the appellant.

Messrs. BACON & NORTON, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This case arises upon demurrer to the return of appellant to an alternative writ of *mandamus*, awarded to compel the payment to relators of a claim of $4,728.68, alleged to be a balance due them as assignees of George W. Travers & Co., upon estimates issued to the latter for work done under a contract, for curbing, filling and macadamizing Chicago avenue.

The demurrer was sustained and a peremptory writ ordered against appellant, requiring it forthwith to pay, or cause to be paid, to relators the principal sum of $3,915.38, with interest at the rate of six per cent per annum on the several estimates comprising said principal sum from the respective dates of the same, amounting to $557.41, making a total amount of $4,072.79.

From which judgment an appeal was taken to this court, and the points made for reversal are: 1st. That under the contract between appellant and Travers & Co., the city was not liable for the principal sum. 2d. That interest was improperly allowed. 3d. If the city is liable, the order should have been that it proceed to levy a tax to pay the amount due, instead of a peremptory order to pay.

Before the hearing below, a stipulation between the parties was made by their respective attorneys, and filed, to the effect, that if upon the decision of the cause the court should be of opinion that in any form of action, *ex contractu* or *ex delicto*, in law or equity, the relators or George W. Travers & Co., either in their own names, or in their names to relators' use, would be entitled to recover any sum of money or have any relief of or from the respondent, then a peremptory writ of *mandamus* might issue for said amount; said writ to be in such form as the court might judge proper, waiving all objections for want or misjoinder of parties.

This stipulation, being binding upon the parties, relieves this court from all consideration of the third point made by appellant's counsel; consequently, the first and second alone will be discussed.

First, then, under any view of the matters disclosed by the record, by the allegations of the writ not traversed, and the facts stated in the return, which must, so far as well pleaded, be taken as true, would appellant be liable in any form of action at law, or proceeding in equity?

By the facts so admitted and stated, it appears that the ordinance ordering the improvement and the levy of the assessment, was passed May 3, 1867, by which the sum of $82,563.43 was directed to be assessed upon real estate deemed specially benefited by the improvement, in proportion, as nearly as might be, to the benefits resulting thereto, and $21,048.45 be chargeable to the city at large. On the 10th of June, 1867, the assessment roll was completed, and on the 17th of the same month, the assessment was confirmed by the council, and the warrant issued on the 29th; that of the above sum assessed upon property deemed benefited, the sum of $4,965.80 was assessed upon the right of way and property of the North Chicago Railway Company, as the amount of special benefits resulting to that corporation; that before Travers & Co. entered into the contract in question, one-half of the amount of the assessment upon property deemed specially benefited had been

paid into the city treasury. On the 14th day of August, 1867, the contract was made between appellant and Travers & Co. by which the latter undertook to do the work, the details of which it is needless to state, only that the appellant agreed to pay them when the contract should be wholly completed by Travers & Co., when the work should be accepted by the board of public works, and *when* the special assessments, levied or to be levied, should be collected.

It is admitted, that the work was completed by Travers & Co., according to contract, and accepted by the board, the estimates issued and assigned to the relators. But it also appears, that appellant failed to collect any of the sum assessed upon the property of the railway company, and failed to obtain a judgment for it, because the railway company was wholly exempt from any such levy; that subsequently appellant attempted to levy a new assessment for the deficiency, but failed to obtain judgment, by reason, as it is alleged in the alternative writ, of its gross negligence and want of diligence in that behalf. The allegations of negligence are specifically denied by the return. This traverse we think is sufficient to raise an issue of fact as to the negligence in regard to the new assessment, and precludes the relators from basing any ground of recovery or relief upon it.

Under the facts disclosed, appellant had no legal authority to levy a new assessment upon property other than that of the railway company, upon which its due proportion of benefits had already been assessed, and paid — not under the thirty-sixth section of chapter 7, because that section confines the new assessment to a particular class of property, viz.: delinquent property; and if the other property had been assessed its proportion, and paid it, there was no delinquency. This is conceded by appellant's counsel; but he insists that it could be levied under the thirty-fifth section of same chapter, which declares: "If, in any case, the first assessment prove insufficient, the board of public works shall make a second, in the same manner, and so on,

until sufficient moneys shall have been realized to pay for such public improvement."

It has been decided by this court that the source of the power to make special assessments for benefits in such cases, is the right of eminent domain; that, under the constitution, it can be exercised only by making compensation; that this compensation may be either in money or benefits. *City of Chicago* v. *Larned*, 34 Ill. 203. As to the last proposition, the court, as then composed, as appears by the opinion in the case, did not wholly concur, nor, if it were a new question, would the court, as now composed, wholly concur in it. The ruling principle recognized in that case, and others in this State, is, that, as assessments are in the ratio of advantages or benefits, they are lawful; that they are an equivalent for the increased value the property derives from the improvement. The charter of the city designates the commissioners of the board of public works, and the common council, as constituting the tribunal to determine these questions, in the first instance. They have acted; the determination has been made, property owners have acquiesced in it and paid the amount, and if the matter has not technically passed *in rem judicatum*, it would still be as much against the established principles of justice to allow it to be overhauled by the commissioners and council, as if it had been a case decided by a court of the highest original jurisdiction in the State.

It follows, from these views, that if appellant can be made liable absolutely, to the extent of this deficiency (and that constitutes the balance claimed as due), the liability must be placed upon other grounds than negligence in making a new assessment.

By the act of the general assembly creating the railway company in question, that body was authorized to use the streets only by permission of the common council, and then in such manner and upon such terms and conditions, and with such rights and privileges, as the council might, by contract with the railway company, prescribe. Under this authority,

a contract was made, long before any of the proceedings to improve Chicago avenue, by which the railway company was wholly exempted from such an assessment. The fact of the existence of this contract was peculiarly within the knowledge of appellant; but as it was not a public act, Travers & Co. are not chargeable with notice of it, and the return does not profess to assert any. The *effect* of the contract was matter of law. If both parties were chargeable with notice of its existence, no mistake as to its effect, whether mutual or unilateral, would afford any ground for relief in equity. But if Travers & Co. entered into the contract to do the work, in ignorance of the dealings between appellant and the railway company, and upon the supposition that the assessment upon the property of the railway company was valid, as it would have been but for the act of appellant exempting it, and were induced to agree to accept the agreement of appellant to pay *when* that assessment was collected, then the mistake would be one of fact on their part, which would operate as a surprise, and equity would relieve, if they had taken the proper steps to disaffirm the contract, which it seems they did not do.

But there is still another ground upon which appellant would be liable absolutely. The property of the railway company being exempt by the act of appellant, the assessment upon it was invalid. The city had no lien upon it; the amount was never due. The condition of the contract to pay when that assessment was collected was impossible and void, and the promise, to that extent, was single and absolute. That was the principle upon which the case of *Maher* v. *The City of Chicago*, 38 Ill. 266, was decided, only this is a stronger case. There, the assessment was void because of a want of power in the appellant to make the improvements by special assessment. Here, it had the power, but was disabled from exercising it by its own act.

If a person promise to pay a sum of money *when* he shall collect his demands of another, then if it appear that he had no demands, or if he have and fail to use due diligence to collect

them, in either case the promise may be enforced as absolute. *White* v. *Snell*, 5 Pick. 425; S. C., 9 id. 16.

The counsel for appellant relies upon the provision of section 17, chapter 6 of charter: "Any persons taking any contracts with the city, and who agree to be paid from special assessments, shall have no claim or lien upon the city in any event, except from the collections of the special assessments made for the work contracted for."

This provision was not intended to preclude the courts from determining the legal effect of the contract, and the difficulty with the counsel's position is, that where the city has no such assessment as it purports to have, the party is to be deemed as not so agreeing. The condition is void, and the promise single. But it may be said that, if the contractor does not so agree, then his contract is void by the last clause of the section, viz.: "and no work to be paid for by a special assessment shall be let, except to a contractor or contractors who will so agree."

Here the contract is not declared void for want of compliance; no penalty is imposed, nor is the power affected. The clause is merely directory.

The second and last point questions the decision of the court below, in allowing interest upon estimates from the respective dates of their issue.

This was error. There is no express agreement on the part of appellant to pay interest. In such case, appellant, being a municipal corporation, is not liable to pay interest. *City of Pekin* v. *Reynolds*, 31 Ill. 530. The clause of the contract providing that the contractors should receive the damages which the city might collect of the property owners, to a certain extent, is not equivalent to an agreement to pay interest.

For this error the judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus.

PETER MONSEN
v.
JONATHAN W. STEVENS.

1. FORCIBLE DETAINER — *by whom the action may be brought.* Under the act of 1861, extending the remedy by forcible detainer to all cases between vendor and vendee, where the latter has obtained the possession of land under a contract, and before obtaining a deed, fails or refuses to comply with the contract, the grantee or alienee of the vendor, being "entitled to the possession," may maintain the action.

2. VENDOR AND PURCHASER — *want of title in the former.* Where a vendor of land agreed to convey upon the making of certain deferred payments, the fact that in the mean time, prior to the full payment of the purchase money, the vendor had no title, and so declared, would not constitute a violation of the contract on his part, because he had until the time he agreed to convey in which to acquire the title.

3. So where a party who had sold land, afterward conveyed the same to a third person, and the latter brought an action of forcible detainer against the original vendee, he having gone into possession under his contract, and made default in payment, it is not competent for the defendant in such action to prove that his vendor had, at a time prior to that at which he had agreed to convey, declared his inability to make a conveyance as to a part of the premises.

4. SAME — *effect of a judgment in forcible detainer, on the rights of the vendee.* It is not necessary that a vendor of land should declare a forfeiture of the contract in order to the maintenance of an action of forcible detainer against the vendee, he having failed to comply with his contract; nor would a judgment in such action, against the vendee, enforce a forfeiture or work a rescission of the contract, but the vendee might still have a specific performance if equity was in his favor.

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

The opinion states the case.

Mr. R. L. DIVINE, for the appellant.

Mr. CHARLES KELLUM, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

On the 1st day of October, 1864, appellant purchased from Aaron K. Stiles, one hundred and twenty acres of land, and they entered into an agreement in writing, by which Stiles covenanted to convey the premises to appellant, in consideration of $200 cash, and the payment of $200 on the 1st of October, 1865, and $880, in seven annual payments, with interest at the rate of eight per cent per annum.

It was further agreed, that, in case of the failure to make either of the payments, the contract and all payments should be forfeited, and that Stiles should have the right of re-entry.

Appellant wholly failed in the performance of his covenants, and made only the first payment.

Stiles conveyed the lands to appellee, on the 27th day of September, 1867; and he commenced an action of forcible entry and detainer, in March, 1868.

A jury rendered a verdict against the defendant below, and a judgment was entered thereon.

This proceeding was instituted, under "An act to amend the statute in relation to forcible entry and detainer," approved February 20, 1861. (Session Laws 1861, 176.) The act of 1845, in relation to forcible entry and detainer, is extended by the act of 1861, to all cases between vendor and vendee, where the latter has obtained the possession of lands under a contract, and, before obtaining a deed of conveyance, fails or refuses to comply with the contract.

The grantee or alienee of the vendor had the right to commence proceedings. He was "entitled to the possession." *Dudley* v. *Lee*, 39 Ill. 339; *Ball* v. *Chadwick*, 46 id. 28.

The first objection urged is, that the court erred in excluding proof offered, that, in 1867, Stiles had declared his inability to convey forty acres of this land, and that the contract was only to apply to the eighty acres in controversy. By the terms of the contract no conveyance was to be made until there was full payment. The last payment would not have matured

until in October, 1872. The vendor and his grantee had, during the life of the contract, the right to acquire the title. Even upon a tender of the purchase money the vendee had no right to a conveyance at the time of the commencement of this suit. The whole purchase money was not due. The time for performance had not arrived. The vendor, therefore, was under no legal obligation to fulfill his covenants before the time fixed by the contract.

The contract to convey one hundred and twenty acres was an entirety; but appellant had no right to insist upon its performance prior to the time agreed upon. This would enable him to substitute a different time for the time mentioned in the written agreement, and thus the vendee might change the contract at pleasure.

Even such a declaration by Stiles would not have been a violation of the contract. He was not bound to have the title until a specified time. It is therefore absurd to say that there was a violation, when there was no present obligation.

Neither did the repudiation of the contract, as indicated, absolve appellant from prompt payment. Two payments had matured before the pretended renunciation of title on the part of the vendor. The failure to comply was on the part of the vendee.

But, concede that appellant had the right to regard the contract as rescinded, he did not exercise the right. If he had he should have surrendered possession, and thus this litigation might have been avoided.

Complaint is made of the following instruction given for plaintiff below:

"In this case, if the jury believe, from the evidence, that Stiles told the defendant he might have until the fall of A. D. 1867, in which to make the payments then due, this, of itself, was no legal extension of the contract or time of payment, and would not prevent Stiles or his grantee from declaring said contract forfeited, even before said fall of A. D. 1867, on the account of any payments that might then remain due thereon."

This instruction was wholly immaterial, and could not operate to the prejudice of appellant. The extension of time, if any was made, was only until the fall of 1867. The suit was not commenced until in March, 1868. The vendee was then in default, and had failed to comply. The giving of the instruction is no cause for reversal, as justice has been done by the verdict. There was no necessity for the vendor to declare a forfeiture. The judgment in this proceeding does not enforce a forfeiture, nor work a rescission of the contract. The vendee can enforce specific performance when out of, as well as when in, possession, if equity is in his favor. His equities are not prejudged by the result. *Dean* v. *Comstock*, 32 Ill. 175; *Wilburn* v. *Haines*, 53 id. 207.

The appellant has wholly failed to comply with his contract, and is wrongfully withholding the possession, after proper demand for possession by the party entitled thereto. He should be compelled to surrender.

The judgment must be affirmed.

Judgment affirmed.

JOSIAH D. DUNNING

v.

EDWARD H. PRICE.

LIMITATIONS — *contract in writing.* A plea of the statute of limitations of five years is not a good plea to a count in an action of assumpsit on a contract in writing, wherein the assignee of a judgment agrees to pay to the judgment creditor, his assignor, a certain sum in satisfaction of the interest of the latter therein, when a note to be given in settlement of the judgment shall be paid.

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

This was an action of assumpsit, brought by Price against Dunning. A trial by jury resulted in a verdict for the plaintiff, on which the court entered judgment. The defendant appealed, and assigns for error the sustaining of the plaintiff's demurrer to the plea of the statute of limitations; the giving of the following instruction for the plaintiff: "If the jury believe, from the evidence, that the note and mortgage mentioned in the contract produced in evidence were collected before this suit was commenced, then they will find for the plaintiff;" the refusal of the following instruction asked by the defendant: "If the jury believe, from the evidence, that the note and mortgage, sold by the defendant to the witness Beith, was the note and mortgage of Edgar and Jonah Keene, then the jury are instructed that they should find for the defendant;" and that the verdict was contrary to the law and the evidence.

Mr. J. D. DUNNING, the appellant, *pro se.*

Messrs. WHEATON & MCDOLE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of *assumpsit.* The declaration contains two special counts and the common counts.

One count is founded upon the following simple contract in writing, to wit:

"$268 Aurora, *Jan'y* 22*d*, 1858.

"Be it known that in May, 1856, Edward H. Price assigned to me a certain judgment against Jonah F. Keene, and whereas, said judgment is about to be settled by the note of David and Edgar Keene, secured by mortgage on lands in De Kalb County. This is therefore to certify that the portion of said judgment, now equitably belonging to said E. Price, is two hundred and sixty-eight dollars, which I promise to pay to him so soon as said

note shall be collected of said D. and E. Keene, with interest from date.

(Signed) J. D. DUNNING."

The plea of the statute of limitations that, the cause of action in each and every one of the counts did not, at any time within five years next before the commencement of the suit, accrue to the plaintiff, was therefore bad, and the demurrer to it was properly sustained.

The instruction for the plaintiff was properly given, and the one for the defendant properly refused. There was no evidence in the case that the note and mortgage sold by the defendant to the witness Beith, was the note and mortgage of Edgar and Jonah Keene. The plaintiff testified that the written contract sued on was for a note made by Jonah F. and Edgar or Edward Keene, which he assigned to the defendant and left with him for collection, but said nothing about what note and mortgage were assigned by the defendant to Beith.

Beith testified, that in the fall of 1858 defendant assigned to him a note, secured by mortgage on land in DeKalb county, Ill., for about $500; executed by Edgar Keene and some other Keene, not recollecting the other name; that he never had but one note and mortgage signed by Keene from Dunning, and that was paid to him by D. W. Annis six or seven years before.

The defendant testified, that in 1858 he had a note signed by David and Edgar Keene, secured by mortgage on land in De Kalb county, for about $500; that he assigned the same to Beith, and that he never assigned and sold him but one note and mortgage signed by any Keene, and which note was signed by David and Edgar Keene.

Taking the testimony of the defendant and Beith, together, in connection with the contract in writing, there can be no doubt that the note and mortgage assigned by the defendant to Beith, and which he collected, were those of David and Edgar Keene, the same as mentioned in the contract; and that the

plaintiff was palpably mistaken, in saying the note he assigned to the defendant was that of Jonah F. and Edgar or Edward Keene.

We think the verdict was supported by the evidence, and perceiving no error in the record, the judgment of the court below must be affirmed.

Judgment affirmed.

WILLIAM M. BUTLER *et al.*

v.

THE CITY OF CHICAGO.

SPECIAL ASSESSMENT — *certificate of publication.* A certificate of publication of the notice of making a special assessment by the Board of Public Works in the city of Chicago, or that of the application for confirmation thereof by the common council, is fatally defective if it fails to state the date of the last paper containing the notice, or something equivalent thereto, and the objection goes to the jurisdiction of the court, and will defeat an application for judgment.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. BARKER & TULEY, for the appellants.

Mr. S. A. IRVIN, for the appellee.

Per CURIAM: This was an application for judgment upon the city collector's report of a special assessment warrant. The objectors produced in evidence certified copies of all the proceedings on the part of the city, and from which it appears that the certificate of publication of the notice of making the

assessment by the board is fatally defective, in not stating the date of the last paper containing the notice, or any thing equivalent thereto. So also is that of the application for confirmation by the common council. If this record, in the form in which it was presented to the court below, had been returned to a *certiorari*, the court would have been bound to quash the proceedings. We think it was equally effective to defeat the judgment asked for, for want of jurisdiction. The judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.**

ELIZABETH HAY

v.

JOHN R. HAYES.

1. BILL OF EXCEPTIONS — *when necessary.* An assignment of error on the ruling of the court below, on a motion not preserved in the bill of exceptions, made to strike certain pleas from the files, will not be considered by this court. Motions of that character, and the decision of the court thereon, can become a part of the record only by a bill of exceptions.

2. EXECUTION — *on judgment before a justice — within what time to issue.* Where execution is not issued on a judgment recovered before a justice of the peace, within a year from its rendition, though afterward one is issued, and returned *nulla bona* and a transcript then filed in the circuit court, an execution issued upon such transcript is a nullity. The only remedy in such case is a suit upon the judgment.

3. So in an action of replevin to recover goods levied on under execution, it is no justification of the officer that the seizure was made by virtue of an execution issued from the circuit court under such circumstances.

4. MARRIED WOMEN — *of their separate property.* Previous to the law of 1869, the earnings of a married woman belonged to her husband, and the fact that she received sewing machines for earnings, and bartered them for horses, would not change the character of the transaction so as to render the latter the separate property of the wife.

---

* JAMES H. KEELER et al. v. CITY OF CHICAGO. In this case the same question was involved and the same decision rendered.

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

The opinion contains a sufficient statement of the case.

Mr. THOMAS J. TURNER AND SON, for the appellant.

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

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

This was an action of replevin, brought by Elizabeth Hay against John R. Hayes, to recover three horses. The defendant pleaded that he was sheriff, and had seized the horses by virtue of certain executions against plaintiff's husband. The verdict and judgment were for the defendant.

Counsel for appellant insist that the court erred in overruling a motion to strike certain pleas from the files, but this motion was not preserved in the bill of exceptions. Motions of this character, and the decision of the court thereon, are made a part of the record only by a bill of exceptions.

The judgments upon which the executions issued were properly admitted in evidence, except that in favor of Harriet L. Guier. This was a judgment originally rendered before a justice of the peace, in 1863, and no execution was issued thereon until 1869, when one was issued, and returned *nulla bona*. A transcript was then filed in the clerk's office of the circuit court, and execution issued.

If execution is not issued on a judgment in a court of record within a year, it so far loses its vitality that none can issue until the judgment has been revived. Greater effect should not be given to a judgment before a justice than to a judgment of a court of record, and, if the party recovering such a judgment fails to sue out an execution within a year from its rendition, his only remedy would be another suit upon the judgment. This judgment was improperly admitted in evidence, but it

worked the plaintiff no harm, as the justification of the officer was complete under the others, and its admission is therefore no ground for reversal.

It is not necessary to consider the instructions in detail. They gave to the jury the law governing the case, with substantial correctness, and, on the undisputed facts, the verdict was clearly right. Two of the horses were bought with the earnings of the wife, which, as the law then stood, belonged to the husband. The fact that she received sewing machines for her earnings, instead of money, and bartered them for horses, does not change the character of the transaction. The third horse bought of Taylor was sold and delivered by him to plaintiff's husband, and the plaintiff subsequently gave her note to Taylor for the price. It is perfectly clear, from the testimony of both Taylor and the plaintiff, that her note was given merely to shield the property from the creditors of her husband. The judgment must be affirmed.

Judgment affirmed.

CHICAGO & ALTON RAILROAD COMPANY

v.

MICHAEL ADLER.

1. JUROR — *competency — having a "leaning" against one of the parties.* A juryman who, on his *voir dire*, was asked if the evidence were evenly balanced which way he would be inclined to find, answered that in such case he would "lean against the defendant:" *Held*, such juryman was incompetent, and it was error to refuse his challenge by the defendant.

2. Nor would the fact that such juryman announced himself impartial, in the slightest degree affect the question of his competency.

3. Neither could instructions from the court correct the bias of jurors who swear that they incline in favor of one of the litigants.

4. WITNESS — *refreshing his recollection.* A witness in giving testimony may make use of a copy of an original memorandum to refresh his memory. But, unless he can give a satisfactory reason for using the copy,

that fact might impair the weight of his evidence with the jury — would go to the credit, and not to the competency of his testimony.

5. Before the witness, however, can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that it is truly transcribed from the original, and that the original was correctly made and was true when it was made.

6. If a witness has no recollection of the circumstances, and can only say they are true because he finds them on his memorandum, it would not be proper to permit him to either read or speak from the memorandum.

7. RAILROADS — *omission to give signal at highways — proof of highway required.* In an action against a railroad company to recover a penalty for the neglect of the defendants to give the signal required by the statute when crossing a public highway with their engine and train, it was *held*, the plaintiff was bound to prove, before he could recover, that a highway existed at the point alleged, and it was error for the court to refuse to so instruct the jury.

8. SAME — *what will be sufficient proof.* Evidence, however, that a road was there, used by the public, and recognized and repaired, so far as repairs were needed, by the officers having charge of highways would, *prima facie*, prove its existence. Though, in case defendants desired, the jury should be instructed as to the effect of such evidence, and thus prevent all possibility of its misleading them.

9. PLEADING — *declaration against railroad company for omission to give signals.* It is not necessary in such actions, to authorize a recovery, to specify in the declaration the trains the engineers of which were guilty of a violation of the statute. Neither is proof of the numbers or description of the engines drawing the trains omitting to give the signals material to a right of recovery.

10. QUI TAM ACTION — *control of the legislature over the penalty.* A person suing *qui tam* has no vested title in a penalty until he, by a recovery, reduces the claim to a judgment.

11. And it has been held that the legislature might remit a penalty, even after verdict and before judgment.

12. So in an action against a railroad company to recover for omissions on the part of the defendants to give the signal required by statute at the crossing of a public highway, instituted under the one hundred and thirty-eighth section of the railroad law of 5th November, 1849, it was *held* erroneous to instruct the jury that if the plaintiff had proved his case they should find a verdict for $50 on each count in the declaration, the legislature having, previous to the trial, by the act of 27th February, 1869, so far changed the penalty of $50 for each omission, given by the act of 1849, as to make it discretionary with the jury to give any sum not exceeding $100, for each omission. For, although it may be the legislature had no

power to increase the penalty after the omissions occurred, yet, having seen proper to give the power to decrease the amount below the $50 given by the former act, such instruction was therefore improper.

APPEAL from the Circuit Court of Will county; the Hon. J. McROBERTS, Judge, presiding.

The opinion states the case.

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

Messrs. RANDALL & FULLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action brought by appellee to recover a penalty against appellants for the failure to ring a bell or sound a whistle at the crossing of a highway with their engine and trains. The suit was instituted under the one hundred and thirty-eighth section of the railroad law of the 5th of November, 1849. On the trial in the court below, the jury found a verdict for $1,150, for various breaches of the statute, upon which a judgment was rendered.

It is first urged, that the court below erred in refusing to allow the peremptory challenges of jurors made by appellants. Four of the jurors who tried the case were asked on their *voir dire* if the evidence were evenly balanced, which way they would incline to find, and each answered that he would, in such case, lean against the defendants, and one of them stated he would do so because the company were able to stand it, and he thought a private individual should "have a little mite the advantage."

It is a fundamental principle, that every litigant has the right to be tried by an impartial and disinterested tribunal. Bias or prejudice has always been regarded as rendering jurymen incompetent. And when a juror avows that one litigant should have any other than the advantage which the law and evidence give him, he declares his incompetency to decide the case. He

thereby proclaims that he is so far partial as to be unable to do justice between litigants, or that he is so far uninformed, and his sense of right is so blunt, that he can not perceive justice, or, perceiving it, is unwilling to be governed by it.

The rule is so plain and manifest that the party claiming to recover must prove his cause of action, it is a matter of surprise that an adult can be found who would not know that such is the common sense as well as the common honesty of the rule. No ordinary business man would be willing that a claim pressed against him should be allowed, and he be compelled to pay it, when the evidence for and against the claim was evenly balanced. And how such men can bring themselves to apply a different rule, as jurors, to the rights of others, is incompatible with the principles of justice. Nor does the fact that jurors, who avow, under oath, that they would incline to favor a recovery by the plaintiff on evidence evenly balanced, declare that they are impartial, in the slightest degree tend to prove their impartiality. Their statement only tends to prove that they are so far lost to a sense of justice, that they regard what all right-thinking men know to be wrong, as just and impartial. To try a cause by such a jury is to authorize men who state that they will lean, in their finding, against one of the parties, unjustly to determine the rights of others, and it would be no difficult task to predict, even before the evidence was heard, the verdict that would be rendered. Nor can it be said that instructions from the court would correct the bias of jurors who swear that they incline in favor of one of the litigants. In suits for the recovery of penalties, the law does not warrant a recovery, unless the proof clearly preponderates in favor of the plaintiff. And to admit jurymen, who avow that they will not even require a preponderance, would be to violate the rule. The objection was well taken to the jurors, and the court erred in permitting them to act on the trial below.

Appellants asked, but the court refused to give, this instruction: "If the jury believe, from the evidence, that the witness,

Jasper Adler, testified from a written memorandum which he held before him, and shall further believe, from the evidence, that said memorandum was a copy made the day previous, of another memorandum made about two years previously, then the jury are instructed that they will disregard so much of witness' testimony as depends on said copy."

It has been held by this court that a witness may use a memorandum to refresh his memory. *Dunlap* v. *Berry*, 4 Scam. 372. But while the witness may use the memorandum to refresh his memory, he must be able to state that he remembers the facts. If he has no recollection of the circumstances, and can only say they are true because he finds them on his memorandum, it would not be proper to permit the witness to either read or speak from the memorandum. If, in this case, the witness could say that he remembered the omissions to ring the bell or to sound the whistle, no objection is perceived in permitting him to refer to his paper to ascertain the several dates, provided he can say that he knows them to be true, because they were true when made and were noted at the time. But the witness must be able to say the facts thus noted are true. And the witness may use a copy of the original memorandum, but, unless he can give satisfactory reasons for using the copy, that fact might impair the weight of his evidence with the jury. That fact would go to the credit, and not to the competency, of his testimony. But, before he can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that it is truly transcribed from the original, and that the original was correctly made, and was true when it was made.

It is next objected that the court erred in refusing to give the sixth of appellants' instructions. It is this: "Unless the plaintiff has proved that the said railroad crossed a highway, as alleged in said declaration, the plaintiff can not recover in this case, and the jury will find for the defendants."

This instruction was proper and should have been given. The gist of the action was, the failure to ring a bell or sound a whistle at the crossing of a public highway. Appellee had averred in his declaration that there was a public highway, and that appellants

had run their engines and trains over it without giving the signal required by the statute, and he was bound to prove that a highway existed at that point. To do so, however, he could adduce evidence that there was a road there, used by the public and recognized and repaired by the officers having charge of highways, so far as repairs were needed. This would, *prima facie*, prove its existence. And, if appellee desired it, he should have asked an instruction informing the jury as to the effect of such evidence, and thus prevented all possibility of its misleading the jury. Containing a correct legal proposition, applicable to the evidence, it should have been given.

It is next urged as ground of reversal that the court misdirected the jury by appellee's instructions. By them the jury are informed that, if the plaintiff had proved his case, they should find for him $50, on each count in the declaration. Under the act of 1849, these instructions would no doubt have been correct, but the act of the 27th of February, 1849, session laws, 308, has, by amendment, made a material change in the law giving such penalties. This act declares that the penalty shall be in a sum not exceeding $100 for each neglect to ring the bell or sound the whistle. Thus it is perceived that the penalty of $50 for each omission given by the act of 1849 is changed to a discretionary power to give any sum not exceeding $100 for each omission.

The second section of the act declares that it shall not apply to suits then pending under the act of 1869, "except that the penalty recoverable in such suits shall be not exceeding $100, instead of $50, as therein provided." This provision operates on the penalty sued for in this case, so far as to repeal the penalty of $50, and to give a discretion in its imposition. Under this last section the jury, had they been properly instructed, might have given but a nominal penalty. Although it may be the legislature had no power to increase the penalty after the omission had occurred, they have seen proper to give the power to decrease the amount below the $50 given by the act of 1849. And, in view of this statute, the instructions given for appellee were clearly erroneous.

It will be conceded by all, that a person suing *qui tam* has no vested title in a penalty until he, by a recovery, reduces the claim to a judgment. In the case of *Parmelee* v. *Lawrence*, 48 Ill. 331, it was said, that it has never been understood that parties, by their contracts, acquire a vested right to existing penalties. And in the case of *Coles* v. *Madison County*, Breese, 120, it was held, that the legislature might remit a penalty even after verdict and before judgment. It was there said that a party acquired no vested right to a penalty by suing *qui tam*, but only thereby prevented any other person from suing for the same penalty. Blackstone, in his commentaries, vol. 2, p. 442, says: "But there is also a species of property to which a man has not any claim or title whatever, till after suit commenced and judgment obtained in a court of law, when before judgment had, no one can say he has any absolute property, either in possession or in action; of this kind, are first, such penalties as are given by particular statutes, to be recovered in an action popular." This is the general rule and is of frequent application, and, so far as we are aware, it has no exception. This, then, rendered the instructions for appellee erroneous, and they should not have been given.

We perceive no force in the objection that the declaration does not specify the train whose engineer was guilty of a violation of the statute. To require such particularity would render prosecutions of this character exceedingly difficult, and almost operate as a repeal of the statute. And it is believed to be a degree of particularity not required in any pleadings, either at law or in equity. It might be urged with equal force that the defendant's cattle, horses or other stock that have committed a trespass, should be identified and described in the declaration.

Nor was proof of the numbers or description of the engines drawing the trains, omitting to give the signals, material to a right to recover. The judgment of the court below, for the errors indicated, must be reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

WILLIAM H. THOMAS

v.

THE BOARD OF SUPERVISORS OF COOK COUNTY.

1. CHANCERY — *restraining a party from dismissing an employee* Equity will not entertain jurisdiction to enforce against the board of supervisors a contract entered into by them, engaging the services of a party as overseer of the heating apparatus in the basement of a county court house, and restrain the dismissal of a party from such employment by injunction.

2. REMEDY *of an employee in such case.* If the board of supervisors violate such a contract, the courts of law are open to the party aggrieved, in which he can not fail to receive the full measure of redress to which he may be entitled.

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

This was a suit in chancery, brought by appellant against appellees. The bill of complaint alleges that, on the 27th of September, 1869, the complainant entered into a contract with the board of supervisors of Cook county to run and keep in repair the heating apparatus, engine, etc., attached to the court house at Chicago, for the period of two years, commencing October 1, 1870, at a salary of $2,500 per annum; that about the 1st of April, 1870, the board of supervisors, by a resolution, appointed a committee of nine members of the board to investigate any and all charges that might be preferred against any persons in the employ of the county, or against any members of the board, and to report the result of their investigations to the board at their next meeting; that the committee proceeded to entertain and consider all manner of charges against divers persons in the employ of the county, and among others, charges were preferred against complainant by one Richard T. Crane, in writing; that there is no truth in the charges preferred against him by Crane, and that the committee has made a report to the board, recommending the

removal of the complainant, because of the charges so preferred and testified to by Crane, notwithstanding the complainant has had no fair and impartial investigation of the charges.

It is further alleged that the board of supervisors, acting upon the report of the committee, are about to cause his removal from his office as engineer in charge of the heating apparatus of the county; that, if the complainant is discharged in this summary way, his reputation as a mechanic and a citizen will be greatly injured, without an adequate remedy; that the complainant has not been guilty of any misconduct in the discharge of his duties, and if the board of supervisors do proceed to carry out their threat and discharge complainant, they will do him irreparable injury.

The bill prays that the board, and every member comprising the board, may be restrained from removing the complainant or interfering with him in any way, or from taking any action in regard to him, and that every member of the board be enjoined from acting in the matter, or voting upon the question of the removal of complainant.

To the bill of complaint a general demurrer for want of equity was filed by the defendants, and sustained by the court, injunction dissolved and bill dismissed. The complainant appeals.

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

Mr. LAMBERT TREE, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The attempt disclosed by this record to exalt the overseer of the heating apparatus in the basement of a county court house, into an officer, and claim for him the protection of a court of equity, borders on the ludicrous. With as much propriety, might an engine driver on a railroad claim protection from the court, when he has received notice of dismissal from

his employment. The idea is preposterous, and no precedent can be found for such a proceeding in any country, State or nation.

If appellant has made a contract with the board of supervisors which they have violated, the courts of law are open to him, in which he can not fail to receive the full measure of redress to which he may be entitled. The remedy there is complete, and equity has no jurisdiction.

We are unable to perceive any analogy between the cases cited by appellant and this case. The books furnish no precedent, and principle is wholly against it.

The decree must be affirmed.

Decree affirmed.

AMELIA CROMIE *et al.*

v.

JOHN VAN NORTWICK *et al.*

1. MOTION — *must be preserved by bill of exceptions.* The action of the circuit court in overruling a motion to transfer a case to the United States circuit court, under the act of congress of 1866, unless the motion and the accompanying papers are made a part of the record by the certificate of the judge who heard the cause on the circuit, will not be reviewed on error.

2. The bond required to be presented at the time of making such a motion does not become a part of the record simply by being filed by the clerk and copied into the transcript of the proceedings in the cause.

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

The opinion sufficiently states the case.

Mr. JOHN J. MCKINNON and Mr. EMERY A. STORRS, for the plaintiffs in error.

Messrs. EUSTACE, BARGE, &. DIXON and Mr. JAMES W. WALLACE, for the defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This case falls within the rule stated in *Hartford Fire Insurance Co.* v. *Vanduzor*, 49 Ill. 489, and is controlled by that case.

The action of the court in overruling the motion to transfer the case to the United States circuit court, under the act of congress of 1866, is not made a part of the record by any certificate of the judge who heard the cause on the circuit. The bond required to be presented at the time of making the motion does not become a part of the record simply by being filed by the clerk and copied into the transcript of the proceedings in the cause. This court has repeatedly decided that papers filed in a cause, but not made exhibits by the bill or answer, do not become a part of the record unless made so by the proper certificate.

In this case, neither the motion nor the accompanying papers are preserved in the record in the form required by the practice in this court, and we can not, therefore, review the action of the circuit court in refusing to transfer the cause to the United States circuit court. The decree must be affirmed.

Decree affirmed.

ROBERT H. FOSS

v.

THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENTS — *in the city of Chicago — by whom to be determined — validity of an ordinance in that regard* The law on the subject of special assessments in the city of Chicago, for public improvements, places the responsibility of prescribing what improvements shall be made, and the

mode, manner and extent of them, with the common council. There is no authority for leaving it to the discretion of the Board of Public Works to determine either the mode, manner, or extent of the improvement, and an ordinance which undertakes to vest such discretion in that board is void.

2. So where an ordinance provided that a certain street should be curbed, filled and paved, "excepting such portions of the above described work which have been already done in a suitable manner:" *Held*, the ordinance assumed that a portion of the work upon the street designated had already been done in a suitable manner, but what portion of it had been so done was left to the discretion of the Board of Public Works to determine, and the ordinance was therefore void.

3. Same—*what character of defense allowed.* The defense which is allowed to property owners, upon an application for judgment upon a special assessment, may embrace every thing which shows that the tax or assessment to collect which the proceeding was instituted, ought not to be collected.

4. So it is competent in such a proceeding for a property owner to set up, as a defense, that his property was damaged by the work in question, and that being so, an assessment upon it for benefits was necessarily fraudulent.

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

The opinion states the case.

Messrs. Hervey, Anthony & Galt, for the appellant.

Mr. M. F. Tuley, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

This is an appeal from the judgment of the Superior Court of Chicago, rendered upon a special assessment warrant. The ordinance upon which the assessment was based, ordered that "West Van Buren street, from the West Dock line of the South Branch of the Chicago river to a point two hundred and seventy-five feet west thereof, and from a point three hundred and ten feet west of said dock line, to the east line of Canal street, be curbed with curb walls, filled, and paved with wooden

blocks, excepting such portions of the above described work which have been already done in a suitable manner."

The first section of chapter 7 of the city charter (Gary's Laws, 60) declares that "the common council shall have power, from time to time, to cause any street, etc., to be filled, graded, leveled, paved, curbed, walled, graveled, macadamized or planked." By the third section of the amendatory act, approved March 6, 1867, the Board of Public Works is required, upon receiving an application for the making of any improvement, etc., to proceed and investigate the same, "and if they shall determine that such improvement is necessary and proper, they shall report the same to the common council, accompanied with a statement of the expense thereof, and a *proper* ordinance or order directing the work, and shall, in such estimate, specify how much of said expense, in their opinion, may be properly chargeable to real estate especially benefited by such improvement, and how much thereof may be properly chargeable to and paid out of the general fund, or out of the proceeds of any general tax authorized to be levied by said city. The board having reported on such application, and recommending that the improvement be made, or disapproving of the doing of it, as is provided for in the above mentioned act, the common council may then, in either case, order the doing of such work, or the making of such public improvement, after having first obtained from said board an estimate of the expense thereof, and in such order specify what amount of such estimated expense shall be assessed upon the property deemed specially benefited, and what amount shall be chargeable to, and paid out of, the general fund, or out of the proceeds of any general tax authorized to be levied by said city."

This, so far as we can discover, is the very latest of the numerous amendments of the city charter pertaining to the subject in question.

And the only perceptible change in it from previous acts, seems to be the opening of additional ways to the city treasury, and for disbursing the proceeds of general taxes. It leaves the

responsibility of prescribing what improvements shall be made, the mode, manner and extent of them, where it was before, with the common council, in theory, composed of the direct representatives of the people. Such is the manifest policy of the statutes in force at the time this ordinance was passed, and there is no color of authority in any of them for leaving it to the discretion of the Board of Public Works, to determine either the mode, manner or extent of the improvement; these must be directed by a proper ordinance or order of the common council. After the ordinance is passed, the twenty-third section of chapter 7 of city charter (Gary's Laws, 70) declares that, before proceeding to make an assessment for such improvement, the commissioners shall give six days' notice, by publication in the corporation newspaper, of the time and place of their meeting for the purpose of making said assessment, "in which notice they *shall specify* what such assessment is to be for and the amount to be assessed." If the extent of the work be left to their discretion, and that discretion has not been exercised at the time of giving such notice, how could they specify in the notice what the assessment is to be for? And, we might ask, how could they make the assessment by any sort of fair standard, unless they had previously, or at the time, decided upon the extent of the work? If they did so decide, no record of it would be made; the basis would not be disclosed; it would remain hidden in their own breasts as though it were a matter in which the public had no concern.

The ordinance in this case assumes that a portion of work upon West Van Buren street, designated therein, had already been done in a suitable manner; but what portion of it had been so done is in no manner specified. Suppose, that for half the distance, curb walls had been built, and a certain kind of filling put in, by the property owners, if this work were done in a suitable manner it would lessen the expense. But no mention is made of its extent or suitableness in the report of the commissioners to the common council, in the ordinance reported, or as passed, nor in the notice of the assessment, given

by them, except in the language of the ordinance. The first point a party interested in property proposed to be assessed, would desire to ascertain would be, whether those curb walls and that filling were to be regarded as a portion of the work already done in a suitable manner. Are the walls of the proper thickness and suitably laid? Is the filling of a proper material?

Unless these questions were determined, and in a way that would be conclusive upon the city, how could such parties adopt any standard by which they could satisfy themselves, that either the original estimate of the cost and expense of the work, or the proposed assessment was reasonable and fair? If the commissioners are to decide, when will they do it? The answer is, that if they can exercise any such discretion at all, they could do it whenever they saw fit.

Every such covert, irresponsible, discretionary power as here assumed, is wholly inconsistent with a proper exercise of the high and sovereign power of taxation or eminent domain. It might be used, and it does not affect the principle whether it was so used or not, as a cover to an unfair estimate or assessment. They could easily say, if parties sought to impeach their conduct for fraud, that when they made the assessment they expected to cause the curb walls already built to be removed, because not made in a suitable manner, but afterward changed their minds. It might be used as the instrument of favoritism in letting the contracts for the work. Some parties might be made to understand that the portions of the work already done were not done in a suitable manner, and that it would all have to be removed, while others might be informed that if they got the contract the portions already done would be considered as done in a suitable manner, and be so much clear gain.

It is true, that there is nothing in the evidence introduced in this case, to show that any portion of the work had been already done. But it is recited in the ordinance, in the notice of the assessment given by the commissioners, in their oath, and in the warrant, in this language: "excepting such portions

of the above described work which have already been done in a suitable manner." If no portion of it had been done at all, why make such a recital? It is a clear affirmation that some portion of it had been so done, and the city is estopped by the record from denying it. The effect of it is an attempt to vest the board of public works with a discretion as to the manner and extent of the work, and renders the ordinance void. *Thompson* v. *Schermerhorn*, 2 Seld. 92.

The counsel for the appellant insist that the evidence introduced before the court below shows, without contradiction, that appellant's property was damaged by the work in question to the amount of thirty or forty thousand dollars, and this being so, an assessment upon it of upward of $5,000, for benefits, is necessarily fraudulent. The issue of fraud was directly made by the defense set up. Such a defense was entirely competent. The statute in this respect remains substantially as it was when the case of *Pease* v. *The City of Chicago*, 21 Ill. 500, was decided, and we re-affirm what was said in that case on this subject: "Here there is an express provision that the owner or person interested in the land may make defense, and it can not, we think, be reasonably contended that such defense shall not embrace every thing which shows that the tax or assessment, to collect which the proceeding was instituted, ought not to be collected. Less than this would be but a mockery of justice." But as the judgment must be reversed for the invalidity of the ordinance, it is unnecessary to express any opinion as to the question raised upon the evidence.

The judgment is reversed and cause remanded.*

Judgment reversed.

*Elias R. Bowen v. The City of Chicago.

Per Curiam: This was an application for judgment upon the collector's report of a warrant for a special assessment for curbing, grading, and paving with wooden blocks, a portion of Park avenue.

The ordinance and other proceedings were like those in the case of *Foss* v. *The City of Chicago*. In that case the ordinance was held void. This case must be decided in the same way; the judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed.

SIMON WOLF *et al.*

v

JARED W. MILLS.

PARTNERSHIP—*fraud by one partner.* A fraud committed by one partner, in the course of the partnership business, binds the firm, even though the other partner have no knowledge of, or participation in, the fraud, and an action will lie against the firm in respect thereto.

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

The opinion states the case.

Messrs. ASAY & LAWRENCE, for the appellants.

Mr. M. W. ROBINSON, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The appellee brought an action on the case, alleging that appellants sold him a lot of sheep pelts, having on them a large quantity of wool; and, with intent to defraud him, delivered other and inferior pelts in quality, and deficient in the quantity of wool. Appellee recovered a verdict.

Wolf and Haber jointly owned the pelts at the time of the sale. The proof is satisfactory that the pelts sold averaged about five pounds of wool per pelt; and the pelts delivered, only three pounds.

As to the alleged fraud, the evidence is conflicting. One witness testified positively, that he saw young Haber, a son of appellant, change the pelts, and that he placed light in place of the heavy pelts, soon after the sale. This was contradicted by the son; but the weight of evidence has been determined by a

jury, and we shall not disturb the finding, unless some principle of law has been violated.

Appellants urge that, as there is no evidence to prove the change, if made, was by the direction of Wolf, or by any person in his employment or under his control, therefore he is not liable. The evidence does show that Wolf & Haber were partners in the buying and selling of the sheep pelts, and that young Haber was handling them and throwing them from one pile to the other. The jury were justified in the inference, that this was in the scope of the partnership business, as it was connected with the joint property. It is improbable that the son would be thus engaged, unless directed. The father must have given him some instructions, in regard to the exchange.

There was, then, no error in the following instruction given for appellee: "If the jury believe, from the evidence, that the defendants sold the plaintiff a certain lot of sheep pelts at an agreed price, and that plaintiff has paid such price, and that the defendants afterward, either in person, by their agents, servants or employees, delivered to plaintiff a lot of sheep pelts in any respect different from and inferior to those actually sold, intending thereby to have the plaintiff believe they were the same he had purchased, and intending to deceive and defraud the plaintiff, then the jury are instructed to find defendants guilty, and to assess as damages whatever loss the evidence may show the plaintiff sustained through such fraud and deceit."

A tortious act of one partner will often create a liability against the firm. So a fraud, committed by one partner, in the course of the partnership business, binds the firm, even though the other partners have no knowledge of, or participation in, the fraud.

The jury might reasonably infer all that was necessary to fix the liability of the firm.

The judgment must be affirmed.

Judgment affirmed.

JAMES H. KNAPP, *Admr., et al.*

v.

JOHN A. MARSHALL *et al.*

1. INTEREST — *when chargeable against a trustee — where there are contesting claimants of the fund.* The first proceeds of an assignment made for the benefit of creditors were paid into the hands of a third person, to be by him applied in satisfaction of a certain preferred debt. Such person refused to pay the money to the holder of that debt, who was entitled to it, on being notified not to do so by a party who was security therefor, and to whom the debtor had given his notes prior to the assignment, in consideration of such securityship. An assignee of these notes thereupon filed a bill in chancery to compel the payment of the money to him, and the holder of the debt upon which the money ought to have been applied, filed his cross-bill, asserting his rights therein. After several years' delay it was agreed the money should be paid to the complainant in the cross-bill: *Held*, the party who thus retained the money in his hands during all this time, should be decreed to pay interest thereon to the party entitled to the money, at six per cent, from the time the latter filed his cross-bill. When the opposing claimants were in court asserting their respective claims, the party holding the disputed fund could have relieved himself from the charge of interest by bringing the money into court to abide the event of the suit, which he did not do.

WRIT OF ERROR to the Circuit Court of Knox county; the Hon. A. A. SMITH, Judge, presiding.

The opinion states the case.

Messrs. TYLER & HIBBARD, for the plaintiffs in error.

Messrs. FROST & TUNNICLIFFE, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 20th of February, 1858, Wisner & Taylor made an assignment to John A. Marshall, for the benefit of their cred-

itors. They had previously become indebted to Sheppard & Reeves, and Morse K. Taylor was surety for the debt, the payment of which was secured by a mortgage which had been given to Sheppard and Reeves, which mortgage had been assigned to Wilson G. Hunt & Co., who were then the owners thereof. To secure Morse K. Taylor, Wisner & Taylor gave him their note immediately preceding their assignment, for the amount of his contingent liability as such security, and, although the note had no other consideration, it was made a preferred debt in the assignment. Before the assignment it was agreed between Wisner & Taylor, Morse K. Taylor, A. L. Titsworth, and Marshall, the assignee, that the first proceeds of the assignment should be paid over by the latter to Titsworth, who should receive the amount and pay over the same on the Sheppard & Reeves mortgage at its maturity, which would be on the 12th day of November, 1858, and by its payment extinguish the debt of Taylor & Wisner to Sheppard & Reeves, as well as the contingent liability of Morse K. Taylor. Titsworth also became security that the assignee would pay over the amount received by him, and that it should be so applied. The assignee soon collected a sufficient amount to extinguish this debt, and paid it to Titsworth, but, on the first day of December, 1858, Morse K. Taylor improperly assigned to Sarah E. Currier the note given to him, and at the same time notified the assignee and Titsworth not to pay over the money to Sheppard & Reeves. The note was not assigned until after its maturity. Titsworth, considering that the money should be paid on the Sheppard & Reeves mortgage, refused to pay it over to Sarah E. Currier, who thereupon filed a bill in chancery to compel payment. Subsequently, Hunt & Co., as assignees of the Sheppard & Reeves mortgage, were made parties defendant, and they also filed a cross-bill asking that payment be made to them. After several years delay the contending parties finally agreed that the money should be paid to Hunt & Co., and a decree was entered to that effect. They asked for interest as against Titsworth, but the court refused to allow it, except

from the 17th day of February to the 10th day of April, 1858, and this refusal of the court is now assigned for error, and is the only question presented on the record.

The money clearly, in equity, belonged to Wilson G. Hunt & Co., the assignees of the Sheppard & Reeves mortgage. Titsworth had received it to be paid over on that mortgage at its maturity.

He neglected to do so, and, although payment was demanded of him by Hunt & Co. before the filing of their cross-bill, he has held the money in his hands since the 10th day of April, 1858, when the last portion of it was received. For such delay in paying over trust money, Titsworth should clearly be charged with interest on it, unless the notification by Morse K. Taylor not to pay it over, and the claim and suit of Sarah E. Currier, afford a sufficient excuse for the retention of the money.

The Morse K. Taylor note having been assigned to Sarah E. Currier after its maturity, she stood in no better position with respect to it than Taylor himself. He had no concern with the money, or real interest in the note, further than, that the Sheppard & Reeves mortgage should be paid, the payment of which would have been a satisfaction of the note, and he had no right to divert the money from its application on that mortgage. That destination of the money, was given to it by Wisner & Taylor, at the time they made the assignment of their property to Marshall, under an agreement between them and Morse K. Taylor and Titsworth; and surely Morse K. Taylor alone, without the concurrence of Wisner & Taylor, could not change it.

The interference of Morse K. Taylor, with the disposition of this money, was unauthorized, and the claim of Sarah E. Currier to it, under the note assigned to her, was unfounded; and the facts of the case were within the personal knowledge of Titsworth.

A wrongful claim to money owing to another, or a wrongful suit brought for it, is no justification for withholding the money

from the person entitled to it; and we think that in this case, it should not excuse from the payment of interest, at least after the opposing claimants were in court, asserting their respective claims. Titsworth might then have exempted himself from the charge of interest, by bringing the money into court, and delivering it into the custody of the law. *Chase* v. *Munheardt*, 1 Bland Ch. 333; *Potter* v. *Gardner et al.*, 5 Pet. 718; *Curd* v. *Letcher*, 3 J. J. Marsh. 443; *Shackleford* v. *Helm et al.*, 1 Dana, 338.

From the time of the filing of the cross-bill of Hunt & Co., we think Titsworth should be charged with six per cent interest on the money received by him.

Less than this, as we conceive, would fail to do justice in this case, and would be holding out a temptation to withhold money which ought to be paid over to another, to stir up opposing claims, and protract controversies in respect to it, in order to enjoy its use in the meanwhile for private gain.

Marshall, the assignee, seems to have received sufficient to pay the principal and interest of the Morse K. Taylor note; he paid over to Titsworth only the principal of the note; whatever accrued interest there was on it at that time, he should be decreed to pay.

The decree is reversed, and the cause remanded for further proceedings, in conformity with this opinion.

Decree reversed.

The Chicago & Northwestern Railway Company

v.

The People of the State of Illinois *ex rel.* Edward Hempstead *et al.*

1. Railroads — *what constitutes the line of a railroad, for purposes of delivery of freight.* In a proceeding, by mandamus, to compel a railroad company to deliver at the elevator or grain warehouse of the relator, in the

city of Chicago, whatever grain in bulk might be consigned to it upon the line of their road, it appeared the company entered the city from different points upon separate tracks, these separate tracks or lines of road being called divisions. The elevator was situated upon a track used by the company in connection with the business of one of those divisions exclusively, but could be reached from the other division, though by a very indirect route, and subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to their regular trains and business on the latter division. It was *held*, the roads constituting these different divisions, though belonging to the same corporation, and having a common name, were, for the purposes of transportation, substantially different roads, constructed under different charters, and the track upon which the elevator in question was situated, having been laid for the convenience especially of one of those divisions, and only approachable from the other under the difficulties mentioned, it could not be regarded that the elevator was upon the line of the latter division in any such sense as to make it obligatory upon the company to deliver thereat freight coming over that division.

2. But the track upon which the elevator in question was situated was owned and used by the respondent company and another company in common, and was a direct continuation of the line of one of the respondent company's divisions, and of easy and convenient access from that division, and was used by the respondent, not only to deliver grain to other elevators thereon, some of which were more difficult of access than that of the relator, but also to deliver lumber and other freight coming over such division, thus making it not only legally, but actually, by positive occupation, a part of their road. So it was *held*, that in reference to grain coming over that division, the track upon which the relator's elevator was situated was to be regarded as a part of the respondent's line of road, and it was their duty to deliver such grain to that elevator, if consigned to it.

3. SAME — *of reasons for refusing to deliver grain in bulk to any elevator to which it is consigned.* Where grain in bulk is consigned to a particular elevator on the line of a railroad, it is no sufficient excuse for the company to refuse so to deliver it, that it can not do so without large additional expense caused by the loss of the use of motive power, labor of servants, and loss of use of cars while the same are being delivered and unloaded at such elevator, and brought back, for it is precisely that expense for which the company is paid its freight.

4. SAME — *of injurious discriminations in the delivery of freight, by means of contracts.* Railway companies are common carriers, and, as such, they owe important duties to the public, from which they can not release themselves, except with the consent of every person who may call upon them to perform them. Among these duties is the obligation to receive and carry goods for all persons alike, without injurious discrimination as to

Syllabus. Brief for the appellant.

terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy.

5. So where a railroad company set up as a defense, in a proceeding by mandamus, to compel them to deliver to the elevator or grain warehouse of the relator, whatever grain in bulk might be consigned to it upon the line of its road, that they had entered into contracts with the owners of certain other elevators at the same point for exclusive delivery to the latter to the extent of their capacity, it was *held*, such contracts could have no effect when set up against a person not a party to them, as an excuse for not performing toward such person those duties of a common carrier prescribed by law.

6. Same — *right of a railroad company to prescribe their mode of carriage and delivery by their own usage or rules.* A railroad company can establish no custom inconsistent with the spirit and object of its charter. It can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, and any general language used in its charter in respect to its powers, in that regard, must be construed with that limitation.

7. So where a railroad company sought to evade the receiving, and delivery of grain in bulk to a particular elevator, to which it was consigned, on the ground that it had the right to establish its own usage in that regard, and it never having held itself out as a carrier of grain in bulk, except upon the condition that it might itself choose the consignee, this had become the custom and usage of its business, and it could not be required to go beyond this limit, it was *held*, the company could make no such injurious or arbitrary discrimination between individuals in its dealings with the public.

8. Mandamus — *when the proper remedy.* The writ of mandamus is the proper remedy to compel a railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it upon the line of its road.

Appeal from the Superior Court of Chicago.

The opinion states the case.

Mr. James H. Howe, for the appellant.

The relations between common carriers and those who employ them are those of contract, either expressed, or implied from their acts; Angell on Carriers, 64; *Noyes* v. *R. R. Co.*, 27 Vt. 110; *Hales* v. *L. N. W. R. Co.*, 4 Bestsmith, 66 (E. C. L. R. 116); *Johnson* v. *The M. R. R. Co.*, 4 Exc. 367; *N. J. Steam Nav. Co.* v. *Merchants' Bank of Boston*, 6 How. 344;

M. C. R. Co. v. *Read*, 37 Ill. 484; *The West. T. Co.* v. *Newhall*, 24 id. 466.

The law imposes what it calls a "duty" upon common carriers, but this duty arises only from contracts the carrier makes, or from the agreements he holds himself out to the world as ready to make. This court, in the case of the *Western Transportation Co.* v. *Newhall*, 24 Ill. 468, define this duty very clearly.

The duty of a common carrier to deliver, in the absence of an express contract, in accordance with the usage and course of his business, was very fully considered by the supreme court of Vermont in the case of *The Farmers and Mechanics' Bank* v. *The Transportation Co.*, 23 Vt. 186. See, also, *Richards* v. *Mich. South. & North. Indiana Railroad Co.*, 20 Ill. 404; *Porter* v. *Chicago & Rock Island Railroad Co.*, id. 407; 2 Redfield on Railways, § 51; *Thomas* v. *Railroad*, 10 Metc. 472; *Moses* v. *Railroad*, 32 N. H. 523; *Norwood Plains Co.* v. *Railroad*, 1 Gray, 263.

It is submitted to the court, that these cases, with many similar ones that might be cited, establish, beyond cavil, these propositions:

I. That the relations existing between common carriers and those who employ them are founded upon contracts.

II. That a carrier has the right to establish his own course and manner of doing his business, and that when established the law imposes a duty upon him to do business for all who seek to employ him, to the extent of his capacity, in the course and manner which he has adopted.

III. That he can make express contracts with persons, changing his usual and ordinary mode of doing business, either by enlarging or restricting his responsibilities.

IV. That the usual and ordinary methods of business of a common carrier by railroad, only impose upon it the duty of delivering property at its own depot.

V. That an action will lie against a carrier for refusing to receive and transport property, having the ability to do it,

within the scope of its usual and ordinary business, but that such action will not lie for a refusal to receive and transport in a manner different from that usual and ordinary course of business.

Mandamus is not the proper remedy. 3 Stephen's N. P. 2,291; Moses on Mandamus, 18; *Lamar* v. *Marshall*, 21 Ala. 772; *Fears* v. *Munn*, 2 N. J. 161; *Roberts* v. *Addsed*, 16 Pet. 216; *Davenport, ex parte*, 6 id. 661; *Gray* v. *Bridge*, 11 id. 189; *Ex parte Bailey*, 2 Cow. 479; *Ex parte Bacon*, 6 id. 392; *The People* v. *The Contract Board*, 27 N. Y. 378; *The People* v. *Canal Boat*, 13 Barb. 432.

Messrs. Goudy & Chandler, for the appellees.

It is the legal duty of the appellant to do the acts commanded by the alternative writ, both by the common law and statute. *Vincent* v. *C. & A. R. R. Co.*, 49 Ill. 33; Laws 1867, 181, § 22. The appellant is a common carrier, and as such must carry for all, and all goods, without discrimination. *Chicago and Aurora Railroad* v. *Thompson*, 19 Ill. 584; *Ill. Central Railroad* v. *Morrison*, id. 139; *Western Transportation Co.* v. *Newhall*, 24 Ill. 466; Redfield on Com. Carriers, 15, 27. The duty of common carriers is one of law, growing out of their office, and not of contract; and the liability can not be limited, except by a contract assented to by the employer. Redfield on Carriers, 30, § 40; *Western Transportation Co.* v. *Newhall*, 24 Ill. 466.

There is no exemption from the common law duty, by the charters of the appellant. By these it became a carrier of all kinds of freight, and, while it could make rules consistent with its duties enjoined by law, it could make none inconsistent with such law. While the railroad company might, by special contract, limit its duties and liabilities, touching the property of the contracting party, it could not agree with another party not to carry for all, or not to deliver to the consignee.

The remedy by mandamus is an appropriate one. The duty

is of a public character, and there is no other adequate mode of relief. *Vincent* v. *C. & A. R. R.*, 49 Ill. 33.

The railroad company will be compelled by mandamus to perform its corporate duties, and to receive and deliver goods as directed.

"No better general rule can be laid down on this subject, than that where the charter of a corporation, or the general statute in force, and applicable to the subject, imposes a specific duty, either in terms or by fair or reasonable construction and implication, and there is no other specific and adequate remedy, the writ of mandamus will be awarded." 2 Redf. on Railways, 279.

A mandamus has been awarded to compel a railroad company to run its cars to a particular point, and there to receive and discharge passengers. *State* v. *Hartford & N. H. R. R. Co.*, 29 Conn. 538; *People* v. *The Albany & Vt. R.*, 24 N. Y. 627.

A mandamus was applied for to compel a railroad company to receive the goods of the relator, and only refused upon the ground that the company was not, by its charter and custom, a carrier of that kind of goods. *Ex parte Robbins*, 7 Dowl. P. C. 566; 2 Shelf. on Railways, 846.

The law is discussed, and many cases referred to in Moses on Mandamus, 155, 168, 171, 176, and 2 Redf. on Railroads, 257, 275, 294.

Mr. John N. Jewett, for the appellants, in reply, contended that mandamus is not the appropriate remedy in this case, citing Tappan on Mand. 57, 64, 65, 69, 72; *People* v. *Corporation of Brooklyn*, 1 Wend. 318; *People* v. *Mayor of N. Y.*, 10 id. 393; *Boyce* v. *Russell*, 2 Cow. 444; *Chase* v. *The Blackstone Canal Co.*, 10 Pick. 244; *City of Ottawa* v. *The People*, 48 Ill. 234.

Counsel argued in support of the following propositions:

1. That at common law, a common carrier was one who undertook, or held himself out as ready to undertake, the

carriage of goods, as an occupation, for all persons indifferently, by the means and upon the routes adopted by himself.

2. That, having entered upon this employment, he was bound by law to receive and carry goods suited to his means of transportation, for all people without discrimination or preference.

3. That the manner and place of delivery at the end of the route was a matter within his own discretion, in the first instance; the only requirement of the law in this respect being, that, when established, it should be uniformly and consistently adhered to.

4. That neither the public nor individuals have any legal right to demand of the common carrier the assumption of any duties or obligations, other than, or different from, those which he has assumed by the custom and usages of his business.

5. That a person may be a common carrier, without importing that he has undertaken to do, and without being under obligation to do, *every thing* which a common carrier might do.

6. That railroad companies, as common carriers, have precisely the same rights of judgment as individual carriers, with the exception, that their routes are fixed, and their means of transportation, generally, determined by the charter creating them.

7. That whether they shall adopt the custom of delivery at the residence or place of business of the consignee, and thereby place themselves under obligations to do so, or not, is a matter of discretion to be determined by themselves, and is, by no means, dependent upon their ability or inability to reach such places with the cars employed by them for transportation from place to place.

8. That, if the law demanded of them such delivery, they would, of necessity, have an implied authority to use the means requisite to make such delivery, and that they might therefrom be required to deliver by wagons, at places which could not be reached by their cars.

9. That the obligations of a carrier, corporate or individual, in respect to the carriage and delivery of goods actually

received for carriage, are regulated by contract, express or implied, and, in the absence of an express contract, the law implies only an agreement or undertaking to carry and deliver according to the custom and usages of his business.

10. That, having established the custom and usages of his business, the common carrier may be compelled (if mandamus is a proper remedy) to carry and deliver in accordance with that custom and usage but not otherwise. The reason is, that the custom and usage being valid, fix the limit of his legal duty in this particular, and the right to demand a service can not be broader than the obligation to perform it.

11. That the object and aim of these proceedings is to compel the appellant to depart from the well established custom and usages of its business, and to make a special contract for the delivery of grain, at a particular place, contrary to such custom and usages.

12. That no duty or obligation to make such a contract is imposed upon the appellant as a common carrier, either by the common law or by statute, and, therefore, the alternative writ is defective in substance, and should have been quashed — notwithstanding the averment of legal duty contained in it.

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

This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows:

The company has freight and passenger depots on the west side of the north branch of the Chicago river, north of Kinzie street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukie divisions of the road, running in a north-westerly direction. It also has depots on the east side of the north branch, for the use of the Galena division, running westerly. It has also a depot on the south branch near Sixteenth street, which it reaches by a track diverging from the Galena line on the west side of the city. The map indicates a line running north from Sixteenth street the entire length of West Water street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren street.

Under an ordinance of the city, passed August 10, 1858, the Pittsburgh, Fort Wayne and Chicago company, and the Chicago, St. Paul and Fond Du Lac company (now merged in the Chicago and Northwestern company) constructed a track on West Water street, from Van Buren street north to Kinzie street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne and Chicago company laid the track from Van Buren to Randolph street, and the Chicago, St. Paul and Fond Du Lac company, that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the precise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren street to Kinzie, and do in fact use it in common. The elevator of the relators is situated south of Randolph street, and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since the 10th of August, 1866, the Chicago and Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, Northwestern, Munn & Scott, Union, City, Munger and Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie street; the Munn & Scott on West Water street, between the elevator of relators and Kinzie street; the Union and City near Sixteenth street, and approached only by the track diverging from the Galena division, on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago river. The Munn & Scott elevator can be reached only by the line laid on West Water street under the city ordinance already mentioned; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water street at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ, that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a drawbridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukie division of respondent's road, thence taken to the track on West Water street, and the cars, when unloaded, could only be taken back

to the Galena division by a similar, but reversed, process, thus necessitating the passage of the drawbridge, with only a single line, four times, and, as averred in the return, subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it can not be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water street freight coming over that division of the road. The doctrine of the Vincent Case, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been re-affirmed in an opinion filed at the present term, in the case of *The People ex rel. Hempstead v. The Chi. & Alton R. R. Company*, 55 Ill. 95, but in the last case we have also held that a railway company can not be compelled to deliver beyond its own line simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukie divisions, running north-west, and the Galena division, running west, though belonging to the same corporation and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water street seems to have been laid for the convenience of the Wisconsin and Milwaukie divisions. It would be a harsh and unreasonable application of the rule announced in the Vincent case, and a great extension of the rule beyond any thing said in that case, if we were to hold that these relators could compel the company to deliver at their elevator grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to

the company and a great derangement of its general business, and though the track on West Water street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator, and the Wisconsin and Milwaukie divisions of respondent's road, we find a very different state of facts. The track on West Water street is a direct continuation of the line of the Wisconsin and Milwaukie division; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits in explicit terms, that it has an equal interest with the Pittsburg, Fort Wayne and Chicago railroad in the track laid in West Water street. It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator, the grain consigned thereto from the Wisconsin and Milwaukie divisions, is, that those divisions connect with the line on West Water street only by a single track, and that respondent can not deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the use of motive power, labor and cars, while the latter are being taken to their place of destination and unloaded, is precisely

the expense for which the company is paid its freight. It has constructed this line on West Water street, in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed it seems evident, from the diagrams attached to the record, that three of the elevators, to which the respondent delivers grain, are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage, by the fact that they can be reached only by crossing the river.

We presume, however, from the argument, that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukie divisions are concerned. They rest the defense on the contracts made between the company and the elevators above named, for exclusive delivery to the latter, to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator, upon its lines and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the supreme court of the United States, and the supreme court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said, that "a common carrier is in the exercise of a sort of public office." *N. J. Steam Nav. Co.* v. *Merch. Bank*, 6 How. 381; *Sanford* v. *Railroad Co.*, 24 Penn. 380. If the language is not critically

accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord Holt, in *Coggs* v. *Bernard*, 2 Lord Raymond, 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel, that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as any thing in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed, that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for

the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power, they take the lands of the citizen against his will and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying or intimating, that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit, without reference to the pecuniary welfare of the company itself. We hold simply that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary

powers is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding, is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in the Vincent Case, in 49 Ill., and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the re-organization of this court under the new constitution, the court as now constituted has re-examined that decision, and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukie divisions of respondent's road. The only difference between this and the Vincent Case is, in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the State.

The contract in question is peculiarly objectionable in its character and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in

the handling of all the grain that might be transported over such road. So too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a principle, and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouses, is a deliberate policy, to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it can not be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling

force. Admit, if the respondent were a private association, which had established a line of wagons, for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago, to whom it might be sent and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and no where else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the

city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we can not suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of *The City of Chicago* v. *Rumpff*, 45 Ill. 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretense of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and

sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. *Marriot* v. *L. & S. W. R. R. Co.*, 87 Eng. Com. Law, 498.

In *Gaston* v. *Bristol & Exeter Railroad Company*, 95 Eng. Com. Law, 641, it was held, that a contract with certain ironmongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In *Crouch* v. *The L. & N. W. R. Co.*, 78 Eng. Com. Law, 254, it was held, a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In *Sandford* v. *Railroad Company*, 24 Penn. 382, the court held, that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say, "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to *Rogers' Locomotive Works* v. *Erie R. R. Co.*, 5 Green, 380, and *State* v. *Hartford & N. H. R. Co.*, 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they can not resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road, as well as to the Wisconsin and Milwaukie divisions. If it had applied only to the latter,

we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion.

Judgment reversed.

AMOS F. TOMPKINS *et al.*

v.

JOSEPH W. WILTBERGER.

1. PROCESS IN CHANCERY — *return of service thereof.* The return upon a summons in chancery set forth that the officer served the writ upon the defendant by leaving a copy at his place of abode, with a person named, "a member of his family, and a white person of the age of ten years and upward:" *Held*, the return was not sufficient to support a decree taken *pro confesso*, by reason of the omission to state that the officer informed the person with whom he left the copy, of the contents thereof.

2. NON-RESIDENT *defendants in chancery — publication of notice.* Where it was sought to give notice to non-resident defendants in chancery by publication, although the record failed to show that an affidavit of non-residence was filed in the court below, yet the clerk stated in the notice that an affidavit was filed, and the court found that publication was duly made as required by the statute, and this was sufficient.

3. DECREE — *decree of foreclosure should find the amount due.* A decree of foreclosure of a mortgage which simply orders the payment of the sum due on the debt secured by the mortgage, without finding the amount, is erroneous.

4. SAME — *where a part of the debt becomes due on the performance of a condition.* In a suit for a strict foreclosure, the decree directed that in order to prevent a strict foreclosure, the entire amount secured by the mortgage should be paid within a certain time, when a part of that sum did not become payable until a certain condition was performed: *Held*, there being nothing in the proceedings to show the performance of the condition, the decree ordering the sum dependent thereon to be paid, was erroneous.

Syllabus.

5. MORTGAGES — *subsequent purchasers from the mortgagor, of portions of the premises — of their rights on foreclosure.* A vendor of a tract of land took from the vendee a mortgage on the same premises to secure the purchase money. The vendee laid out the land in blocks and lots, and sold several of the lots to third persons. The mortgage debt becoming due and remaining unpaid, the mortgagee filed a bill for a strict foreclosure. On the objection that there ought not to be a foreclosure without sale and redemption, in view of the rights of those purchasers from the mortgagor, it was *held*, the correct rule governing such a foreclosure is laid down in *Iglehart* v. *Crane*, 42 Ill. 261, that is, first to sell such portion of the premises as is retained by the mortgagor, and then the remainder in the inverse order in which he had sold the lots to third parties.

6. PARTIAL REVERSAL — *and affirmance as to parties not joining in the writ of error.* Where a decree is a joint one, and error has intervened, the whole decree must be reversed, not only as to those who sue out the writ of error, but also as to such as do not join therein.

7. So upon bill to foreclose a mortgage against several defendants who held separate interests in the premises, a decree was so rendered that each defendant, in order to protect his separate interest, was required to pay the entire mortgage debt, Upon writ of error sued out by only a portion of the defendants below, it was *held*, there being error in the decree, it should be reversed as to all the defendants below, as well those who did not join in the writ of error, as those who did.

8. ERROR — *effect of letting in defendant in chancery to answer.* The fact that a defendant in chancery, against whom a decree *pro confesso* has been rendered, upon constructive notice, has been let in to answer, affords no reason why the appellate court should not proceed to hear errors assigned upon such decree. The decree is not vacated by permitting the party to come in and answer.

WRIT OF ERROR to the Superior Court of Chicago.

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

Messrs. BONNEY, FAY & GRIGGS, for the plaintiffs in error.

Messrs. JONES & GARDNER, for the defendant in error. Mr. MELVILLE W. FULLER, for some of the subsequent purchasers.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit in equity, brought by defendants in error, in the Superior Court of Chicago, against plaintiffs in error, for the strict foreclosure of a mortgage. The bill alleges that, on the 18th day of November, 1858, complainants were seized in fee of the west ½ of the north-east ¼ of section 15, and a part of the north-west ¼ of the same section, which is described by metes and bounds, all in township 38 north, range 14, east of the third principal meridian, and that they sold and conveyed these premises to one Jesse Embree, for the consideration of $94,550; that Embree paid $3,350 in cash, and executed nineteen notes, eighteen of which were for the sum of $2,400, payable, two in each year after date until 1867, when the last two matured. He also gave for the balance of the purchase money a note for $48,000, payable the 1st day of January, 1868. To secure the payment of these notes Embree executed a mortgage back to the vendors on the premises which he had thus purchased. The mortgage describes the notes, and states that they were given for the purchase money of the land, and provides that, if either of the notes should not be paid at maturity, the whole purchase money should thereby become due, and that, after publishing a notice for thirty days in a newspaper in Chicago, the mortgagee might sell the premises and the equity of redemption at auction to the highest bidder for cash, and as attorney of Embree might make a deed to the purchaser, and out of the proceeds retain the costs and the mortgage debt.

The bill further alleges that Embree represented that he could make better sales if an arrangement were made to release part of the premises on a *pro rata* payment of the mortgage, and that complainant agreed with West, Gerard, Rodebaugh and May Moody, who were first purchasers, that if they would pay their respective ratable shares of the mortgage, their portions of the premises should not be sacrificed to pay the original notes, or on present payment of such shares an imme-

diate release would be given to their several portions of the premises, but that these several persons had refused to carry out the arrangement, and had abandoned the premises purchased by them, and had allowed the same to be sold for taxes, and that the land could not be sold for more than half they agreed to pay therefor.

That one George W. Yerby, under some agreement with Embree, subdivided the premises into blocks and lots, and sold portions to various parties. That complainant had no knowledge of the arrangement or the contract with such purchasers, but alleges that the sale was subject to the mortgage, and, as far as he could learn, these purchases were abandoned.

That after Embree had failed to pay the notes and taxes, complainant, on the 9th of May, 1862, advertised the premises for sale under the mortgage, and on the tenth of the following June, the time specified in the notice, complainant offered the premises for sale to the highest bidder for cash, and Egbert W. Wiltberger bid the sum of $400 per acre, and, being the highest bidder, the property was sold to him, and complainant executed a deed therefor, but, through inadvertence, complainant executed the deed in his own name, instead of doing so as attorney in fact of Embree; that the parties claiming an interest in the premises did not pay the money to prevent the sale; that Egbert paid no money on the purchase, and the sale was without consideration, and on the 4th of September, 1862, Egbert reconveyed to complainant, who has also acquired the title of Charles L. and Joseph S. Wiltberger, to the premises; alleges that Embree is insolvent, and $80,000 was due on the notes; that no proceedings had been resorted to at law to recover the notes, and the premises were not worth more than $24,000. A large number of persons are made defendants, and a prayer for a strict foreclosure.

A summons was issued to the sheriff of Cook county, who returned that he had served the same by copy on Tompkins, and on Ashton, by leaving a copy with a member of his family, on the 4th of November, 1865, and the other defendants not found.

Notices of the pendency of the suit were published, and certificates thereof filed; and on the 4th of January, 1866, the bill was taken as confessed as to the non-residents. The *pro confesso* order recites proof of publication against all of the defendants but Tompkins and Ashton, and that they had been personally served; they not having answered under the rule of court, the bill was taken as confessed as to them at the June term, 1866. The court thereupon found that there was then "due, on the said notes over and above, the sum of $45,000, beside the $52,800 yet to mature, but which, as provided by the mortgage, has also become due and payable, making a total of some $97,800." The court found the property to be worth not more than $30,000; and it was ordered, that if the defendants, or either of them, should pay the sum due on the notes and mortgage, with interest and costs of suit, within thirty days, complainant should cancel the mortgage, but if they failed to make such payment, then the defendants stand absolutely barred and foreclosed of and from all equity of redemption in the mortgaged premises. The record is brought to this court on error, and various irregularities are urged as grounds of reversal.

It appears from the record that Tompkins was duly served with process, but, on an examination of the sheriff's return, it is found that the sheriff says he "also served Samuel Ashton by leaving a copy at his place of abode, with Mary Clohish, a member of his family, and a white person of the age of ten years and upwards, the 16th of November, 1865." It will be observed that this service on Ashton is not what the statute requires. It fails to state that the officer informed the person with whom the copy was left, of the contents thereof. It is a positive requirement of the law that the person shall be so informed, and in a direct proceeding such a service will not sustain a decree. The statute, for wise purposes, has made this requirement. Being designed to take the place of personal service, to avoid the danger that the defendant may not receive notice of the suit, the law has said, in addition to the other requirements,

the officer shall inform the person with whom the copy is left, of its contents. In the case of *Cost* v. *Rose*, 17 Ill. 276, a return was held insufficient to support a decree, because it failed to show that the copy was left with a "white person," a member "of the family," or that the person was informed "of the contents thereof." This is to the point, and must govern this case. In the case of *Boyland* v. *Boyland*, 18 Ill. 551, this court announced the rule that in making service by copy left at the abode of defendant, as in the case of constructive service by publication, the requirements of the statute must be strictly complied with, and this must affirmatively appear in the record. In that case the defect in the return was, that it failed to show the person with whom the copy was left was a member of defendant's family. And numerous other cases hold the return insufficient because they omit some one of the particulars required by the statute. And in the case of *Boyland* v. *Boyland*, *supra*, it was held, that such defects were not cured or aided by a recital of proper service in the decree. There was, therefore, no sufficient service on Ashton to warrant the rendition of the decree against him.

It is again urged, that there is not sufficient service by publication against the other defendants to sustain the decree. A careful examination of the record fails to show that there was filed in the court below an affidavit of non-residence of these defendants. But the clerk, in the notice, states an affidavit was filed, and the court finds that publication was duly made as required by the statute. This is sufficient, under the former decisions of this court. *Tibbs* v. *Allen*, 27 Ill. 119; *Millett* v. *Pease*, 31 id. 377.

The decree is vague and rather indefinite in finding the amount of money due on the mortgage debt. But we infer it finds $97,800 to have been due at the date of the decree. If it but ordered that the sum due on the debt should be paid, without finding the amount, the decree would be erroneous. We cannot say that a specific sum has been found, and the decree only directs the payment of the sum due on the notes

and mortgage. If that be the finding of the court, it was erroneous, as the amount of the unconditional notes was not half of that sum; and there is no allegation in the bill that the Wiltbergers, who were minors, and owned a part of the land, had conveyed, or offered to convey, their interest in the land to Embree, as the condition of the $48,000 note required they should before it was payable. Until they convey to Embree, or to some person, so the title should inure to his benefit, complainant could not insist upon the payment of that note, and to authorize the court to decree its payment, it should have appeared that the condition had been complied with; this does not appear either from the allegations of the bill, which were taken as confessed, or from proof in the record.

Nor is the decree aided by the allegation in the bill, that the Wiltbergers, who were to convey to Embree before that note fell due, had conveyed to complainant, as he does not pretend that he had conveyed, or offered to convey, to Embree. The decree was therefore unauthorized by the allegations of the bill, in finding that the $48,000 note was due, and in requiring its payment to prevent a strict foreclosure.

It is also urged that the court below erred in decreeing a foreclosure without sale and redemption, in view of the fact, that it appears that other parties had acquired rights or interests in the property by purchase from Embree. By their purchase they unquestionably acquired rights in the property, a right of redemption, if not a right to discharge their proportionate share of the mortgage and have the portion released from the mortgage. It would have been but equitable to have sold the premises by lots, as it had been subdivided, — selling first any portion which might have been retained by Embree, and then the remainder in the inverse order in which he had sold the lots to the other defendants. In the case of *Iglehart* v. *Crane*, 42 Ill. 261, the rule governing such a foreclosure is fully discussed and clearly stated. The rule there announced is applicable to the facts of this case, and should govern a foreclosure of this mortgage so far as relates to a sale of these premises to satisfy the mortgage debt.

It is urged that the decree, in any event, should only be reversed as to the plaintiffs in error, leaving it in full force against those defendants who have not joined in suing out the writ. In this case the decree is a joint one, and in such cases, if error has intervened, the whole decree will be reversed. *Montgomery* v. *Brown*, 2 Gilm. 581. The decree was so rendered that each defendant, to protect his rights, was required to pay all of the money due on the notes and mortgage. Had it ascertained the extent of each defendant's purchase from the mortgagor, and the *pro rata* amount each should pay to relieve the land he had purchased, and given him the right to redeem, or be foreclosed, then, had the decree been regular, except as to plaintiffs in error, it might have been reversed as to them and affirmed as to those not joining in the writ of error. But this entire decree is erroneous and must be reversed *in toto*.

It is suggested that the heirs of one of the defendants, and a defendant, have been let in to answer the bill, and for that reason there is no ground for reversing the decree. On the decree being opened to permit them to answer, the court below has not vacated the decree, but it stands unaffected until a hearing shall be had on the answers thus filed. If they should fail in their defense the decree would be unaffected. And even if they succeeded, it might only result in a modification so far as it related to their interest in the premises. We perceive no reason for refusing to consider the errors assigned on the record, and hence give the case the same consideration as though these parties had not been let in to answer.

We regard the allegations of the bill as being vague and not of that clear and concise character that the rules of equity pleading require, but we shall not consume the time necessary to consider them in detail to ascertain whether they are sufficient to sustain a decree on a *pro confesso* order. As the case must be remanded, the question as to the sufficiency of the bill can be raised on demurrer, or the complainant, if he desires, can have leave to amend. The decree of the court below is reversed and the cause remanded. *Decree reversed.*

HENRY ALLEN

v.

WILLIAM WEBSTER.

FORCIBLE DETAINER — *by whom the action must be brought.* The owner of certain premises having leased them to A who went into possession, upon the expiration of such lease, let the premises by a verbal lease to B who, with the consent of A, took possession and proceeded to cultivate a portion of them. A, however, subsequently refused to quit the premises: *Held,* the landlord having parted with his right to the possession could not maintain forcible detainer against A to recover the premises. The verbal lease was a legal and binding letting of the premises and entitled B to the possession, which he actually obtained with the assent of A, and he alone could bring the action.

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

This was an action of forcible detainer brought before a justice of the peace by William Webster against Henry Allen to recover possession of certain premises. Upon trial had judgment was rendered against the defendant, who appealed to the circuit court, where a trial by jury resulted as before, in a verdict and judgment for the plaintiff. The defendant appealed.

Messrs. DIVINE & PRATT, for the appellant.

Mr. CHARLES KELLUM, for the appellee.

Mr JUSTICE BREESE delivered the opinion of the Court:

The main question presented by this record is, who was entitled to the possession of these premises at the time complaint was made? If Webster, then the judgment must be affirmed; if Vanderburg, then it must be reversed, and it is to this we have directed our attention.

The question is not difficult of solution when the facts are considered.

The first fact is, that Webster, the appellee, claimed to be the owner of the premises, and had leased them to appellant, who had taken possession. The next fact is, that appellant's term having expired, appellee, by a verbal lease, let them to one Vanderburg, who, with the consent of appellant, took possession, and proceeded to cultivate a portion of them. This last fact is conclusive in this case. The verbal lease to Vanderburg was a legal and binding letting of the premises, and entitled Vanderburg to the possession and which he actually obtained with the assent of appellant. This being the state of the case, appellee was not, at the time the complaint was made, entitled to the possession, but the same belonged to Vanderburg, and brings the case within the second branch of the statute respecting forcible entry and detainer, and within the ruling of this court in *Dudley et al.* v. *Lee*, 39 Ill. 344. It is clear, Vanderburg being entitled to the possession, the appellee could not be, and the judgment declaring the right to be in him was erroneous, and must be reversed and the cause remanded.

Judgment reversed.

MATTHEW HENNEBERRY

v.

JOHN M. MORSE *et al*.

1. FAILURE OF CONSIDERATION — *notice of to assignee — what constitutes.* A promissory note contained the following clause: "This note is given for part of the purchase price of the property, on lot 2 on block 15, in the original plat of the city of Galesburg, Knox county, Ill., lately occupied by A. Thorsalle:" *Held*, while such clause in the note fully notified the assignee or purchaser of the true consideration, it was not of itself sufficient to advise him that there was or would necessarily be a failure of the consideration, but it was evidence, in connection with other evidence, to be considered by the jury on the question of notice.

Syllabus. Opinion of the Court.

2. NOTICE—*what will constitute.* Ordinarily, if the facts would put a prudent and cautious person on inquiry, and the party willfully shuts his eyes against the lights to which his attention is directed, and which, if followed, would lead to a knowledge of the true facts, he must suffer the consequences of his own negligence.

3. INSTRUCTIONS—*need not be repeated.* It is not error to refuse an instruction wherein the principle sought to be announced is substantially contained in another instruction given.

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

This was an action brought by Henneberry, as assignee of Lynch, against John M. Morse and Sarah Morse, upon a promissory note executed by the defendants to Lynch. A trial resulted in a verdict and judgment for the defendants. The plaintiff appealed.

The grounds of the alleged errors are set forth in the opinion of the court.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The single question presented in this case is, whether the appellant had sufficient notice of the failure of the consideration of the note upon which the action was brought, before he purchased the same of the payee.

It is not denied that there has been a total failure of the consideration. The note contained this clause, "this note is given for part of the purchase price of the property on lot 2 on block 15 in the original plat of the city of Galesburg, Knox county, Ill., lately occupied by A. Thorsalle."

While this clause in the note fully notified the assignee or purchaser of the true consideration, it was not, of itself, sufficient to advise him that there was, or would necessarily be, a failure of the consideration, but it was evidence in connection with other evidence to be considered by the jury on the question of notice. What will constitute notice is sometimes a very difficult question. It is a general rule, that every case must rest

on its own facts and circumstances. Ordinarily, if the facts would put a prudent and cautious person on inquiry, and the party willfully shuts his eyes against the lights to which his attention is directed, and which, if followed, would lead to a knowledge of the true facts, he must suffer the consequences of his own negligence.

Consistently with this reasonable rule we hold that the facts in this case were sufficient to have put the appellant on inquiry, and if inquiry had once been instituted it would have led to a full knowledge of the entire transaction.

The clause in the note was actual notice to him of the true consideration, and upon the question of whether he had notice of the failure of that consideration there was a direct conflict of evidence. The jury were the better judges of the credibility of the witnesses. This court has repeatedly said that, where there is a contrariety of evidence, and the case has been fairly submitted on proper instructions, we will regard the finding of the jury as settling the controverted facts. After a careful consideration we can not say that the verdict is not warranted by the evidence. The witnesses, so far as we can know, were of equal respectability. Their testimony is flatly contradictory, and in all such cases it is the peculiar province of the jury to determine the weight of the evidence. The jury by their verdict have found that the appellant had notice, before he took the note, of the defenses that existed against it, and we can not undertake to say that they found incorrectly.

It is insisted that the court erred in refusing to give the instruction numbered eight in the series asked on behalf of the appellant. The principles sought to be announced in that instruction were substantially contained in the third instruction which was given. The court was not bound to repeat it, and there was therefore no error in the action of the court in refusing to give the same instruction the second time.

We can discover no substantial error in the record, and the judgment of the circuit court is accordingly affirmed.

Judgment affirmed.

A. B. JENKS

v.

THE CITY OF CHICAGO.

SPECIAL ASSESSMENTS *in Chicago — by whom to be determined — validity of an ordinance in that regard.* An ordinance of the common council of the city of Chicago, directed that a certain street should be curbed, filled and paved, "excepting such portions of the above described work which have been already done in a suitable manner, said work to be done under the superintendence of the board of public works, conformably to the drawing prepared by said board, and hereto annexed." There was nothing in the drawing referred to in the ordinance, nor in any of the papers or proceedings in the case, which was an application for judgment upon an assessment, to define what portions of the work had been done in a suitable manner, but the ordinance left the determination of that question to the discretion of the board of public works, and was therefore void.

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

The opinion states the case.

Mr. S. A. IRVIN, for the appellant.

Mr. M. F. TULEY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an application made by the city collector, at the March term, 1870, of the Superior Court of Chicago, for judgment upon a special assessment warrant for certain improvements upon West Twelfth street, in the city of Chicago.

The ordinance upon which the assessment was based reads as follows: "That West Twelfth street, from the east line of Halstead street, to the west line of Canal street, and from the east line of Canal street to a point 685 feet east of the east line of

Beach street, be and is hereby ordered curbed with curb-walls, filled, and paved with wooden blocks (excepting such portions of the above described work which have been already done in a suitable manner), said work to be done under the superintendence of the board of public works, conformably to the drawing prepared by said board, and hereto annexed."

The oath of the commissioners, notice of the assessment given by them, and the heading of the assessment roll, all contain the same exception, "of such portions of the above described work, which have been already done in a suitable manner."

Appellant filed objections to the recovery of the judgment, and among them, raised the question as to the validity of the ordinance. There is nothing in the drawing referred to in the ordinance, nor in any of the papers or proceedings in the case, which tends, in the least, to define any such portions of the work, which have been already done. As the ordinance declares the work shall be done under the superintendence of the board of public works, it is an attempt to clothe that board with a discretionary power which the law does not warrant, and this court will not tolerate; because it opens the door to fraud and favoritism. This case falls directly within that of *Foss* v. *The City of Chicago*, *ante*, p. 354, in which we held such an ordinance void. This point being decisive of the case, it is unnecessary to consider the others presented by the record and argued by counsel. The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Syllabus.

THEODORE FRANCOIS

v.

SOLOMON MALONEY.

1. BOUNDARY LINE *between adjacent lots — mistake in respect thereto — estoppel.* The owner of a lot of ground brought ejectment against the owner of an adjoining lot, to recover a portion of the land on which the house of the latter stood. There was evidence that, at the time the defendant built his house, about three years before the suit was brought, the plaintiff pointed out to him what he considered the line between the lots, and assisted in taking down a fence. But the plaintiff denied all knowledge as to the line: *Held*, under the circumstances, if the plaintiff through mistake thus induced the defendant to build to a wrong line, he was not thereby estopped from a recovery to the true line, his mere acquiescence in such practical location for so short a time not being sufficient to bar the action, and the evidence too uncertain and contradictory to prove an express agreement.

2. SAME — *deficiency in quantity — how apportioned.* The owner of a parcel of land made a plat of it into lots, and conveyed the same to different purchasers, the deeds describing the lots only by numbers. It was afterward ascertained that the frontage of the whole tract was less than was originally supposed and as shown by the plat: *Held*, in determining the true boundary line between the different lots, the original monuments being gone, and it was necessary to refer to the plat for the ascertainment of the dimensions of the lots, the deficiency in the frontage should be apportioned *pro rata* between them.

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

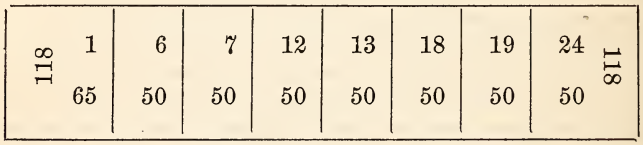
The opinion states the case.

Mr. JAMES L. STARK, for the appellant.

Messrs. NICHOLES & MORRISON and Mr. SIDNEY SMITH, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellee commenced an action of ejectment, in the circuit court of Cook county, for the east eight feet of lot 1, in block 10, in the school addition to the city of Chicago. A verdict was obtained against appellant, and judgment entered thereon. The question in issue seems to have been, the true boundary line between lots 1 and 6. Lot 1 is in the south-west corner of the block. The following is the plat of this part of the block:



Taylor Street.

S.

It will be seen that all the lots are fifty feet in width, except lot 1. It is sixty-five feet wide.

The frontage on Taylor street, according to the original survey, and the plat as recorded, and from which both parties derive title, was four hundred and fifteen feet. By actual measurement, recently made, the actual frontage is four hundred and six feet, leaving a deficiency to be taken from one, or all the lots. It was also in proof that appellee, at the time Francois' house was built, pointed out the line between the lots, and assisted in taking down a fence. This, however, was only about three years before the commencement of the suit. Appellee, in rebuttal, denies all knowledge as to the line. Both parties had a perfect title to their respective lots.

Two questions arise upon this record. 1st. Does the act of appellee, in regard to the boundary, operate as an estoppel? 2d. How shall the deficiency in the frontage be apportioned? Under the circumstances, appellee is not estopped from a recov-

ery to the true line, if, through mistake, he induced appellant to build to a wrong line. The testimony is too uncertain and contradictory. To divest a party of title by deed, which clearly defines the boundary, the evidence should be positive and unequivocal. An actual location, by express agreement, different from the deed, is obligatory. No express agreement was proved in this case. The mere acquiescence has been for too short a time to bar the party from maintaining ejectment. In most cases where confirmations of practical locations have been made, upon evidence of this kind, the acquiescence has been much longer than is shown in this case. *Kip* v. *Norton*, 12 Wend. 127; *Adams* v. *Rockwell*, 16 id. 285; Tyler on Eject. 571 *et seq.*

Besides, the fact of acquiescence has been determined by the jury, under proper instructions; and the finding ought not to be disturbed, as the evidence was conflicting.

It is just and reasonable that a *pro rata* division of the deficiency should be made. There is no good or substantial reason why the loss should fall entirely on lot 1. The parties hold title by deeds, which describe the lots by numbers. The recorded plat is necessarily referred to, for the ascertainment of the dimensions of the lots. The original monuments were lost. The purchaser of lot 1, then, has as good a right to sixty-five feet in width as the purchaser of lot 6 has to fifty feet. Each party should lose his proportion of the deficiency. A contrary rule would operate the most palpable injustice. *Jones* v. *Kimble*, 19 Wis. 429; *Moreland* v. *Page*, 2 Clark (Iowa) 139; *Thomas* v. *Patten*, 13 Me. 329; *Witham* v. *Cutts*, 4 Greenl. (Me.) 31; *Wolf* v. *Scarborough*, 2 Ohio St. 363.

The judgment is right and is affirmed.

Judgment affirmed.

THE COMMERCIAL INSURANCE COMPANY

v.

HENRY IVES *et al.*

1. INSURANCE — *of mistakes or omissions in the application, when made by the agent of the company — estoppel.* Where an insurance company issues a policy, relying entirely on its own knowledge of the facts connected with the property insured, and dispensing with any information from the assured, the agent of the company having himself, without any communication at the time with the assured, made out the application and signed the name of the assured to it, the company will be precluded from denying the truth of any statement in the application, or setting up any mistake or omission in the same.

2. Where matters set up in avoidance of a policy, are acts and omissions of the company's agents, which took place before the delivery of the policy, and would render it invalid, by its terms, at the time of delivery, they can not avail the company in their defense. The issuing of such a policy as and for a valid policy, and taking the premium for it as such, is a representation that it is a valid policy, and the company would be estopped by law to say or show the contrary. It is an estoppel *in pais.*

3. SAME — *who will be considered an agent of the company.* A property owner applied to an insurance agent for additional insurance. This agent wrote to another insurance agent, who resided at another place, on the subject. The latter replied that he might make out an application, and a correct diagram and full description of the property, and he would forward it to a company of which he was agent, for their approval or rejection. The first agent thereupon wrote the application and signed the name of the applicant to it without any communication with the latter at that time, and sent it to the other agent, who forwarded it to his company. A policy was returned to the agent who forwarded the application to the company, and was sent by him to the agent who first solicited the insurance, who delivered it to the assured, and received the premium. This soliciting agent had previously procured insurance on the same property, and was familiar with it: *Held,* although the agent to whom the application was originally made, and who wrote the application, was not employed as their agent by the company who issued the policy, yet he must be regarded as acting as their agent in this particular case, and not as the agent of the assured.

4. The policy provided "that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed

the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." This clause was held not to have the effect to change the fact, that the agent who originally furnished the application was not the agent of the assured.

5. Moreover, that clause was not intended to apply to a case where the company itself took the insurance, without the procurement of another, as was considered to be the case in this instance.

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

The opinion states the case.

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

Messrs. INGERSOLL & MCCUNE, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is unnecessary to consume time and space in examining in detail the numerous assignments of error on this record, one among them being the refusal of sixteen instructions, and another the giving of eight, as the determining of two or three questions arising under three several stipulations in the policy of insurance sued on, will substantially dispose of the merits of them all.

These stipulations, in printed words upon the face of the policy, are as follows:

"Applications for insurance, whether written or verbal, must contain or convey a true description and valuation of the property insured, and such description and valuation shall be deemed a part of this contract, and a perpetual warranty on the part of the assured. * * * or, if the assured, or any other person interested, shall have already procured, or shall hereafter procure, any other policy of insurance, or instrument purporting to be a policy of insurance against fire on the prop-

erty, or any part thereof, hereby insured (whether such instrument be valid or binding as contract of insurance upon the parties thereto, or either of them, or not), without the consent of this company written hereon; * * * then, in each and every such case, this policy shall be void and of no effect. * * *

"If the premises herein insured be held upon lease, or upon leased ground, or if the interest of the assured be equitable, or if it be not one of absolute ownership in fee simple, without incumbrance by mortgage or otherwise, it shall be incumbent upon the assured, whether inquired of or not, so to state the same to this company in writing, giving the true title of the assured and the extent of the interest insured, and the same be so expressed in this policy in *writing*, otherwise this policy shall be void and of no effect; and this policy shall not be construed to protect the interest of any person not named herein as the assured. Goods held on storage must be separately and specifically insured. * * *

"It is a part of this contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance. * * * and no part of this contract can be waived except in writing, signed by the secretary of this company."

The application stated the title, "Fee," the other insurance then on the property, "Peoria Fire & Marine, $3,000, and The Enterprise of Cincinnati, $5,000 on mill and machinery."

The title was a bond for a deed. The appellees had, at the date of the application, two other policies of insurance, one for $3,000 by the Farmers and Merchants' Insurance Company, and one for $5,000 by the La Salle County Mutual Insurance Company, the last being a bankrupt and worthless concern, and its policy expired May 7, 1868, four days before the fire. All the above named insurance, except the last named $5,000, had been procured by J. P. Holmes, who resided at El Paso, where the

property burned was situate, and there acted as the agent of the Farmers and Merchants' Insurance Company.

The policy in suit recites that appellant insures appellees in the sum of $3,000; and in writing upon its face reads: "On their frame steam flour mill building, machinery, and warehouse adjoining, situate in the town of El Paso, Woodford county, Ill., reference being had to their application and survey, No. 14,510, on file in the office of the company in Chicago, for a more particular description, and is a part of this policy and is a warranty by the assured. $8,000 other insurance permitted."

It is now contended by the counsel for the appellant, that this policy is null and void, as provided by its terms; because the consent of the company to the prior insurance was not written upon the policy; because the interest in the property insured was equitable and the assured did not so state the same in writing, giving his true title and extent of interest, and the same was not so expressed in the policy in writing, and because of the falsity of statement in the application.

From the evidence it appears that Holmes was familiar with this property; the appellees had applied to him, an insurance agent, to get $6,000 more insurance on it; he writes to one Folsom at Bloomington, general agent of the Bloomington Insurance Company, and local agent for appellant, who issued policies himself in ordinary cases, but not on special hazards, as this was. He writes back to Holmes: "You may make out an application for Ives Bros., in the Commercial, and give a correct diagram and full description of the mill, etc., also how the furnace is situated, and I will forward to the company for approval or rejection." Holmes himself, without any communication with appellees, wrote the application, signed the name of H. & E. Ives to it, and sent it to Folsom; he forwarded it to appellant at Chicago, which thereupon made the policy in suit, forwarded it to Folsom, who in turn inclosed it in a letter to Holmes, saying: "Enclosed you will find policy in Commercial Insurance Company which you will deliver to Messrs. H. &.

E. Ives and collect premium and report to me. In making charges for commissions, you must fix it so I won't lose any thing," etc.

Holmes drew a diagram on the back of the application, and made the following indorsement upon the application under the head of "Remarks of agent."

"I can not give any better description of the premises than I have done, as I am not very skillful at platting. However, this is all that is required of me by other companies, having placed the entire amount on it. I consider it a very good risk of the class to which it belongs. The owners are our best men, careful and reliable.

"J. P. HOLMES, *Solicitor.*"

Holmes delivered the policy to the appellees; they paid to him the premium, $180, and he forwarded it to Folsom. Holmes had obtained in the same manner, through Folsom, a previous policy of insurance from appellant.

The company, then, issued this policy, relying entirely upon its knowledge of the facts, and dispensed with any information from the assured. In such case, it is precluded from denying the truth of any statement in the application, or setting up any mistake or omission in the same. *Atlantic Insurance Co.* v. *Wright*, 22 Ill. 462.

In reference to a similar provision in a policy, which made it null and void unless the consent of the company to other insurance should be in writing and indorsed on the policy, this court, in *N. E. Fire and M. Ins. Co.* v. *Schettler*, 38 Ill. 168, say: "The agent of plaintiff states the assured mentioned two offices in which he had effected insurance, but the agent did not enter them in writing on the policy, as he was bound to do. For this neglect, the assured should not suffer."

Any thing required by the policy to be done by the appellees, after it was delivered to them, to make it available, they would be held to perform.

But the matters set up in avoidance of this policy are acts

and omissions, and those too of the company's agents, which had taken place before the policy was delivered, which, by its terms, would have made it an invalid policy at the time it was delivered. Now, the issuing of this policy, under the circumstances of this case, as and for a valid policy, and taking the premium for it as such, was a representation that the policy was then valid; and the company are estopped by law to say or show the contrary. It is an estoppel *in pais.*

When a party, either by his declaration or conduct, has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person.

This is a clear rule of law.

Declaring a note to be good to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor. *Watson's Executors* v. *Mc Laren*, 19 Wend. 557.

No declaration by words could have been a stronger representation that this was a valid policy, than the conduct of the appellant.

But it is urged that the last stipulation above recited makes Holmes appellees' agent — that they so agreed.

There is no magic power residing in the words of that stipulation to transmute the real into the unreal. A device of mere words can not, in a case like this, be imposed upon the view of a court of justice in the place of an actuality of fact, and make this company and its agents the agents of the appellees, and their doings the doings of the appellees.

But the general language of that provision was not framed in view of any such case as this. It contemplates the case where some other person has procured the insurance to be taken by the company, upon whose information or conduct it depended. Here, the company of itself alone took this insurance; no one else procured them to take it.

Believing these views essentially dispose of all the material

questions presented to our consideration, and show the propriety of the action of the court below, in giving and refusing instructions, and overruling the motion for a new trial, the judgment of the court below is affirmed.

Judgment affirmed.

Subsequently to the announcement of the foregoing opinion, a petition for a rehearing was filed by appellant. The application was denied, and thereupon the following additional opinion filed:

PER CURIAM: A petition for a rehearing in this case has been presented.

The case was before presented and considered, chiefly upon matters of law arising upon the instructions involving the effect of certain provisions in the policy, requiring certain things to be expressed in writing, upon it; and whether the language of the policy did not make Holmes the agent of the assured, without regard to the actual fact, so that his application was their application, and any false statement in it vitiated the policy. This application for a rehearing is urged mainly on the grounds that Holmes was, in fact, the agent of the assured, and that the assured wrongfully concealed from Holmes, the insecure condition of the furnace, which tended greatly to increase the risk.

This involves only the finding of the jury upon the facts, and presents the question, whether the finding of the jury, in these respects, against the company, was so manifestly against the evidence, as to call upon us to set aside their verdict.

Had Holmes really been employed by the assured as their agent, to get these premises insured for them, we do not say that he would not have had an implied authority to sign their names to the customary application, as being a necessary and proper means for effecting the insurance; but here, the testimony was, that Holmes was in the insurance business at El Paso; we suppose this to import that he was the agent of some one or more insurance companies to act for them in making

insurance; and not that he was the agent of applicants for insurance, to obtain insurance for them. And it is not to be admitted, that when an application is made to such a representative of an insurance company for insurance, he is thereby constituted an agent of the applicant, to make an application for him in writing, and sign his name to it, whereby the assured can be charged as upon an express warranty of the truth of the statements contained in it. It was for the jury to say, whether the appellees did not rather apply to Holmes, as an insurance agent, to be insured, than to act for them, as their agent, to get them insured.

Holmes, it is true, testifies that he had made several applications for Ives before; but there is no evidence that any one of them was with the sanction or knowledge of Ives. He further testified, that he made the application, in the present case, at his own instance; that he drew the diagram on the back of the application, and the Iveses had nothing to do with it, and that he was not agent of the appellees.

There was evidence tending to show, that Holmes, in making out the application and diagram, etc., was acting for and at the direction of Folsom, an admitted agent of the appellants at Bloomington. Without attempting to review the evidence in detail, we will say, that we have carefully re-examined all the testimony, and find there is so much tending to show that Holmes was not the agent of the appellees, that we see no reason to disturb the finding of the jury in that respect, as being contrary to the evidence.

Upon the point of concealment from Holmes, of a matter material to the risk, it appears that Henry Ives, in pursuance of a provision in the policy, submitted to an examination under oath before a notary public in Chicago, and then stated, that he supposed the mill took fire from the sparks from the furnace through a crack in the furnace wall, the reason of which supposition was, that the fire was first discovered immediately over the boiler furnace, and he further said, he had known of a crack there on the outside for a month, perhaps longer, but he

did not know that it extended through until after the fire. But on the trial, Ives testified, that, at the time of his examination in Chicago, he supposed, from the appearance of the crack after the fire, that it extended clear through the wall, but that after said examination, when they got ready to rebuild, the furnace wall was taken down, and it was then found that the crack was only in the outside of the wall; that there was no crack through the inside wall; and that there were eight inches of solid brick work between the furnace and the crack spoken of in his examination; that he never had any knowledge or suspicion of that crack until after the fire; that for a while before the fire he had seen another crack at the back of the wall, and had it repaired; that it was filled up with brick and mortar; that before he made application to Holmes, for insurance, he knew of no defect in the furnace, except this on the outside, and that he did not consider it of any importance. This statement and testimony of Ives was all the evidence upon the point. This testimony on the trial tended, in a material degree, to qualify the former statement made on the examination. It was especially for the jury to judge of the force and effect of the whole evidence when taken together; and we can see no cause for interference with their finding on this question of fact.

The rehearing must be refused.

Rehearing refused.

James H. McCausland

v.

Henry Wonderly.

1. Remittitur — *of the form of entry thereof.* A plaintiff who had recovered a verdict, expressing a readiness to enter a remittitur as to part, to meet the views of the court, a judgment was entered for $1,250, the full

amount of the verdict, less $600, to be remitted, etc. This was held to be informal, and the judgment was reversed in order that the plaintiff might properly enter a remittitur and then take his judgment in proper form.

2. Evidence—*proof of one's own statements—res gestæ.* In an action for malicious prosecution, for the alleged unlawful arrest of the plaintiff upon a charge of larceny, it appeared the prosecution was dismissed by the justice, and it was held incompetent for the defendant to prove what he, himself, stated at the time the prisoner was discharged, as the reason of his failure in the prosecution. A party can not make evidence for himself in this way and claim its admissibility as *res gestæ.*

3. New trial—*remittitur.* A court can not compel a party to remit a part of his verdict; but if a plaintiff prefers to remit a part of a verdict he has recovered, in order to meet the view of the court and to avoid a new trial upon the ground of excessive damages, he can not assign that for error.

Appeal from the Circuit Court of Cook county; the Hon. Erastus S. Williams, Judge, presiding.

On the 18th day of November, 1868, McCausland caused a warrant to be issued by a justice of the peace, and Wonderly to be arrested thereon, on a charge of larceny. On the first of December following, Wonderly, on being brought before the justice, was discharged from custody, no witnesses appearing against him; whereupon, Wonderly brought this action for malicious prosecution. On the trial the defendant offered in evidence statements made by himself at the time the prisoner was discharged, as to the reason of his failure in the prosecution, which were rejected by the court, and the defendant excepted.

A verdict was returned in favor of the plaintiff for $1,250, and thereupon the defendant moved for a new trial, which the court stated would be granted, unless the plaintiff would remit $600 of his verdict. This the latter consented to do, and the judgment was entered as follows, that upon "plaintiff's remitting the amount aforesaid, it is ordered and considered by the court that said Henry Wonderly, plaintiff, recover of said defendant, James H. McCausland, $1,250, his damages aforesaid, by the jury assessed, less the sum of $600 to be remitted as aforesaid, together with his costs," etc.

The defendant appealed.

Mr. John Lyle King, for the appellant.

Messrs. Story & King, for the appellee.

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

This was an action for malicious prosecution, in which the jury found a verdict for the plaintiff for $1,250. On a motion for a new trial, the court held the verdict too large, and the plaintiff expressed his readiness to enter a remittitur of $600, which would obviate the objections of the court, but the remittitur was not in fact entered. Judgment was however rendered for $1,250, less $600, to be remitted, etc. This judgment was informal, and must be reversed, with leave to the plaintiff to properly enter a remittitur and then take his judgment in the proper form.

The other errors are not well assigned. The instructions only lay down familiar principles of law and can not have misled the jury. The evidence as to what the defendant said at the time the prosecution of the plaintiff was dismissed by the justice was very properly excluded. A party can not be permitted to make evidence for himself in this way and claim its admissibility as *res gestæ*. The naked fact to be proven in that part of the case was that the plaintiff, who had been arrested, was discharged by the justice. The law thereupon raises the presumption that he was discharged for want of proof of guilt, but why his prosecutor had failed to make the proof was certainly not a fact to be proven by the declarations of the prosecutor himself.

A cross error is assigned, that the court should not have compelled the plaintiff to remit a part of the damages. That is not the proper mode of stating the action of the court. The court can not compel the plaintiff to remit, but when there is a motion

for a new trial on the ground of excessive damages, and the court states its intention to grant it on that ground alone, the plaintiff has the election either to take the verdict of another jury, or to remit so much of his verdict already gained as will obviate the objections of the court. If he chooses to take the latter alternative, he can not complain here. The granting of a new trial can not be assigned for error, and it necessarily follows, if a plaintiff prefers to give up part of his verdict to avoid a new trial, he can not assign that for error. The judgment is reversed and the cause remanded.

Judgment reversed.

GEORGE W. HOLCOMB

v.

JOHN DAVIS.

1. STOCK RUNNING AT LARGE — *in Monroe, St. Clair, and other counties— construction of act of* 1867. Under the act of March 7th, 1867, entitled "An act to prevent domestic animals from running at large in the counties of Monroe, St. Clair and other counties," it is only necessary, in order to render that act operative in any of the counties named therein, which may vote upon the question, that a majority of the votes cast on the proposition for or against, shall be in favor of its adoption. That is sufficient to give force to the law although the number of votes cast in its favor may be less than a majority of the whole voting population of the county. The ninth and tenth sections of that act explain and limit the meaning of the eighth section, in that regard.

2. IMPOUNDING STOCK — *in Monroe and other counties, under act of* 1867. The statute of 1867 has not authorized any but householders to take up and impound stock running at large contrary to its provisions. And it has been held that a party who seeks to justify the taking up and impounding of stock, under that law, must show that he is a householder.

3. SAME — *demand by owner and tender of expenses.* The owner of cattle taken up in accordance with such law, before he can maintain replevin for their recovery against the person impounding them, must show both that

he demanded the cattle from the defendant, and that, before the commencement of the suit, he offered to pay him fifty cents per head for taking up the same, and the price of one-half bushel of corn per day per head during the time defendant had them in possession.

4. ERROR — *waiver*. Where there is error in an instruction which would operate against the party asking it, the objection will be regarded as waived.

5. INSTRUCTIONS should never be given unless there is evidence in the case tending to support the legal propositions announced therein.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion states the case.

Mr. A. E. HARDING, for the appellant.

Messrs. PILLSBURY & LAWRENCE, for the appellee.

MR. JUSTICE WALKER delivered the opinion of the Court:

This was an action of replevin, brought by appellee before a justice of the peace in Livingston county, to recover the possession of two cows. A trial was had before the justice, resulting in a verdict and judgment in favor of plaintiff, from which an appeal was prosecuted to the circuit court of that county, where a trial was had, with a like result, and the case is brought to this court by appeal, and a reversal is urged upon the errors assigned.

On the trial in the court below, it appeared that appellant took up and impounded the animals under the act of March 7, 1867 (Sess. Laws, 97), and the evidence shows that on the vote for and against adopting that act in Livingston county, there were cast for "keeping up stock," as required by the statute, 1,244 votes, and "against keeping up stock," 971 votes. It also appears that there were cast at that election 2,600 votes. It is therefore contended, that while there was a majority of those voting on that question, in favor of "keeping up stock," that

still there was not a majority of all the legal votes of the county cast in favor of the proposition, and the law, for that reason, did not become operative in Livingston county.

The eighth section of the law declares that it shall not be in force until it shall be ratified by a majority of the legal voters of the county, etc. This section, considered independent of other provisions of the act, would, no doubt, require a majority of all the votes cast at the election at which the question was submitted for its adoption. But it is urged that the language employed in the ninth and tenth sections explains the legislative intention, and modified the language employed in the eighth section.

The ninth section required the clerk of the county court to give notice of the election, and provides for the form of the votes cast. It then declares, if a majority of all the votes cast in the county are in favor of adopting the law, then the law should be and continue in full force. The tenth section declares that, in case a majority of the votes cast are against the adoption of the law, the county court shall have power, at any subsequent regular term, to submit the same question to the voters of the county, at the next regular election.

It will be observed that the tenth section declares that if a majority of the votes cast are against the law, then another, or subsequent election, may be held. If the construction contended for by appellant be correct, the question could not be again submitted, unless the majority of all the votes cast at that election, for officers or otherwise, was against the law; and a case like the present would not be within its provisions. In this case there is not a majority, either of all the votes cast at the election, or on this question, against the proposition. And we must conclude that, inasmuch as the general assembly have provided for again submitting the question in case of its failure, it was intended to apply to any case where, from any cause, it failed to be adopted. And if so, it would seem to be repugnant to the construction claimed by appellant.

The fact that the law requires the votes to be for and against,

would seem to clearly imply, that, if a majority cast on the question was for the law, it should become operative. If those not voting are to be counted against the law, why require them to vote at all on the question. It would be supererogation. Hence we conclude, there was a reason for requiring a negative as well as an affirmative vote. And that reason was, no doubt, to enable a majority voting on the question, to control in its adoption or rejection. Again, in providing for a resubmission, the tenth section declares, if, at a subsequent election on the question, "a majority vote for the same, then the act shall take effect." This last provision does not, in terms or meaning, require any more than a majority voting on the proposition, to give the law effect. No reason is perceived, nor do we think any exists, for a different rule to be applied, as between a first and second election on the proposition. It could not have been intended, that it should require a majority of all the votes in the county, to adopt the law at one election, and only a majority of those voting on the question, at a subsequent election, to give the law force and validity. We are therefore of opinion, that the true construction of these sections, when considered together, only requires a majority of the votes cast on the proposition, to give force to the law; and that the ninth and tenth sections explain and limit the meaning of the eighth section.

It is also urged that the court erred in refusing to give this instruction:

"Under the law as it existed in this county at the time of the taking up of the cows in question, it was unlawful for cattle to run at large, and if the jury believe, from the evidence, that the cows in question were running at large in said county, and committing trespass on the land of defendant, then the taking up by defendant was lawful, and in such case the law is for defendant, unless they further believe, from the evidence, that plaintiff demanded said cows, or, before the commencement of this suit, offered to pay the said defendant fifty cents per head for taking up the same, and the price of one-half

bushel of corn per day per head during the time defendant had them in possession."

This instruction is faulty, in putting the demand and tender in the alternative. Both of these acts were necessary to entitle appellee to maintain replevin for the recovery of the property. But the error would have operated against appellant, who asked the instruction, and he must be considered as having waived it.

But there is a fatal objection to the instruction, in the failure to inform the jury that they must believe that appellee was a householder. The statute has not authorized any but householders to take up and impound stock running at large contrary to its provisions. And this has been held essential to a justification under this statute. See *Erlinger* v. *Boneau*, 51 Ill. 94. But had the instruction been, in this respect, sufficient, still it was properly refused, as there is no evidence in the record upon which to base it. The court should never give instructions unless there is evidence in the case tending to support the legal propositions announced. For these reasons the judgment of the court below must be affirmed.

Judgment affirmed.

FREDERICK R. WILSON

v.

THOMAS RAYBOULD.

MEASURE OF DAMAGES — *lessee against lessor.* In an action on the case by a lessee against his lessor, to recover damages resulting to the former by reason of the false and fraudulent representations of the lessor, that he was the owner of the premises, it appeared the lessee, on the faith of such representations, had erected a shop on the premises, and, upon being evicted under title paramount, was compelled to move his shop, machinery, etc., to another lot: *Held,* the measure of damages, in respect to the expense of moving, should be limited to the necessary expense thereof; and in respect

to the cost of another lot whereon to place his shop, during the unexpired portion of his term, the damages should be confined to the rent of a lot similarly situated, and of equal rental value, to the one the plaintiff was compelled to leave.

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

This was an action brought by Raybould against Wilson, to recover for damages resulting to the plaintiff by reason of the alleged false and fraudulent representation of the defendant, that he was the owner of water lot 45, in Kinzie's Addition to the city of Chicago, whereby the plaintiff, relying on such representation, was induced to accept from the defendant a lease of a part of the premises, of date May 1, 1867, for five years, and erected a shop thereon, put in machinery, etc., and was ejected therefrom November, 1868, by a writ issued on a judgment in favor of the holder of the paramount title, etc. The question arises as to the measure of plaintiff's damages, in case he is entitled to recover.

Messrs. JONES & GARDNER, for the appellant.

Messrs. PAYNE & COOK, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case, brought by Thomas Raybould against Frederick R. Wilson, to the circuit court of Cook county, resulting in a verdict and judgment for the plaintiff, of $2,500, to reverse which the defendant appeals.

We have not deemed it necessary to consider any other question raised in the case, but the rule of damages, as laid down by the court, on its own motion. That rule is found in this instruction:

"If the jury shall not find, from the evidence, that the defendant has been guilty of fraud, as alleged in the declaration, then no recovery can be had in the action, against the defendant,

but if the jury shall find, from the evidence, that the defendant is guilty, then the damages to be awarded to the plaintiff may include: First. The expenses incurred in removing the plaintiff's shop, machinery, tools and stock in trade, to another location as near to the plaintiff's former location as a suitable lot could be obtained by plaintiff. Second. The difference, if any, in the amount the plaintiff had to pay for another lot of equal dimensions, upon which to remove his buildings and machinery, for the period that the plaintiff's lease from the defendant was to continue. Third. Interest on the amount of capital actually invested in the plaintiff's business, at six per cent, for the time plaintiff's business was necessarily suspended by reason of the removal from one place to another."

The first clause of this instruction authorized the jury to give, as damages, any expenditure the plaintiff might have made in removing. It should have been confined to necessary expenses, and to those only. The second authorized them to allow rent, no matter how extravagant, for a lot of equal dimensions, whereon to place his building and machinery, whereas it should have been confined to the rent of a lot similarly situated, or of equal rental value, to the one the plaintiff was compelled to leave.

For this error the judgment is reversed and the cause remanded.

Judgment reversed.

AUGUSTUS P. SMITH

v.

WILLIAM L. GRAY *et al.*

CONTRACT — *construction thereof — sale of goods.* A party wishing to purchase tanned sheep skins, wrote to a manufacturer as follows: "I will accept of the proposition made in your favor of the 20th inst. * * * This, of course, contemplates A No. 1 skins in quality and size, with the privilege of returning skins that I can not use."

The letter to which this was a reply, simply contained a proposition on the part of the manufacturer to sell and furnish to the other party, all the skins he might make that season, up to a certain number, at a stipulated price.

The manufacturer responded: "Will do the best for you as regards the quality of skins, and make the same as last year, with what improvements can be made:" *Held*, the extent of the agreement on the part of the seller was, that the quality of the skins should be equal to those made the year before, with the privilege reserved to the buyer to return such as would not answer his purpose; and if the buyer, upon a full and fair inspection of the skins delivered to him, with a knowledge of their size and quality, elected to retain them, and not to avail of his privilege to return them to the seller, he could not afterward be heard to complain that they were not in accordance with the terms of the contract.

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

The opinion states the case.

Messrs. BATES & HODGES, for the appellant.

Mr. R. W. SMITH, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action instituted by the appellees in the Superior Court of Chicago, to recover of the appellant the price and value of certain goods and merchandise, consisting of tanned sheep and calf skins, which it is alleged were sold and delivered during the summer of 1868.

The pleas filed were, the general issue, and a notice of set-off, under the statute.

In the notice it is alleged that the skins were purchased for the express purpose, and that it was so understood between the parties, of being manufactured into mittens; that it was agreed they should be of the same size and quality of those furnished by the same parties during the year 1867. It is further averred that the goods furnished were not of the proper size and quality, and thereby the appellant was greatly damaged.

A jury was waived and the cause submitted to the court for trial. The court found the issues for the plaintiffs, and rendered judgment in their favor for the sum of $1991.04.

The errors assigned only question the ruling of the court in construing the contract between the parties, and the finding of the court on the evidence.

The negotiations between the parties for the sale and purchase of the goods in question seem to have been mostly carried on by letters, and the contract between them is to be found in their correspondence preserved in the record. All that is material to be considered with reference to the contract may be found in their respective letters of the dates of the twenty-fifth and twenty-seventh of March.

On the 25th day of March, 1868, the appellant wrote to the appellees as follows, viz.: "I will accept of the proposition made in your favor of the twentieth instant. It is too much, but I must have the skins and have them early. This of course contemplates A No. 1 skins in quality and size, with the privilege of returning skins that I can not use."

The letter to which this is a reply, simply contains a proposition on the part of the appellees, that they will sell and furnish to the appellant all the skins that they may make that season, up to two thousand dozen or more, at twelve dollars per dozen.

Under the date of March 27, 1868, the appellees replied to the appellant's letter as follows, viz.: "Yours of the twenty-fifth is received and contents noted. Will do the best for you as regards the quality of skins and make the same as last year, with what improvements can be made."

These letters must be construed together as constituting the contract between the parties, under which the goods were sold and delivered.

It will be perceived that there is no agreement on the part of the appellees that the skins should be of the same size as those manufactured and sold the previous year. The extent of the agreement is, that the quality shall be the same as those made

the year before, with such improvements as could be made, and there was, therefore, no error in the court in so construing the contract.

But if the contract should be understood to mean that the skins were to be of the same size and quality of those furnished in 1867, then, by the express terms of the contract, it was the duty of the appellant to return all that he could not use for the purposes for which they were intended. He stipulated in the contract for that privilege, and it was accorded to him. Under the privilege thus reserved to himself, he did return something over one hundred dozen, and the same were received and credit given. The appellant was in no way bound to keep any of the goods sent that he could not advantageously and economically use in his business. It was so expressly agreed, at his own instance.

If, therefore, upon a full and fair inspection of the goods, with a knowledge of their size and quality, the appellant elected to retain them and not to avail of his privilege of returning the same, he can not now be heard to complain that the goods were not in accordance with the terms of the contract.

Under this view of the meaning of the contract the evidence fully sustains the finding of the court.

We discover no error in the ruling of the court in construing the contract or in its findings on the evidence, and the judgment must be affirmed.

Judgment affirmed.

JOSEPH CREOTE *et al.*

v.

THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENTS *in Chicago — what defense allowable after confirmation — construction of the statute.* Where it is alleged that the board of public works in the city of Chicago, in making a special assessment for the

construction of certain improvements in the city, willfully and knowingly included in their assessment the cost of certain work in respect to such improvements, which had been done by persons other than the city, property owners affected by the assessment are not precluded from presenting such fact as a defense after confirmation of the assessment by the common council, but the defense may be made for the first time, on the application for judgment on the assessment.

2. SAME — *admissibility of evidence — what constitutes a defense.* On an application for judgment upon an assessment for curbing with curb walls, filling and paving a certain street in the city of Chicago, it is competent for a property owner embraced in the assessment, under a proper form of objection, to prove that a portion of the curb walls upon said street and on the line of the proposed improvement, had been built before the assessment by the board of public works was made. While such evidence, standing alone, would not establish a defense, yet it would afford a link in the chain of evidence which would. If followed by evidence that such portions of the walls had been built by property owners, or any party other than the city, and the board had willfully and knowingly included them in the assessment, it would be such a fraud upon the property owners as ought to render the assessment void.

3. SAME — *whether a particular defense is embraced in the objections filed.* An objection filed to such an assessment stated that the estimate of the expense of the improvement, as reported by the board of public works to the council, was knowingly and willfully stated by the board at a much larger amount of money than the board believed the expense would be, and at a sum much larger, by several thousand dollars, than the board knew would be the cost of the work: *Held,* if a portion of the curb walls had been previously built by parties other than the city, and they were included in the amount of the estimated cost of the improvement, this would sustain such objection, and constitute a good defense.

4. SAME — *of the rule of uniformity.* Upon objection to such an assessment, it is competent to prove that the cost of the curb walls was assessed upon each lot in proportion to each lot's frontage upon the street. Such evidence would tend to show a violation of the principle of uniformity established in the constitution and by the statute.

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

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

Messrs. BARKER & TULEY, for the appellants.

Mr. S. A. IRVIN, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is an appeal from the judgment of the Superior Court of Chicago against certain lots of appellants for an assessment on warrant for curbing with curb walls, filling, and paving with wooden blocks, West Lake street, from Halsted to Reuben street, in the city of Chicago.

The appellants, having filed numerous objections to the recovery of judgment, offered to prove upon the hearing, in support of the objections, that a portion of the curb walls upon said street and on the line of the proposed improvement, had been built before the assessment by the board of public works was made. The evidence was objected to by the counsel for the city, and the court excluded it, on the ground that there was no objection filed to that effect. The exclusion of this evidence is relied upon for error.

The evidence offered would not, standing alone, establish a defense; but it afforded a link in the chain of evidence, which would. If it were followed up by evidence that such portions of the walls had been built by property owners, or any party other than the city, and the commissioners had, willfully and knowingly, included them in this assessment, it would be such a fraud upon the property owners as ought to render the assessment void.

There is some lack of precision in the offer as made, but for the purpose indicated, the evidence was admissible, if any such defense can be set up after confirmation by the common council, and if there was a proper objection on file.

Can such a defense be made to the recovery of judgment, upon the collector's report? In actions concerning real estate, there are defenses termed legal and equitable. In actions of ejectment, for instance, with but very limited exceptions, none but the former are recognized in this State as proper; while in other States, in order to avoid multiplicity of suits, equi-

table defenses may be interposed. It is a matter generally within the legislative power to regulate, and the question is, what character of defenses, if any, is allowable under the statute governing these proceedings? By the fourteenth section of chapter nine of the city charter (Gary's Laws, etc., 89), it is declared that each of the collector's reports shall constitute a separate suit, and shall be docketed by the clerk as a suit. The fifteenth section, same chapter, says, that "It shall be the duty of the court, upon the filing of the reports, to proceed to the hearing of the same, and they shall have priority over all other causes pending in said court." The application for judgment is thus treated as a suit — a cause pending in court. But the statute proceeds: "The court shall pronounce judgment against the several lots and parcels of land or other property described in the report to which no objections shall be filed, for the amount of the tax or assessment, damages and costs due severally thereon." This judgment, the statute speaks of as a judgment by default.

The statute further declares, that "The owner of any property described in said report, or any person beneficially interested, may appear at said court at the time designated in the collector's notice, and file objections in writing to the recovery of judgment against such property, but no objection shall be sustained founded on any mere formal irregularity or defect." By the sixteenth section of the same chapter, these objections are styled defenses. There is nothing in this language which places any limitation upon the objections, except that none founded upon any mere formal irregularity or defect shall be sustained. But in giving it a construction the court must hold that the objections which may be sustained, if apparent upon the proceedings, or if not, which are supported by evidence, are those which, by recognized principles of either law or equity, are sufficient to quash the proceedings for want of compliance with the statute, or to overthrow them for matters extrinsic the record. As was said in *Pease* v. *The City of Chicago*, 21 Ill. 500, "any thing which a court of law would

examine into, under a writ of *certiorari*, may be considered on this trial, and even more, for the court may inquire *dehors* the proceedings of the common council, and see if any facts exist which render the tax or assessment illegal, as well as into any substantial irregularity in the mode of assessing it, for which a court of law should set them aside.

It has been supposed, and some of the later decisions of this court are to that effect, that if such defense as was sought to be established in this case was not made in the common council, before confirmation of the assessment, it could not be objected to the recovery of the judgment. We are unwilling to give our adherence to such a position. The thirteenth section of chapter 7, concerning the condemnation of land for public use (Gary's Laws, 66), says, that "Said assessment, when confirmed by the common council, shall be final and conclusive upon all parties interested therein, except as hereinafter provided." This exception includes the very case of a defense being made to the recovery of judgment, by a party who decides to test the validity of the proceedings. If other parties choose to submit to the confirmation as conclusive upon them, and voluntarily pay their assessment, when the law affords them the means of resisting its collection, if illegal, then, as to them, it should be conclusive.

The twenty-fourth section of chapter 7 (Gary's Laws, 79), if taken literally, would seem to sustain the position of the conclusiveness of the confirmation. But, when the whole statute is construed together, it does not admit of such a construction. This section requires that the commissioners, when they shall have completed the assessments for street improvements, "shall sign and return the same in like manner, and give the like notice of the application to the common council for confirmation, as herein required in relation to assessments for the condemnation of real estate; and all parties in interest shall have the like rights, and the common council shall perform like duties and have like powers in relation to such assessment, as are herein given in relation to assessments for the con

demnation of real estate." Here is a plain intention to assimilate the confirmation, and its effects, to that in the case of the condemnation of real estate, and the remaining clause must be construed in the light of the context. "When confirmed by the common council, said assessment shall be final and conclusive upon all parties interested therein, and shall be collected as in other cases; and no appeal shall lie in any case from the order of confirmation."

The thirty-fourth section of the same chapter (Gary's L. 74) takes away the common law *certiorari*, of which the circuit court has jurisdiction, unless the writ is applied for within thirty days after the confirmation; and if the party interested neglects to file objections in the common council, to the confirmation, it is taken away altogether, "unless he can show, by legal and satisfactory evidence, other than his own oath, that he has a sufficient legal excuse for such omission or neglect."

Thus it will be seen that if the defense in question can not be made upon the application for judgment upon the collector's report, it can be made nowhere except before the common council. Such a construction would render the statute arbitrary and despotic. No appeal is allowed. The common law *certiorari* practically taken away. The property owner, bound hand and foot, would be subject to a conclusive judgment upon the most important rights of property, rendered by a tribunal wholly unfitted by the very nature of its organization, for sitting in judgment upon questions so grave, intricate and delicate as are involved in the exercise of the high prerogative power of eminent domain.

The common council of the city of Chicago does not belong to the judicial department of the State, and, under the constitution, can not be clothed with judicial power. We hold, therefore, that the appellants were not precluded by the confirmation of the assessment by the common council from setting up the defense offered.

Was there an objection filed under which the defense was admissible?

The sixth objection is, in substance, that the estimate of the expense of this improvement, as reported by the board of public works to the council, was knowingly and willfully stated by the board at a much larger amount of money than the board believed the expense would be, and at a sum much larger, by several thousand dollars, than the board knew would be the cost of the work. These grounds of objection show an abuse of power, and, if true, amount to a fraud.

If a portion of the curb walls had been previously built by parties other than the city, and the commissioners included them in the amount of the estimated cost of this improvement, this would sustain the objection just stated, and constitute a good defense. *City of Chicago* v. *Burtice*, 24 Ill. 489. It was error to exclude the evidence.

Appellants also offered to show, by competent evidence, that the cost of the curb walls was assessed upon each lot in proportion to each lot's frontage upon the street. There was an objection stating this as a ground, but the court excluded the evidence, and exception was taken. The evidence was competent, as tending to show that the principle both of the statute and the constitution was violated. *City of Chicago* v. *Larned*, 34 Ill. 203.

Other questions are made in this case, but they are based upon technical grounds involving no principle; errors of a substantial character being found in the record, for which the judgment must be reversed, it is unnecessary to discuss the other points made.

Judgment reversed and cause remanded.

Judgment reversed.

BERNARD SOUTHEIM *et al.*

v.

THE CITY OF CHICAGO.

SPECIAL ASSESSMENT *in Chicago — what defenses availing.* Upon an application for a judgment upon a special assessment in the city of Chicago, it is admissible to prove as a defense thereto, "that the commissioners, in making said assessment, knowingly and willfully assessed objector's real estate at more than its proportion of benefits to be conferred by said improvement;" and that the "commissioners assessed certain real estate benefited, for an amount grossly and very much less than it was benefited, and, in so doing, increased the benefits assessed against objector's real estate."

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

The opinion states the case.

Messrs. BARKER & TULEY, for the appellants.

Mr. S. A. IRVIN, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is an appeal from the judgment of the Superior Court of Chicago, for a special assessment for the extension or opening of Dearborn street, in the city of Chicago.

The appellants appeared in court at the time specified in the collector's notice of application, and filed objections, in writing, to the recovery of the judgment, pursuant to statute, among which was, "that the commissioners, in making said assessment, knowingly and willfully assessed objector's real estate at more than its proportion of benefits to be conferred by said improvement."

"And because commissioners assessed certain real estate benefited, for an amount grossly and very much less than it was benefited, and, in so doing, increased the benefits assessed against objector's real estate."

Upon the hearing, appellants offered evidence tending to sustain their objections, and to prove fraud, on the part of the commissioners, in making the assessment. The court excluded the evidence. Appellants excepted, and assign this ruling for error.

We have determined in favor of the admissibility of this defense in the preceding case of *Creote et al.* v. *City of Chicago.*

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

Judgment reversed.

THOMAS J. VENNUM

v.

HIRAM VENNUM.

1. FORCIBLE DETAINER — *demand.* The grantee of a lessor, preparatory to bringing an action of forcible detainer against the lessee, prepared this notice: "You are hereby notified that, in consequence of the expiration of your lease, which expired August 22, 1868, also your default in the payment of the rent of the premises now occupied by you, being lots 2 and 6, in block 11, in the village of Milford, in the county of Iroquois, and State of Illinois, I have elected to determine your lease, and you are hereby notified to quit and deliver up possession of the same to me within ten days of this date." "Dated Milford, August 27, 1868." *Held,* although the notice contained more than was necessary, it was a sufficient "demand in writing for possession."

2. SAME — *demand of possession, how proven.* The fact of the delivery of a copy of the "demand in writing for possession," to the party against whom it is proposed to bring such action, can not be proven by an indorsement on the original paper, either by an officer or by a private person, whether sworn to or not. Service must be proved by a witness.

Syllabus. Brief for the appellant.

3. PARTY AS A WITNESS — *evasion of service.* If one party desires the testimony of the other party in the suit, he should procure the attendance of the witness by subpœna, duly issued and served in apt time. Parties are not required to remain in court to await an examination; and even if the party whose testimony is desired should evade service of a subpœna, that would not justify the admission of improper evidence against him.

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES H. WOOD, Judge, presiding.

This was an action of forcible detainer, to recover possession of certain premises, brought by Hiram Vennum against Thomas J. Vennum. On the trial the plaintiff introduced in evidence the following written notice:

"Thomas J. Vennum, Esq.: You are hereby notified that in consequence of the expiration of your lease, which expired August 22, A. D. 1868, also your default in the payment of the rent of the premises now occupied by you, being lots 2 and 6 in block No. 11, in the village of Milford, in the county of Iroquois, and State of Illinois, I have elected to determine your lease, and you are hereby notified to quit and deliver up possession of the same to me within ten days of this date.

"Dated MILFORD, *August* 27, A. D. 1868.

"HIRAM VENNUM."

Judgment was rendered for the plaintiff, from which the defendant appeals.

Messrs. BLADES & KAY, for the appellant.

We maintain that the notice in question in this case was not such a demand as is contemplated by the statute. It appears that the lease expired August 22, 1868. The notice bears date August 27, 1868. By the terms of the notice he was to quit the premises within ten days of the latter date. Now, as we understand the law, the lease having expired, he had a present and immediate right of action as soon as the lease

expired, upon making demand. He could have made demand on one day, and the next day instituted suit. Here the time of occupancy was extended ten days after the service of notice. The appellee could not have instituted suit within the ten days. After the expiration of the ten days the appellant could not have been placed in default without demand of immediate possession. We understand that the statute makes a distinction between a notice and a demand for present possession.

This action is founded upon tort. In case of trover, while the party defendant has the property tortiously, he yet, in law, is not deemed to have converted it to his own use until demand made. In this case the appellant, by the terms of the notice, was given an extension of time, and we hold that, after the expiration of the time, a demand was necessary.

Messrs. ROFF & DOYLE, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellee commenced proceedings before a justice of the peace, to obtain possession of certain premises, under section 1 of chapter 43 of the statutes, entitled "Forcible entry and detainer." This case was tried before the justice, and taken by appeal to the circuit court of Iroquois county.

That court found the defendant guilty, and rendered judgment that the plaintiff have restitution of the premises. The appellant brings the case to this court, and has assigned several causes of error.

On the 22d of August, 1866, Henry J. Fry and appellant executed a written agreement, by the terms of which Fry leased certain premises to appellant for two years, and before the termination thereof, Fry, by good and sufficient deed, conveyed the same to appellee.

For the purpose of proving a demand in writing for the possession of the premises, as required by the statute, the appellee introduced Dr. Fullenwider, who testified that he had

written two notices similar to the one shown to the witness; that the notice now offered was one of them; that the constable, Thompson, had returned to him, as the justice in the case, the notice then in court; that it was used on the trial before him, and that he heard appellant say that he had been notified of the proceeding, but he did not say whether the notice was verbal or written. The admission of this evidence was objected to by the appellant and the objection was overruled by the court, and exceptions were then taken.

Appellee then offered in evidence the following notice in writing, to wit:

"Thomas J. Vennum, Esq.: You are hereby notified that in consequence of the expiration of your lease, which expired August 22, A. D. 1868, also your default in the payment of the rent of the premises now occupied by you, being lots 2 and 6 in block No. 11, in the village of Milford, in the county of Iroquois and State of Illinois, I have elected to determine your lease, and you are hereby notified to quit and deliver up possession of the same to me within ten days of this date.

"Dated MILFORD, *August* 27, A. D. 1868.

"HIRAM VENNUM."

[Indorsement.]

"Notice to Thomas J. Vennum: Personally served this writ by delivering copy to Thomas J. Vennum, this 27th day of August, 1868.

M. A. THOMPSON, Constable,"

and proved by Dr. Fullenwider that the indorsement on the back of said notice was in the handwriting of M. A. Thompson, and that his signature thereto was genuine. Appellant objected to the admission of said notice and the statement as to the handwriting of Thompson, as evidence, and the court overruled the objection and received the testimony, to which ruling of the court the appellant then excepted.

It is insisted, by appellant's counsel, that the notice offered is not, in form, a demand. We think it is sufficient in form.

It contains more than is necessary, but this will not vitiate. It required the party in possession to "quit and deliver up possession." This is in full compliance with the statute, which requires a "demand in writing for possession."

The proof did not, however, justify the court in receiving the notice as evidence of a demand. In proceedings of this character a demand in writing is necessary. Such a demand can only properly be made by the delivery of a copy to the party in possession. Thompson's indorsement was wholly insufficient to prove the delivery of a copy. Proof of the handwriting did not aid in the slightest degree. No indorsement upon the paper, either by an officer or by a private person, whether sworn to or not, that a copy had been delivered, constitutes proof of such fact. *Ball* v. *Peck*, 43 Ill. 486, 487.

The testimony utterly fails to show that appellant ever had a copy of the demand before the filing of the complaint. This could easily have been proved, if true. It was, too, essential to prove it. Thompson, who, it is assumed, served the demand, or the appellant, to whom a copy should have been given, might have been called to prove that the law had been complied with.

It is said, in the record, that appellant evaded the service of a subpœna, issued after the commencement of the trial, and locked himself in the office of his counsel. The proof fails to show that appellant knew of the existence of the subpœna. He had the right to leave the court room, as he was not bound to be there in obedience to any process or order of the court. Even if he evaded the service, this would afford no excuse for permitting improper testimony. His attendance, if desired, should have been procured by subpœna, duly issued and served in apt time for the trial.

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

Judgment reversed.

EPHRAIM FRAZEE

v.

LEMUEL MILK *et al.*

TEXAS AND CHEROKEE CATTLE—*infection from those of different owners.* In an action to recover damages on account of disease alleged to have been communicated to the plaintiff's cattle by Texas and Cherokee cattle belonging to the defendant, and brought into this State in violation of the act of 1867 on that subject, if there be evidence tending to show that plaintiff's cattle were exposed to two lots of Texas and Cherokee cattle, one belonging to the defendant and the other to a third person, it would be improper to instruct the jury that if both lots contributed to infect plaintiff's cattle, and they were not able to say that one lot was concerned in doing so more than the other, they must find for the defendant. An instruction on that subject should be given only on the hypothesis that the disease was communicated by the cattle of the one party solely, and not by the cattle of both.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion states the case.

Mr. URIAH COPP, Jr., and Mr. R. G. INGERSOLL, for appellant.

Mr. H. LORING and Mr. T. P. BONFIELD, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action by the appellant against the appellees to recover damages on account of disease alleged to have been communicated to appellant's cattle, of which they died, by Texas or Cherokee cattle belonging to appellees, under the act of 1867, making it unlawful for any one to bring into this State, or own, or have in possession, any Texas or Cherokee

cattle, and any person violating the provisions of the act liable to pay all damages accruing to any one by reason of such violation.

One point of defense on the trial was, that Texas and Cherokee cattle of Fowler & Earl had the opportunity, and might have communicated the disease to plaintiff's cattle; and the following instruction was given to the jury for the defendants:

"If the jury believe, from the evidence, that the cattle of defendants and the cattle called Fowler & Earl's, would communicate disease to native cattle when they (the native cattle) came in contact with the cattle of defendants, and of Fowler & Earl; and if the jury believe, from the evidence, that the cattle of plaintiff took a disease of which they died, either from the Fowler & Earl, or from the cattle of the defendants, and if the jury further believe that the testimony is equally balanced as to which of said cattle, defendants' or Fowler & Earl's, the plaintiff's cattle took the disease from, then the jury should find a verdict for the defendants."

There was evidence tending to show that the plaintiff's cattle contracted their disease by ranging over ground the cattle of defendants and of Fowler & Earl had previously passed over; and the jury might have believed that both lots of cattle contributed to infect the plaintiff's cattle with disease, without being able to say that either one lot was concerned in doing so more than the other; in which case, the instruction would seem to require them to find for the defendants, which would have been wrong. We think the instruction should, at least, have been modified so as to have been given to the jury only on the hypothesis, that the disease was communicated by the cattle of the one party solely, and not by the cattle of both.

For error in giving this instruction the judgment is reversed and the cause remanded.

Judgment reversed.

BOARD OF SUPERVISORS OF THE COUNTY OF LIVINGSTON *et al.*

v.

GEORGE F. DART.

VENDOR AND PURCHASER—*forfeiture and re-sale—conclusive as to original contract.* Where a vendor of land has properly declared a forfeiture of the contract, for non-performance on the part of the vendee, and made a re-sale of the premises to a third person, he can not afterward waive the forfeiture so declared and restore the original contract so as to give it any force as against the second purchaser.

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

The opinion states the case.

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

Mr. JOHN CLARK, for the defendant in error.

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

On the 31st of March, 1858, the county of Livingston, by the county judge, executed to one Minnear, a contract for the sale of certain swamp lands. By the conditions of the contract, the purchaser was to drain the land, and improve one-tenth annually, and to pay interest annually on the purchase money, which was to be paid in full at the end of five years. Upon final payment the purchaser was to have a deed. The contract provided for forfeiture of all rights under the contract and all money paid, in case of failure by the purchaser to keep the conditions of the sale. Under this contract only the first year's

interest was paid and about ten acres were improved to December, 1862, when the county again sold the land to Patrick and William Henneberry, to whom a similar contract was given, they paying at the time one year's interest. On the 14th day of October, 1863, the board of supervisors of the county passed an order authorizing all purchasers holding old contracts, who had failed to comply with their conditions, to enter into new contracts within sixty days, by paying back interest upon a reduced valuation of the land. By virtue of this order, Dart, the defendant in error, in December, 1863, applied to the county for a renewal of the Minnear contract, which he claimed to have purchased in September, 1863. The county refused, on the ground that the land had been sold to Patrick and William Henneberry after the forfeiture of the Minnear contract. In June, 1865, Dart, who was in possession of the land and had improved the same, filed his bill to have the Henneberry contract canceled and his own established. In January, 1866, Patrick and William Henneberry assigned their contract to Lonergan, who immediately paid to the county the amount due, and the county made him a deed. Dart thereupon amended his bill, made Lonergan a party, and asked that the title be conveyed to him, offering to pay whatever might be due. The circuit court so decreed.

The defendant in error has filed no argument in support of this decree, and we do not see how it can be sustained. If the county had not declared a forfeiture of the Minnear contract, by selling the land to Patrick and William Henneberry, and thus given to the latter rights which the county could not control, the order of the board of supervisors, in October, 1863, would have placed Dart in a position where he could have insisted on his contract. But the county, having re-sold the land to the Henneberries, and received the first year's interest, could not, as against them, re-establish the Minnear contract. As against itself it might waive the forfeiture, but not as against its vendees. Their rights the county could not affect, except as provided in the contract. Indeed, it is not

probable the board of supervisors designed its resolution should apply to cases where the land had been re-sold in consequence of a forfeiture of the first contract, and it can not be so construed. As against the Henneberries or their assignee, the position of Dart is what it would have been if no such resolution had been passed. By the sale to them the county extinguished the Minnear contract, as it had a right to do, and, as against them, can not revive it. They have the superior equity, and the county having conveyed the legal title to their assignee, there it must be suffered to remain. The decree must be reversed and cause remanded.

Decree reversed.

ROBERT F. SHINN

v.

GEORGE W. FREDERICKS *et al.*

1. PROMISSORY NOTE — *subsequent holder by delivery — subject to what defenses.* The maker of a promissory note may set up any defense he may have to the note, in the hands of a purchaser, by mere delivery, or who takes it after maturity.

2. PAYMENT — *what constitutes.* Where a grantor of land, by agreement with his grantee, rescinds the sale and receives back the deed, but the notes held by the grantor, which were given for the purchase money, were not surrendered to the maker, as was agreed, remaining in the hands of the agent of the grantor, who transferred one of them by delivery, it was *held*, such agreement of rescission operated as a satisfaction of the notes, and the defense would be availing as against the subsequent holder.

3. Where a person buys land from one who has notes outstanding, which were given upon his own purchase, the second purchaser agreeing, as a part of the consideration, to pay such outstanding notes of his grantor, and upon a sale by himself to the party who holds those notes, receives them in payment for the land, that will amount to a payment of the notes so taken up, and a defense will arise thereon against any subsequent holder of them who is chargeable with notice.

4. MORTGAGE—*merger in the fee.* Where the fee to lands and a mortgage on the same are united in the same person, the latter becomes merged in the former, unless there are equitable reasons for keeping the mortgage alive.

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

This was a bill in chancery to foreclose a mortgage executed by George W. and Charles S. Fredericks, to secure the payment of three certain promissory notes, by them signed, each for the sum of $333.33\frac{1}{3}$, all dated July 7, 1860, drawing six per cent interest per annum, and given for the purchase money of the land in said mortgage described.

Joseph Wetzler being, at the commencement of the suit, in possession of the land, and claiming title thereto, was made a party defendant.

The facts necessary to an understanding of the case are fully presented in the opinion of the court.

Mr. JOHN CLARK, for the plaintiff in error.

Messrs. JOHNSON & HOPKINS and C. H. CHITTY, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears, from the evidence introduced on the trial, that the land was entered by Joseph Kirk on the 31st of July, 1852. He soon after removed to the State of Iowa, and left the land in charge of Darst, as his agent, to look after it and to pay taxes and make sale. Darst effected a sale, and Kirk conveyed the land to Alexander Easton, a resident of Pennsylvania, on the 25th of December, 1855. On the 7th of July, 1860, Easton, being in Woodford county, in this State, where the land is situated, sold it to the two Fredericks for $1,000, and received for the purchase money three notes of that date,

due respectively in three, four and five years, and for equal sums, and to secure the purchase money took a mortgage on the land.

Soon after their purchase the Fredericks entered into a contract to convey the land to one Michael Sander, at an advance on their purchase of $45, which was at the time paid to them, and for the $1,000 balance they took Sander's notes of equal amounts, and falling due at the same time, as their notes to Easton. Sander went into possession of the land and improved it by breaking a part, but finding he would be unable to meet any of the payments he applied to the Fredericks to rescind the contract; but, depending on him for money to pay Easton, they refused, unless they could, in conjunction, induce Darst, the agent of Easton, to rescind the contract with them and take back the land, and surrender them their notes. And after negotiations had been in progress for a time, Darst obtained Easton's consent to the arrangement, and thereupon the Fredericks released Sander, and the deed to the Fredericks was returned to Easton, in Pennsylvania, and Sander surrendered possession to Darst as Easton's agent. The Fredericks, by the arrangement, were to reconvey to Easton, and Darst to give them their notes to Easton. All of the parties went before a justice of the peace, who drew a deed from the Fredericks to Easton, but they left, saying they were going for the wife of George W. to join in the deed, but did not return, and the deed was never executed, and the notes remained in the hands of Darst. Easton, through Darst, his agent, remained in possession of the land.

On the 8th day of January, 1864, Darst purchased the land of Easton, for $1,200, and received from him a conveyance. Subsequently, the Fredericks, in the following September, conveyed the land to Plank; he thereupon called upon Darst, notified him that he held Fredericks' title, and demanded a settlement, and on the 7th day of February, 1865, Plank sold and conveyed to Darst, and on the 28th of the same month Darst conveyed to Wetzler.

At the time Darst purchased of Plank he delivered to the latter, without indorsement, as a part of the consideration, the first of the notes of the Fredericks to Easton, which remained in his hands, and upon which this suit is brought. Darst, as he testifies, gave Plank notice that the note was worthless and void, but Plank said he could collect something of the Fredericks. Plank at the same time gave to Darst this writing evidencing their agreement:

"METAMORA, Ill., *February* 17, 1865.

Received of John Darst one note of $333.33, on Charles Fredericks and G. W. Fredericks, and dated the 7th day of July, A. D. 1860, at six per cent interest per annum, payable annually from date, due three years after date, and payable to Alexander Easton or order. And it is hereby expressly agreed that the said Darst is entirely released from all recourse either in law or equity on account of the sale of said note to me.

"ELIJAH PLANK."

When Plank purchased of the Fredericks, he took the land subject to the Easton mortgage, and paid them $100, and he, as a part of the consideration, agreed to pay off these notes secured by the mortgage upon the land. Plank, after obtaining the note, sold it to Clark, plaintiff's attorney, who commenced this suit in his name. After the suit was commenced Darst entered satisfaction of the mortgage under a power of attorney from Easton.

The court below, on a hearing, dismissed the original bill to foreclose, and under the cross-bill of Wetzler decreed that the two remaining notes in the hands of Darst be surrendered up, and declared the mortgage canceled.

The question presented by this record is, whether plaintiff in error acquired any lien upon this land when he purchased. The note was past due, and had never been indorsed by the payee, both of which facts charged him with notice of any defense that existed to the note. The maker may set up and

rely upon any defense that he may have to the note in the hands of a purchaser by mere delivery, or who takes it after maturity. This is the long and well settled law regulating commercial paper, and requires no citation of authorities or reasoning for its support.

Did there exist a defense to this note at the time plaintiff in error received it? We think there did, as was shown in several ways. There is no pretense that Darst owned the note, or held any, even the remotest, interest in the note. It was given to Easton for the land, and when the arrangement was made to cancel his sale to the Fredericks they returned his deed, which, it seems, the parties supposed was all that was required to re-vest the title in him. And that he believed such to be the fact may be inferred from his subsequently selling the land and giving a warranty deed. By receiving the deed, we, then, conclude that he intended to and supposed he had received the title in satisfaction and discharge of the notes and mortgage. And as further evidence that he supposed the notes were satisfied, he seems never to have asserted any further claim to them. By selling the land he was estopped from again receiving pay for it by collecting these notes. If any one could have asserted any such claim after that sale it was Darst, who might have urged that he had become the assignee of the mortgage, and was ready to surrender the land upon payment of the notes, or have treated the land as belonging to the Fredericks, and proceeding to foreclose. But this he did not attempt, but seems to have preferred to hold the land. The notes were thus satisfied. Plaintiff in error took no more or better title than Easton or Darst held.

Again, when Darst, the assignee of the mortgage, purchased of Plank, the mortgage and the fee united in him, and the former merged in the latter. Such is always the effect of the union of the fee and the mortgage in the same person, unless there are equitable reasons for keeping the mortgage alive. And the evidence in this case fails to disclose any such equities or necessity. Nor can it be inferred that Darst intended

to keep the mortgage alive, but, on the contrary, when he sold the note, he took the precaution to receive a written agreement that he was not to be held liable, either at law or in equity. This does not have the appearance, on his part, of reviving the mortgage.

Again, when Plank purchased of the Fredericks, he gave $100, and agreed, for the balance of the consideration, he would pay the three notes, of which this was one. He, then, when he sold the land to Darst and obtained the note, paid it, and to that extent carried out the agreement. He gave for it what he had received from the Fredericks, their claim of title, and with the claim he paid the note. By taking up the note under the agreement, it operated as a payment, and he acquired no interest in it. He could not have recovered it of the makers, and, having no title, he could transfer none, as the note was past due and had never been indorsed by the payee. Plaintiff in error took the note subject to all the equities, and, consequently, acquired no right to enforce its payment. The court did right in rendering the decree, and it must be affirmed.

Decree affirmed.

CHARLES WALKER
v.
JOHN A. CRAWFORD.

1. PAROL EVIDENCE—*to vary the terms of a promissory note.* It is an inflexible rule that the maker of a promissory note, absolute on its face, can not show, as a defense thereto, even against the payee, an oral contemporaneous agreement which makes the note payable only on a contingency.

2. Where, in an action on a note by the payee against the maker, the defendant pleaded the general issue and filed therewith a notice of special matter, in substance, that the note was delivered conditionally, or as a collateral security for the performance of a parol promise or agreement by the maker, which he was prevented from performing by the act of the payee, in refusing to accept of the same, alleging his readiness to perform and ten-

der thereof, and the payment into court of the sum due upon said promise or agreement, evidence offered to sustain such notice was held inadmissible.

3. PLEA OF PAYMENT — *evidence thereunder.* But had the defendant pleaded such facts as payment, or that the note was given without consideration, or that the consideration had wholly or in part failed, the evidence might have been admissible.

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

This was an action of assumpsit, brought by Crawford against Walker, on a certain promissory note executed by the latter in favor of the former. The defendant pleaded the general issue and filed therewith the following notice of special matter of defense:

"The plaintiff will take notice that the defendant, on the trial of this cause, will give in evidence and insist that, before and at the time of the making and delivering of the promissory note mentioned and set out in the plaintiff's declaration, the schooner Australia, whereof this defendant was agent, then lying at the port of Chicago, was in the custody of the United States marshal for the northern district of Illinois, under a monition issued out of the district court of the United States for the northern district of Illinois, upon a certain libel then pending in the said court, wherein the said John A. Crawford was libellant, and the said schooner Australia was defendant, and so being in such custody, it was agreed by and between the plaintiff and defendant in this cause as follows:

"That this defendant should, within thirty days from the 17th day of October, 1868, pay to the said plaintiff the sum claimed by said libel, together with costs upon the same, and make and deliver unto the plaintiff the promissory note sued on in this cause, as collateral to, and security for, the fulfillment of his, the defendant's, agreement to pay the aforesaid sum of money, and, in consideration thereof, the said plaintiff agreed to dismiss the aforesaid libel, and discharge the said vessel from the custody

of said marshal, and that, upon such agreement of the said parties respectively, the said plaintiff did cause the said vessel to be released and discharged from the custody of said Marshal, and the aforesaid libel to be dismissed, and the said defendant made and delivered to the plaintiff, as security as aforesaid, the said promissory note; that afterward and within ninety days from the said 17th day of October, A. D. 1869, this defendant tendered and offered to pay unto the said plaintiff in lawful money the sum of $67.07, in fulfillment and performance of this promise and agreement to pay unto the plaintiff the sum claimed in the aforesaid libel and costs thereupon; that the sum claimed by said libel, together with costs, was the sum of $67.07, and that the said plaintiff thereupon refused to accept the said sum.

"And this defendant here renews his aforesaid offer and tender, and now brings into court the aforesaid sum of $67.07."

The plaintiff offered in evidence the note sued on. And the defendant, to maintain the issues on his part, offered to prove the matters and facts contained in his notice of special matter, to which the plaintiff objected. Objection sustained by the court, and the evidence offered excluded, to which ruling of the court the defendant excepted. Whereupon the court found the issues for the plaintiff, and entered judgment accordingly. The defendant appeals.

Mr. J. N. BARKER, Mr. WILLIAM HOPKINS and Mr. T. J. TULEY, for the appellant.

Messrs. SPAFFORD, MCDAID & WILSON, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only question presented by this record is, as to the admissibility of the evidence offered to sustain the notice accompanying the plea of the general issue.

The substance of the notice is, that the note was delivered

conditionally, or as collateral security for the performance of a parol promise or agreement by appellant.

Appellant, not denying or questioning the rule of law so long established, that parol testimony is inadmissible to vary the terms of a written contract, seems to intimate there is some inconsistency in the decisions of this court, at least, as to the application of this rule.

Under point five in his brief, he contends that the evidence excluded would have proved that the consideration of the note had wholly or in part failed, and under that head calls attention to *Mager* v. *Hutchinson*, 2 Gilm. 267. That case decides only that, when a contract is reduced to writing, the writing affords the only evidence of its terms and conditions. It can not be contradicted or varied by the previous or contemporaneous verbal agreements of the parties. These are all regarded as merged in the written contract.

The agreement sought to be established by parol in this case, which was an action of debt on a promissory note executed by one Mager and De Lassoule to the plaintiff, the latter being alone served with process, was, that at the time of the execution of the note, it was understood that De Lassoule was to be liable for its payment only in the event that the money could not be collected of Mager, averring that no effort had been made to collect it of Mager.

Scammon v. *Adams et al.*, 11 Ill. 575, was a case where it had been agreed between the indorser of a note and the indorsee, to whom the indorser was indebted, that he should refund to the indorser the surplus of the note after paying himself. The court say, that parol evidence may be introduced to show this understanding, without violating the rule that a written contract can not be contradicted by parol proof.

Penny v. *Graves*, 12 Ill. 287, merely reiterates the familiar doctrine that a party may show by parol, a note was given without consideration, or that the consideration has wholly or in part failed, and to impeach the consideration of a note, but not to vary its terms.

Ward v. *Stout*, 32 id. 399, decides, a joint maker of a note may plead and prove he signed the note as surety only. The court say, such proof does no violence to the rule that a written instrument can not be varied by parol, for it does not affect the terms of the contract, but establishes a collateral fact merely, and rebuts a presumption. To sustain this view, *Flynn* v. *Mudd et al.*, 27 Ill. 323; *Harris* v. *Brooks*, 21 Pick. 195; *Carpenter* v. *King*, 9 Metc. 50; *Archer* v. *Douglass*, 5 Denio, 509; *Bank of Steubenville* v. *Leavitt et al.*, 5 Ohio (Ham.) 207, and 1 Parsons on Bills and Notes, 233, were referred to. Parsons says, the weight of authority, and principle, are in favor of the admission of such evidence, p. 234. It certainly should be the rule between the maker and payee.

Daggett v. *Gage*, 41 Ill. 465, does contain an intimation, apparently inconsistent with the previous ruling, of the court in *Ward* v. *Stout*, *supra*, but it affirms the doctrine that the terms of a written contract can not be varied by parol proof.

We fail to see, in the cases cited, any departure from this rule. The proof offered by plaintiff went to show a contract entirely different from the one shown by the note. It tended to show the note, which was on its face absolute, was, in fact, conditional only. Had he pleaded the facts as payment, as in the case of *Hagood* v. *Swords*, 2 Bailey (S. Car. Law Rep.) 305, or that the note was given without consideration, or that the consideration had wholly or in part failed, the evidence might have been admissible under repeated rulings of this court and other courts. That defense is given by statute.

The rule we understand to be inflexible, that the maker of an absolute note can not show, against the payee, an oral contemporaneous agreement which makes the note payable only on a contingency. 2 Pars. on Notes and Bills, 508, and the numerous cases and illustrations there given. *Foy* v. *Blackstone*, 31 Ill. 541.

We have intimated the defendant might have pleaded want of consideration, or a total or partial failure of consideration. A case is reported in 1 Hill, 116, *Payne* v. *Ladue*, which sus-

tains this suggestion. There, the consideration of the note was, that the payee should give up certain notes, discontinue certain suits, and sign a retraction of an alleged slander, and, on his failure to do these things, the note was to be void. The payee gave up the notes and the suits, but did not sign the retraction, yet his parol agreement to do so could not be let in to contradict the absolute note. If the retraction had been the sole consideration for the note, the oral agreement to retract would have been a good defense, on the ground of want of consideration. But, where only part of the consideration fails, an action on the agreement is the only just remedy, and the terms of the note can not be changed.

The authorities cited by appellant fail to sustain the position he has taken.

The note could not be an escrow, as it was delivered to the payee. An escrow is delivered to a stranger or third party. But the notice was not to the effect, it was delivered as an escrow. In *Hagood* v. *Swords*, *supra*, the court considered the agreement as equivalent to payment of the note. In *Couch* v. *Meeker*, 2 Conn. 302, the condition was in writing and indorsed on the note, but the judgment was against the defendant. In the case of *Vallett* v. *Parker*, 6 Wend. 615, the defendant offered to prove that the note was delivered to a third person, as an escrow, and that he had fraudulently put it in circulation.

In *Woodhull* v. *Holmes*, 10 Johns. 230, the point was, a want of consideration for the note, the proof being that the note was made and delivered to a third person to carry to the bank, for discount, and, instead of this being done, this person placed it in the hands of a broker.

The authorities are overwhelming to this point: A note, absolute on its face, can not be shown by parol to have been conditional.

There is no error in the judgment, and it must be affirmed.

Judgment affirmed.

Syllabus.

JOEL JENKS *et al.*

v.

BRADLEY BURR.

1. EVIDENCE — *declarations of an agent.* Before the declarations of an agent can ever be admitted as evidence, it must appear that, at the very time of making them, he was transacting or doing something about the business of his principal, so that his acts and declarations become and form, of themselves, a part of the *res gestæ*. Under such circumstances the acts and declarations of the agent may be proved, as any other affirmative fact in the case, but not otherwise.

2. If a fact rests in the knowledge of the agent, which is material to the issues between the parties, the party desiring such testimony must call the agent himself as a witness.

3. A being indebted to B, there being a controversy as to the amount actually due, offered the sum of $300 in full satisfaction of the debt, which B refused to accept on those terms, but was willing to receive it and credit the same on their general account. Thereupon A informed B that he would deposit $300 in bank where he could get the same whenever he concluded to take it in full payment and discharge of his entire claim, which he soon afterward did, in accordance with his proposition, subject to the order of B, who drew the money out of the bank to his own use: *Held*, in an action by B against A, to recover the balance of his claim, on the question whether he received the money in full discharge and satisfaction thereof, or whether he received it only as a partial payment on his account, that the testimony of the plaintiff as to a conversation he had with the banker, on the street, before he drew the money, in substance that, on asking the banker whether the money had been deposited to his credit, he replied it had, and in answer to the question whether there were any conditions attached to it, that there were not, was inadmissible. Admitting the banker was the agent of the defendant for the purpose of paying out the money, still his declarations at the time specified, and under the circumstances, were inadmissible as original evidence.

4. TENDER — *whether a bar.* And an instruction, which, in substance, directed the jury, that if defendant tendered to the plaintiff the sum of $300, on condition he would accept it in full satisfaction of his claim, yet if the jury believed the defendant afterward, by himself or his agent, let the plaintiff have the money without an agreement that it should be received in full satisfaction of the claim, then it would be no bar to a further recovery if more was due, was *held* erroneous, as tending to mislead the jury into the belief that some special agreement was necessary to consti

tute a bar; the law not requiring any special agreement to that effect. If the plaintiff received the sum thus tendered, on the terms proposed, the law would imply the agreement from the acts of the parties.

5. If a party tender to another a certain sum of money in full satisfaction and discharge of a disputed claim, and the other party receive it on the terms proposed, it will constitute an effectual bar to any further recovery on the same account.

6. It is always a question of fact for the jury whether the money was tendered in full satisfaction and discharge of the claim, and whether it was received on the terms proposed, by the party to whom it was tendered.

7. If, however, a party should receive money under a misapprehension of the terms under which it was tendered, he can always relieve himself from the consequences by offering to pay back the money before he institutes his suit.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

The opinion states the case.

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

Mr. T. C. MOORE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of assumpsit, brought by the appellee to recover for materials furnished and work and labor performed in repairing a carriage or coach for the appellants.

It appears from the evidence, that there was a controversy between the parties as to the amount actually due to the appellee, and before the suit was instituted the appellants offered to pay to the appellee the sum of $300 in full satisfaction and discharge of this claim. The appellee would not accept the money tendered, on the terms proposed, but was willing to receive it and credit the same on the general account.

Van Vleet, one of the appellants, then told the appellee that he would deposit the sum of $300 in Mr. Coffin's bank, where he could get the same whenever he concluded to take it in

full payment and discharge of his entire claim; and Van Vleet soon afterward did deposit the money in the bank in accordance with his proposition, subject to the order of the appellee. The appellee afterward drew the money out of the bank to his own use.

One question involved in the case is, whether the appellee received the $300 in full discharge and satisfaction of his claim, or whether he only received it as a partial payment on his account. On the trial there was a direct conflict of the evidence bearing on this question. To maintain the issues on the part of the plaintiff, the court, against the objection of the counsel for the defendants, permitted the plaintiff, who offered himself as a witness for that purpose, to testify to a conversation between himself and Mr. Coffin on the street about the money. The plaintiff then testified, in substance, that he met Mr. Coffin on the street before he drew the money, and inquired of him whether Jenks and Van Vleet had deposited $300 in the bank to his credit, and, on being answered in the affirmative, the plaintiff then asked him if there were any conditions attached to it, to which he replied that there were none. Upon receiving this information the appellee drew the money out of the bank and applied the same as a general credit on the account of the appellants.

We are familiar with no principle upon which it would be proper to admit this evidence to go to the jury.

If it be admitted that Mr. Coffin was the agent of the appellants for the purpose of paying out the money, still his declarations at the time specified, and under the circumstances, were inadmissible as original evidence. Before the declarations of an agent can ever be admitted as evidence, it must appear that, at the very time of making the declarations, he was transacting or doing something about the business of his principal, so that his acts and declarations become and form, of themselves, a part of the *res gestæ*. Under such circumstances the acts and declarations of the agent may be proved as any other affirmative fact in the case, but not otherwise. If a fact

rests in the knowledge of the agent, which is material to the issue between the parties, the party desiring such testimony must call the agent himself as a witness. He certainly can not be permitted to prove his mere declarations. *The Michigan Central R. R. Co.* v. *Gougar*, 55 Ill. 503; 1 Greenlf. on Ev., §§ 113, 114.

The second instruction given at the trial, at the instance of the appellee, was erroneous, and ought not to have been given. It states, in substance, the proposition that, if the defendants tendered to the plaintiff the sum of $300, on condition that he would accept that sum in full satisfaction of his claim, yet, if the jury believed that the defendants afterward, by themselves or their agent, let the plaintiff have the money without an agreement that it should be received in full satisfaction of the claim, then it would be no bar to a further recovery if more was due. The law does not require that there should be any special agreement between the parties, that the money tendered should be received in full satisfaction of the claim. It is sufficient, if there exists a disputed account between the parties, if one tenders a sum certain to the other in full satisfaction and discharge of his claim, and the other receives the sum thus tendered, on the terms proposed; without any special agreement to that effect, the law would imply the agreement from the acts of the parties. We can conceive that this instruction may have misled the jury into the belief that some special agreement was necessary to constitute a bar.

The last instruction asked by the appellants, which the court refused to give, states a correct principle of law, and we can perceive no reason why it was not permitted to be read to the jury. It states the law correctly, that, if a party tender to another a certain sum of money in full satisfaction and discharge of a disputed claim, and the other party receives it on the terms proposed, it will constitute an effectual bar to any further recovery on the same account. This rule is fully recognized in the cases of *Miller* v. *Holden*, 18 Ver. 337, and *Gassett* v. *Andover*, 21 id. 342.

It is always a question of fact for the jury whether the money was tendered in full satisfaction and discharge of the claim, and whether it was received on the terms proposed, by the party to whom it was tendered. If, however, a party should receive money under a misapprehension of the terms under which it was tendered, he can always relieve himself from the consequences by offering to pay back the money before he institutes his suit.

For the errors indicated, the judgment must be reversed and the cause remanded.

Judgment reversed.

Lake Shore and Michigan Southern Railroad Company

v.

The City of Chicago.

1. Special assessments *in Chicago — by whom to be determined — validity of an ordinance in that regard.* Upon an application for judgment upon a special assessment for the curbing and filling of a certain street in the city of Chicago, it appeared that, before the passage of the ordinance ordering the improvement, a considerable portion of it had been done by private individuals, of their own motion. The ordinance directed the improvement to be made, "excepting such portions of the above described work which have been already done in a suitable manner." There was no attempt, in any stage of the proceedings, by the council or the board of public works, to define, by any public act, what portion of the work had been done in a suitable manner: *Held*, the ordinance was void, because the responsibility of directing the mode, manner and extent of such improvements is with the common council, and this was an attempt to vest a discretion in that regard in the board of public works.

2. Same — *of evidence admissible — to show fraud in the assessment.* It is competent, on an application for judgment upon such an assessment, for an objector to prove that the assessment was made as if no part of the work had been previously done, as showing the fraud and injustice of the

assessment. But proof of that fact was unnecessary because the ordinance was void without it.

3. Same—*of arrangements between the Board of Public Works and individuals.* It was also competent, in such case, to show that the Board of Public Works made arrangements with some of the parties who had voluntarily done the work thus embraced in the assessment, and who were in no way entitled to be allowed any thing for it, by which they were to be assessed a certain sum, and to be allowed for the work done by them as a set-off against the assessment. If such a set-off were allowable, the common council, not the Board of Public Works, was the proper authority to make the arrangement.

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

The opinion states the case.

Mr. Daniel L. Shorey, for the appellants.

Mr. M. F. Tuley, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

This was an application for judgment, upon a special assessment levied for curbing with curb walls and filling Clark street, from the south line of Twelfth street to the north line of Eighteenth street, and from the south line of Eighteenth street to the north line of Twenty-second street.

It appears from the evidence, without controversy, that before the passage of the ordinance ordering this improvement, a considerable portion of it, such as building curb walls and filling, had been done by private individuals and a railroad corporation, of their own motion. In the report of the Board of Public Works recommending the improvement, the ordinance of the council, the oath of the commissioners, and the several notices given, the proposed work is described as above, with this addition: "Excepting such portions of the above described work which have been already done in a suitable

manner." And there was no attempt, in any stage of the proceedings, by the council or the commissioners, to define, by any public act, what portion of the work had been done in a suitable manner.

We have held in several cases at this term that such an ordinance is void, because the responsibility of directing the mode, manner and extent of such improvements, is with the common council, and because it is an attempt to vest the board with an irresponsible, discretionary power which may afford a cover to an unfair estimate or assessment, and open the door to fraud and favoritism in letting the contracts for the work. *Foss* v. *The City of Chicago*, *ante*, p. 354.

The objectors offered to prove that the assessment in this case was made as if no part of the work had been previously done. The court excluded the evidence, and exception was taken. It was unnecessary to give any such evidence, because the ordinance was void without it. But it was admissible, as showing the fraud and injustice of the assessment. Various other offers of evidence were made, tending to show that the Board of Public Works, at some time, made arrangements with some of the parties who had voluntarily done this work, and who were, by no provisions of law or of any ordinance, entitled to be allowed any thing for it, by which they were to be assessed a certain sum and then to receive vouchers from the board for the work done, by which the assessment against their property was to be set-off or paid. The court excluded the evidence, and exception was taken. If an improper arrangement had been entered into before or at the time of making the assessment, and was carried into effect, it would most clearly render the assessment upon the property of others, not parties to the arrangement, fraudulent and void, even if the ordinance had been free of objection. Because, if any such set-off could be made, and we are not prepared to say that it could not, the common council, and not the Board of Public Works, was the proper authority to do so.

If the exercise of this great power over the rights of private

property can be upheld at all, it can only be done by showing a close, straight-forward, honest compliance with every substantial requirement of the law prescribed for its government.

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

*Judgment reversed.**

WILLIAM FEASTER

v.

REBECCA FLEMING.

1. JUDGMENTS AND DECREES — *whether void for error.* Where the court has jurisdiction of the subject matter and the parties, no error will render the decree void.

2. REVERSAL OF DECREE — *whether a purchaser affected thereby.* The rights of a purchaser who is not a party to the record, under a decree which is not void, acquired while the decree is in force, will not be affected by a subsequent reversal of the decree for error.

APPEAL from the Circuit Court of Iroquois county.

The opinion states the case.

Messrs. ROFF & DOYLE, for the appellant.

Messrs. BLADES & KAY, for the appellee.

---

*TIMOTHY WRIGHT v. THE CITY OF CHICAGO and THE CHICAGO & ROCK ISLAND R. R. CO. v. THE SAME; appeals from the Superior Court of Chicago: In each of these cases Mr. JUSTICE MCALLISTER delivered the opinion of the court as follows: This case is like that of the *Lake Shore & Michigan Southern R. R. Co.* v. *The City of Chicago*, and must be decided in the same way. The judgment of the court below is reversed and the cause remanded.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

In 1860, Vennum and Axtell filed a petition for partition of eighty acres of land, in Iroquois county, against Rebecca Fleming, alleging their ownership of all the premises, except one-sixth, which belonged to Rebecca, and also averring that Mrs. Fleming was entitled to dower. She appeared by counsel and answered, claiming the one-sixth of the land and her right of dower. On the 14th of June, 1860, during the term of the court, the following stipulation, in writing, signed by the attorneys of the respective parties, was filed: "It is agreed that said land be partitioned according to prayer of petition, without taking into account the house and pump put thereon by Mrs. Fleming, and the house and pump to belong to her, and that Charles W. Dawson, Amos White and George Gray be appointed commissioners to divide the same." The court thereupon rendered a decree, reciting the stipulation, and finding the interests of the parties, and that Mrs. Fleming was entitled to dower, and appointing commissioners to make partition. Upon the report of the commissioners that the land was not susceptible of division, a sale was ordered, reserving a dwelling and pump on the land to Mrs. Fleming, and appointing a commissioner to sell. The commissioner reported to the court that, on the 11th of August, 1860, the land was sold to William Feaster, the appellant, after due notice, and at public auction, for $725, and a deed executed, which report was approved. Mrs. Fleming, then residing on the premises, immediately after the sale abandoned them, removing the dwelling reserved to her. Feaster, in 1860, took possession, which has been uninterrupted from that time to the present, and has paid all taxes from 1861 to 1868, inclusive.

In 1863, Mrs. Fleming filed a bill, called in the record a bill of review, making Vennum, Axtell and Feaster defendants, and upon the hearing the court rendered a decree setting aside all the proceedings in the original petition for partition, except the decree, and the report of the commissioners that

partition could not be made, and divesting Feaster of all rights acquired under the decree. This decree was rendered in 1865. No further action was taken by Mrs. Fleming.

The next step in this anomalous and voluminous record is the filing of a bill, in 1868, by the heirs of Vennum, making only Mrs. Fleming a defendant, and averring the purchase by their father of all the interest of Axtell in the eighty acres, and that they were the owners of all of it, except one-sixth and the dower, to which Mrs. Fleming was entitled. Mrs. Fleming filed an answer, and a cross-bill, making the Vennum heirs and Feaster parties. Feaster answered the cross-bill, and filed a bill against Mrs. Fleming, in the nature of a bill of revivor, as it is termed in the record, setting forth all the former proceedings, decrees, etc., and praying that all might be set aside, except the first decree, in 1860, and the sale and proceedings thereunder. Answer and replications were filed. An order for assignment of dower was made and commissioners appointed. Upon the coming in of the report, the court made a final decree, giving the widow, for her dower, twenty-four acres of land, and for detention of the same, $337, as found by a jury. For a reversal of this decree, appellant brings the case to this court.

It is in proof that only $220 of the purchase money had been collected; and that of this Mrs. Fleming had received $70. It also appears that the original decree was reversed for error, by this court, in 1867.

There are two questions to be considered: 1st. Was the decree of 1860 void? 2d. If not, what was the effect of its reversal? It is an unbending rule of law, that if the court had jurisdiction of the parties and the subject matter, no error will render the judgment or decree void. In this case, the petition was in proper form, described the land correctly, and all parties in interest were before the court. Jurisdiction was properly acquired of the parties, and the subject matter was one proper for adjudication. Some sanctity must be given to judicial proceedings, and some safe-guard thrown around pur-

chasers at judicial sales. Mrs. Fleming is in court, consents to the decree, permits the sale without objection, abandons the premises, and interposes no claim for three years. The purchaser pays his money, enters into possession, accepts his deed, and is protected by the decree, for he is not bound to look beyond it. *Buckmaster* v. *Carlin*, 3 Scam. 108; *Swiggert* v. *Harber*, 4 id. 371; *Young* v. *Lorain*, 11 Ill. 637; *Rockwell* v. *Jones*, 21 id. 285; *Iverson* v. *Loberg*, 26 id. 179; *Fitzgibbon* v. *Lake*, 29 id. 176; *Guiteau* v. *Wisely*, 47 id. 434; *Mulford* v. *Stalzenback*, 46 id. 306.

The reversal of the decree, seven years after its rendition, for error, can not affect the rights of the purchaser, acquired while it was of binding force. Feaster was no party to the record, and the rule of notice of *lis pendens* does not apply to him. Flowing from the principles of the law and from strict justice, it is a fixed rule that all rights acquired under a decree while in force, are secure, though there may be a subsequent reversal. There must be reliance upon the judgments and decrees of the courts. Deprive purchasers, at judicial sales, of protection from them, and our titles become mere shadows. *McJilton* v. *Love*, 13 Ill. 495; *Goudy* v. *Hall*, 36 id. 318; *Goodwin* v. *Mix*, 38 id. 128; *Fergus* v. *Woodworth*, 44 id. 381.

Appellant is entitled to the land by virtue of the original decree and a sale under it. The widow should have a decree for a portion of the purchase money in lieu of dower.

Decree must be reversed and the cause remanded.

Decree reversed.

FRANKLIN L. BABCOCK *et al.*

v.

JAMES W. SCOVILLE.

1. ASSIGNEE OF A LESSEE — *whether liable for rent.* It is not necessary in order to subject an absolute assignee in fact of a term of years to a liability to the lessor for rent, that such assignee shall have entered into possession of the demised premises.

2. SAME — *where there are several assignees — whether jointly or only severally liable.* Where several persons hold the entire interest of the original lessee of premises, not as joint purchasers, but by separate deeds of assignment, each of them an undivided interest, they are not jointly liable to the lessor for the whole rent, but each assignee is severally liable for a part only according to his interest in the premises as compared with the whole interest under the lease.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of covenant, brought by Scoville against Franklin L. Babcock, Rudolphus Babcock and Daniel L. Boone, to recover rent alleged to be due to the plaintiff, from the defendants jointly, as assignees of the lessee of certain premises.

It appears the defendants held the entire interest of the original lessee, not as joint purchasers, but by separate deeds of assignment, each of them an undivided one-third interest.

The court below held the defendants jointly liable, and judgment was entered accordingly. They thereupon sued out this writ of error.

Messrs. SLEEPER & WHITON, for the plaintiffs in error.

Messrs. SCOVILLE, BAILEY & BRAWLEY, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Two questions arise on this record:

1st. Does the absolute assignee of a lease become liable for the rent to the lessor before entry into possession?

2d. Is the assignee, by a separate deed, of an undivided interest in a term of years, jointly liable with all the other assignees of the remaining undivided interests in such term, to pay the whole rent to the landlord, none of the assignees having taken actual possession of the premises?

In support of the negative of the first proposition, which is maintained by the plaintiffs in error, one, and only one, authority, has been adduced, that of *Damainville* v. *Mann*, 32 N. Y. 197, which, with the authorities therein cited, is confidently referred to as decisive of the point.

It is held in that case, that the assignee of the lessee of a term of years is under no obligation to pay rent to the original landlord, until he has actually entered into possession of the premises; that it is the privity of estate between the lessor and assignee which creates the obligation to pay rent, and that there is no privity of estate where the assignee is not in the actual possession.

The principal authorities in support of the decision cited, seem to have been, *Eaton* v. *Jaques*, Doug. 454; *Turner* v. *Richardson*, 7 East, 335; and what Sergeant SHEPHERD said in his argument in *Webb* v. *Russell*, 3 Term R. 193. In *Eaton* v. *Jaques* it was decided, that if a term of years is assigned by way of mortgage, with a clause of redemption, the lessor can not sue the mortgagee as assignee of all the estate, right, title, interest, etc., of the mortgagor, even after the mortgage has been forfeited, unless the mortgagee has taken actual possession. It is true, that Mr. Justice BULLER there says, "I do not agree with Mr. Ward that, even if the assignment was absolute, the action would lie without the possession. There is no instance. The distinction between a naked right and the beneficial enjoyment is founded in sound reason. And there

are authorities in Danver's Abridgment, title Rent, where the court declared that the ground upon which assignees are made liable is because they have enjoyed the rents and profits," and much weight was declared, in the New York case, to be attached to these observations. But the other judges rather carried the idea that, being by way of mortgage, it was not a complete assignment. Lord MANSFIELD said, in conclusion of his opinion, it was not an assignment of *all* the mortgagor's estate, right, title, etc. WILLIS and ASHHURST, Justices, of the same opinion.

Turner v. *Richardson* was an action for rent, brought by the landlord of certain premises against the assignees of a bankrupt lessee, where Lord ELLENBOROUGH said, "it had been decided that assignees of a bankrupt are not bound to take, what Lord KENYON called *a damnosa hæreditas*, property of the bankrupt, which, so far from being valuable, would be a charge to the creditors; but they may make their election." It was there admitted that the assent of the defendants, to the assignment to them, was necessary to bind them, and held that there was no such assent; that the advertising the premises for sale was a mere experiment, to enable them to judge whether the lease were worth their taking."

Taylor's Landlord and Tenant, section 451 and section 456, adverts to the distinction in the case of such assignees in law: "When the assignment is by deed, an assignee becomes *liable as such*, by merely accepting the deed; but, if a man becomes assignee only by operation of law, he is not, in general, chargeable until he actually enters, or does some act showing his acceptance of the lease."

The observation of Sergeant SHEPHERD, referred to in his argument in *Webb* v. *Russell*, was this, in speaking of the three relations, at common law, between the lessor and the lessee, and their respective assignees, after first mentioning privity of contract, he said: "Secondly, privity of estate, which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversioner." After

quoting which, in the opinion in *Damainville* v. *Mann*, it is remarked: "The learned author of the Touchstone thus holds that possession of the estate by the assignee is requisite to create the relation of privity of estate between him and the lessor."

With this much of authority in support of the doctrine, laying out of view the case of an assignee by operation of law, so far as has come under our examination we do not find it elsewhere laid down in any reported case, or by any legal writer of approved authority, that, in the case of an absolute assignee in fact of a term of years, an entry by the assignee is necessary, in order to subject him to a liability for the rent, but the whole tenor of authority is to the contrary.

The case of *Eaton* v. *Jaques*, decided in 1780, was, subsequently, in 1819, in *Williams* v. *Bosanquet et al.* 1 Brod. & Bing. 238, 5 Com. Law Rep. 72, formally overruled, upon a consideration of all the previous cases.

It was there *held*, that when a party takes an assignment of a lease, by way of mortgage as a security for money lent, *the whole interest passes to him*, and he becomes liable on the covenant for payment of rent, though he has never occupied or become possessed of the premises in fact.

In *Astor* v. *Miller*, 2 Paige, 77, the chancellor, in the opinion, remarking upon these cases, says: "It may therefore be considered as now settled, in England, that a mortgagee of leasehold premises is liable to an action on the covenants in the lease, although he has never been in possession of the estate, or received any benefit therefrom." To the same effect is *Calvert* v. *Bradley et al.* 16 How. 593.

Although, in this country, the better opinion may be in favor of the decision in *Eaton* v. *Jaques*, it would be upon the ground that the estates of the mortgagor and mortgagee are viewed differently here and in the English courts. In their common law courts the mortgagee is considered the owner of the estate, while here, generally, perhaps, while the mortgagee is out of possession, the mortgagor, for every substantial purpose, is the real owner; so that the mortgagee of a term of years, who has

not taken possession, is not to be treated as a complete assignee. But this would in no wise militate against the liability, in such case, of an absolute assignee.

The distinction is thus recognized in Cruise's Digest: "It is a principle of law that *an assignee of a lease is subject to the performance of all the covenants* contained in such lease. So that, where a lease was assigned by way of mortgage, the mortgagee would become liable to the covenants in the lease, unless a *distinction* were made between an *absolute assignment* and *one made by way of mortgage.* Upon this ground it was determined by the court of King's Bench, in 1783, that, if a leasehold was *assigned as a security only* for the re-payment of a sum of money, the *lessor could not sue the mortgagee*, as assignee of all the mortgagor's estate, even after the mortgage was forfeited, *unless the mortgagee had entered into possession.*

"But this doctrine has been altered, and it is now settled that when a party takes an assignment of a lease, by way of mortgage, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he never occupied or became possessed in fact." Greenlf. Cruise, 580.

The assignee of a term is bound to perform all the covenants annexed to the estate, as, if A leases land to B, and B covenants to pay the rent, repair houses, etc., during the said term, and B assigns to J. S., the assignee is bound to perform the covenants, though the assignee be not named, because the covenant runs with the land. 1 Bac. Abr. 524, Covenant (E), 3.

Upon a covenant running with the land, etc., the assignee of the lessee is liable to an action for a breach of covenant committed after the assignment of the estate to him, and though he have not taken possession. 1 Chit. Pl. 55.

In 2 Chit. Pl. 552*b*, and 552*d*, are precedents of a declaration in covenant, against the assignee of a lessee for rent, and for not repairing. The one for rent contains no averment of an entry by the assignee, and in note (*t*), p. 552*e*, it is said: In an action against a lessee for years, it is not necessary to allege an entry, and, even against the assignee of the lessee, such aver-

ment seems unnecessary, referring to preceding page, 550*a*, note (*y*), which cites authorities. The precedent for not repairing, avers the entry of the assignee, but in a note thereto, it is said, this does not seem necessary.

In Taylor's Land. and Tenant (4th ed.), section 450, it is said: "An actual entry upon the demised premises, by an assignee of the lessee, is not requisite, in order to charge him with the performance of covenants running with the land; for, by accepting an interest under the conveyance, he incurs all the responsibility connected with the estate, as if he had taken possession in fact."

In 1 Washb. on Real Prop. (3d ed.) 438, it is laid down: "Nor does the liability of an assignee, during the time that the term remains vested in him, depend upon his ever having actually entered into possession of the premises, unless, perhaps, the assignment be by way of mortgage, in respect to which different opinions have prevailed." Id. 456, and see *Watson* v. *Cronly's Administrators*, 14 Wend. 63.

As to the position that the action is maintainable against the assignee, only *upon the privity of estate*, and that he is merely charged thereby, because it is a covenant which runs with the land, and that this relation can not subsist upon the assignment alone, without an entry by the assignee, we fail to perceive why such entry is essential to constitute such relation. Of so little avail, in this respect, is possession, that where an under lessee has all of the term but one day, and is in the actual possession, there is no privity of estate between him and the original lessor, and no liability to the latter on any covenants in the original lease, because the former has not the whole of the unexpired term. *Van Rensselaer's Exrs.* v. *Gallup*, 5 Denio, 460, and cases cited.

We understand, that where a lesser estate is carved out of a greater one, the relation of privity of estate subsists between the owners of the respective estates; and that such privity exists by virtue of the absolute ownership of the less estate, and right of immediate possession, irrespective of the fact of

actual possession; that is, in the case of an assignment in fact. It is said, a lessee, during his occupation, holds both by privity of estate and of contract. His *privity of estate* depends upon, and is co-existent with, the continuance of his term. By an assignment, he divests himself of this privity and transfers it to his assignee; it remains annexed to the estate, into whose possession soever the lands may pass, and the assignee always holds in privity of estate with the original landlord. Taylor's Land. and Ten. § 436.

In the light of the authorities referred to, we can not but regard the decision in the case of *Damainville et al.* v. *Mann*, in so far as it holds an entry into possession necessary to create a liability to pay rent on the part of an absolute assignee in fact, as a departure from the common law, and deeming it our duty to adhere to the rule of the common law, we must hold, that, in accordance with what we conceive to be that rule, these assignees, plaintiffs in error in this case, have incurred a liability to pay rent to the original landlord, although they have never been in actual possession of the demised premises.

The next question is, whether their liability is joint or several.

There could be no question had the entire interest in different parcels of the land passed to the plaintiffs in error. Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*, and the assignee will be answerable for his proportion only of any charge upon the land, which was a common burden upon the whole; and will be exclusively liable for the breach of any covenant which related to that part alone. Taylor's Land. and Ten. § 443; 1 Washb. Real Prop. 428; *Stevenson* v. *Lambard*, 2 East, 575; *Van Rensselaer* v. *Bradley*, 3 Denio, 135; 5 id. 454.

This case is somewhat different, for the plaintiffs in error have no entire interest in any part, but a partial interest in the whole.

But we are referred to no authority which varies the rule in such case, and we perceive no sufficient reason for so doing. Were the assignees to be held jointly liable, one of them might be made to pay the whole rent, which would be manifestly unjust.

They hold the entire interest of the original lessee, not as joint purchasers, but by separate deeds of assignment, each of them an undivided one-third; neither one of them has taken actual possession, and, in our opinion, they are not jointly liable for the whole rent, but each assignee is severally liable for a part only, according to his interest in the premises as compared with the whole interest under the lease. The court below erred in holding them jointly liable for the whole rent. The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ALBERT HOVEY *et al.*

v.

JAMES W. MIDDLETON *et al.*

1. EVIDENCE — *conversation between agents — admissibility of, as original evidence.* Mere casual conversations between two agents in regard to the business of their respective principals, not made at a time when they were transacting any business of their principals so as to make the conversations a part of the *res gestæ*, are not admissible as original evidence.

2. SETTING ASIDE DEFAULT — *discretionary.* The power of setting aside defaults, as a general rule, is a discretionary one, and the court exercising it may impose upon the party guilty of *laches* such terms as it may deem equitable and just under all the circumstances, and its action will not be reviewed in the appellate court.

3. COSTS — *on a trial after judgment by default set aside.* Where, upon motion of a defendant, the court set aside a judgment rendered against him by default, and leave was given him to plead, upon the condition that he would pay all costs to date, and deposit in court the amount of the judg-

ment, and upon trial the plaintiff recovered a less amount than the former judgment, it was *held*, the deposit in court of the amount of the judgment, and the failure of the plaintiff to prove that he was entitled to its full amount, could not render him liable for costs, as in case of a refusal to accept a proper tender.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

The opinion states the case.

Messrs. DENT & BLACK, for the appellants.

Messrs. SMITH & KOHLSAAT, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

By agreement of the parties, this cause was submitted to the court for trial without the intervention of a jury, and the court found the issues for the plaintiffs, and rendered judgment against the defendants in the sum of $150.50.

The errors assigned question the findings and rulings of the court on the trial in the court below.

It appears from the evidence that, in March, 1868, the appellants desired to have produced an illustrated catalogue of designs in terra cotta work, and for that purpose entered into a contract with appellees to print one thousand copies of a work of fourteen pages, for which the appellants were to pay the sum of $470.

In preparing the designs it was found that the work would have to be extended to twenty pages, and the parties had an interview about the increased cost of the enlarged work. They do not agree in their statements of what occurred at that interview.

Appellants insist that it was then agreed that the enlarged work should be charged for at a little less than a *pro rata* of the agreed price of the catalogue of fourteen pages. This the

appellees deny, and insist that the additional work was to be paid for at a fair price.

It is not denied that the appellants ordered the work to be enlarged from the original design, and, in the absence of any special contract to the contrary, the law would imply a promise to pay for the additional work so much as the same would be reasonably worth. A very considerable amount of evidence was heard on the trial, and it is quite as conflicting in its character as are the statements of the parties in interest. There is evidence that tends to show that the enlarged work should be completed at a *pro rata* of the agreed price for a work of fourteen pages, and there is also evidence tending to show that the appellees were to be paid for so much as the same was reasonably worth. The burden of proof was on the appellants to establish the special contract, and the law required them to prove that fact by a preponderance of the evidence. After a careful consideration of all the evidence in the case, we can not say that the evidence so preponderates in favor of the appellants that we would, for that reason alone, disturb the finding of the court. The evidence would clearly warrant the finding of the court, and we are perhaps better satisfied with the result than we would have been had the court reached a different conclusion.

It is insisted that the court erred in excluding proper evidence offered by the appellants on the trial.

The appellants offered to prove by Mr. King, a conversation between himself and Mr. Wilson, on the street, about the price of the enlarged work, and the court sustained the objection interposed to that evidence. We think the court ruled correctly in excluding the testimony offered. It is true, that King and Wilson were, or had been, in the employ of the respective parties. The conversation offered as evidence was not had at a time when the agents were transacting any business of their respective principals, so as to make the conversation a part of the *res gestæ*, but it was simply a casual conversation on the streets about the business of their principals.

We are not familiar with any principle of law or rule of evidence that would permit a party to give such conversations as original evidence. It was, at most, a conversation between two agents about the business of their principals, and such conversations are not admissible as testimony, under any known rule of evidence. *Michigan Central R. R. Co.* v. *Gougar*, 55 Ill. 503.

It is again insisted, that the court erred in awarding costs against the appellants, in the court below.

The record discloses that the defendant Hovey suffered a default, and upon executing the writ of inquiry, the court rendered judgment in favor of the appellees for the sum of $222.08. Subsequently, on motion of the appellant Hovey, the court set aside the judgment rendered on the default, upon the condition that the appellants would pay all the costs to that date, and deposit in court the amount of the judgment, and upon the terms imposed, leave was given to plead. A plea was then filed by both of the appellants, and because the appellees only recovered a judgment on the trial for the sum of $160.50, it is now insisted that it was error in the court to tax the appellants with costs. It is insisted that, when the appellees chose to avail of the terms imposed by the court, and to require that the appellants should deposit the amount of the judgment, it became, in law, a tender, and the appellees assumed the risk of proving that they were entitled, on the trial, to recover the full amount by them required to be deposited, and failing to do so, that they would be liable for costs as in case of a refusal to accept a proper tender.

We are not aware of any such rule as that insisted upon by the appellants, and we have not been referred to any adjudged case that holds such a rule of practice. The power of setting aside defaults, as a general rule, is a discretionary power, and the court exercising it may impose upon the party guilty of *laches* such terms as the court deems equitable and just under all the circumstances, and its action will not be reviewed in the appellate court.

The terms imposed in this instance by the court, as a condition upon which the appellants should be allowed to plead to the merits of the action, were not unreasonable. It was a proper exercise of that discretionary power with which the court is clothed.

We are, therefore, of opinion that there was no error in the finding or rulings of the court, and the judgment must be affirmed.

Judgment affirmed.

WILLIAM STANBERRY

v.

MATTHEW MOORE.

1. NEW TRIALS — *how many may be granted — construction of the statute.* The statute which provides that no more than two new trials shall be granted in the same case, has special application to suits in the circuit court, and does not operate to restrict the power of the appellate court in reversing judgments in the same case any number of times. In this case, a third verdict was set aside by this court because it was not supported by the evidence.*

2. AMENDMENT OF PLEADINGS — *erasures and interlineations.* The practice of amending pleadings by erasures and interlineations ought not to be tolerated by the courts. A paper thus disfigured should be stricken from the files.

3. AGENCY — *negligence.* A person having title papers to land placed in his hands as agent and attorney, with authority to effect a sale of the land, intrusted the papers to a third person for examination, and with a view of making a sale to him. The party so intrusted with the papers, being charged with some crime, absconded and took the papers with him: *Held*, this act of the agent, which resulted in a loss of the papers, was not negligence on his part, so as to impose any liability upon him therefor.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

* See *Silsbe* v. *Lucas et al.* 53 Ill. 479.

The opinion states the case.

Messrs. COHRS & SALTONSTALL, for the appellant.

Messrs. WILLIAMS & ELLIOTT, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

There have been three verdicts in this case, and, if we could find any evidence to sustain the judgment appealed from, we should be reluctant to disturb it. The statute, which provides that no more than two new trials shall be granted in the same case, has special application to suits in the circuit court. In *Wolbrecht* v. *Baumgarten*, 26 Ill. 291, this court held, that there might be a case where a third verdict might be set aside by this court, where there was no evidence to support it, or for gross misdirection of the court as to the law. In this regard our power is not restricted by any statutory provision, and the ends of justice are often subserved in setting aside verdicts which have no foundation upon which to rest.

The declaration in this case, containing a number of special counts, and the common counts in *assumpsit*, was filed in May, 1867. It was twice amended, and, at the special November term, 1868, a demurrer was sustained to the special counts and overruled to the common counts. Leave was then given to amend, but, from a careful examination of the record, we can not ascertain that any amendment was made. Counsel for appellee say that the declaration was amended "by proper erasures and interlineations," and was re-filed January 19, 1869. The clerk also certifies to the re-filing, but this certificate forms no part of the record. There are neither erasures nor interlineations in the record. In fact, the record shows that no amended declaration was filed subsequently to the term at which the demurrer was sustained. We can not forbear the remark that the practice of making amendments, by erasures and interlineations, is a bad one, and ought not to be tolerated

by the courts. A paper thus disfigured ought to be stricken from the files.

What is the evidence to sustain a verdict under the common counts? Appellee claims that, in 1856, he, as attorney in fact of one Hutchinson, with power to sell, had in his possession certain papers, evidencing title to lands in Texas, called "head-rights;" that he made a sale of these papers, and executed a conveyance to one Prettyman, and took his note for $225, in payment, on the condition that appellee should procure from Hutchinson's heirs a complete release of all their interest in the "head-rights," and deliver it to Prettyman, as Hutchinson had died pending the negotiation between the parties.

This note was left with appellant, according to the evidence of appellee, until the release was obtained, and if it was not procured the note was to be given to Prettyman. Appellant testified to the same purport, and, in addition, that if the release was not satisfactory to Prettyman, the note was to be given up. Prettyman testified that the condition of the note was, that it was not to be paid until the title of Hutchinson's heirs to the land was vested in him; that the release or confirmation was to be satisfactory to him; and that the paper presented to him was worthless, and in no sense a confirmation to him of the title of the heirs.

Appellant then gave up the note to Prettyman. In so doing he violated no duty to his client, but acted strictly in accordance with instructions. He received no money from Prettyman; and if under any legal liability, it could not be enforced under the common counts.

When appellant returned the note to Prettyman, he received from him the title papers to the "head rights." Having been authorized to effect such sale as he could, he intrusted the papers to one Crosson, for examination, and with a view of making a sale to him. Crosson, about this time, was charged with some crime, and absconded and took the papers with him. This act of appellant, which resulted in a loss of the papers,

was in good faith and for the best interests of his client. Even if the pleadings permitted, it would be marked injustice to hold him liable for such conduct. The loss was a result entirely unforeseen, and against which ordinary prudence could not have provided.

In the special counts of the declaration, to which a demurrer was sustained, it was intended to charge the appellant with negligence, or breach of duty. Without proof of these he could not be held liable. The principal duties of an attorney or agent are care, skill and integrity. There is no proof of deficiency in any of these requisites; and if the pleadings were formal and correct, no principle of law would render appellant liable for his conduct in the premises.

The length of time which has elapsed since the pretended liability foreshadows the character of this claim. There were ten years between the alleged misconduct and the commencement of this suit.

The judgment is reversed and the cause remanded.

Judgment reversed.

PETER BRESSLER *et ux.*

v.

WILLIAM MCCUNE *et al.*

1. INJUNCTIONS *in the appellate court.* In cases where the court below has awarded a temporary injunction, which is continued to the final hearing, and is then dissolved and the bill dismissed, and the party prays for and perfects his appeal under the order of the court, such appeal will operate to suspend the decree dissolving the injunction, and, therefore, leaves it still in force.

2. But if the injunction should be dissolved by an interlocutory order, and the cause afterward proceeds to a final hearing, the appeal will not operate to revive the injunction.

3. When, however, an injunction has been dissolved by an interlocutory order in the court below, and an appeal taken from a final decree dismissing the bill, the appellate court will entertain a motion to revive the injunction, and, in a proper case, such motion will be allowed.

4. CHANCERY — *when proof necessary to support the bill.* When a chancery cause is regularly set for final hearing on bill, answer and replication, and the answer denies the material allegations of the bill, if the complainant would obtain the relief sought, he must maintain his bill by the necessary proof.

5. PRESERVING EVIDENCE IN CHANCERY — *depositions.* If depositions are regularly taken in a chancery cause and filed therein, they will be taken and considered by the appellate court as a part of the record without any certificate of the judge below for that purpose.

6. And the same rule prevails as to exhibits made a part of the bill and regularly filed therewith.

7. EVIDENCE IN CHANCERY — *affidavits.* *Ex parte* affidavits, produced on a motion to dissolve an injunction, can not be read in evidence on the final hearing of the cause except by consent of parties, which should appear from the certificate of the judge who tried the cause.

8. CHANCERY — *presumption as to what evidence is considered.* Where depositions have been regularly taken and filed in a suit in chancery, it will be presumed they were read on the final hearing, although there is no recital in the final decree to that effect; and the same presumption obtains in regard to exhibits made a part of the bill and regularly filed therewith. So, also, it will be presumed that oral evidence, heard on a motion to dissolve an injunction, was considered on the final hearing of the cause when such evidence is preserved in the record.

9. SAME — *reference to the master in matters of account.* In cases of a complicated character, involving matters of account between the parties, the chancellor ought, in conformity to the rules of chancery practice, to refer the subject to the master to take and state the account.

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

This was a suit in chancery, instituted in the court below by Peter Bressler and Sabrina Bressler, his wife, against William McCune and William A. Sanborn. An injunction which had been granted by the judge, at chambers, was afterward dissolved by an interlocutory order of the circuit court, and on a final hearing the bill was dismissed. Thereupon this appeal

was taken by the complainants, who entered a motion in this court to revive the injunction.

Messrs. EUSTACE, BARGE & DIXON, and Mr. F. VANDERVOORT, for the appellants.

Messrs. SACKETT & BEAN and Mr. J. M. WALLACE, for the appellees.

Per CURIAM: The complainants filed their bill against the defendants in the circuit court of Whiteside county, and prayed for an injunction. The bill was presented to the judge of said court, at chambers, and thereupon he made an order on the record for a temporary injunction. In pursuance of such order, a writ of injunction was issued by the clerk of said court, in due form, and was regularly served on the defendants. At the October term of said court the said defendants entered their motion to dissolve the injunction. This motion was not disposed of at that term of the court, but in vacation succeeding said term, the parties submitted affidavits and oral testimony on said motion. At the May term, A. D. 1870, on the 23d day of May, the court entered an order dissolving the temporary injunction. At the same term, on the 25th day of May, the parties, by their solicitors, submitted said cause to the court for final hearing. The court dismissed the bill for want of equity, and thereupon the complainants prayed an appeal, and perfected the same by filing their appeal bond in due form.

The appellants filed the record of said cause in this court, and now enter their motion to revive the injunction.

The rule on the question of injunctions, on records in this court, may be concisely stated, thus: In cases where the court below award a temporary injunction, which is continued to the final hearing, and is then dissolved and the bill dismissed, and the party prays for and perfects his appeal under the order

of the court, such appeal suspends the decree dissolving the injunction, and, therefore, leaves it still in force. But, if the injunction is dissolved by an interlocutory order, and the cause afterward proceeds to a final hearing, such appeal will not revive the injunction.

This case falls within the latter clause of the rule.

After a careful examination of the record in this cause, the court is of opinion that the injunction awarded in the court below should be revived in this court until said cause can be heard. The injunction will, therefore, be revived on the said complainants giving bond, in the usual form, in the penal sum of $1,000, with security, to be approved by this court.

Injunction revived.

Upon a final hearing on the appeal, the following opinion was delivered:

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the 9th day of January, 1869, the appellant Peter Bressler, executed his note to the defendant Sanborn, for the sum of $8,093.77, and to secure the payment, Bressler and his wife executed a trust deed to the defendant McCune on certain real estate, a part of which was owned by the wife in her own right. The note was not paid at maturity, and McCune, at the instance of Sanborn, advertised the property under the provisions of the trust deed, and was about to sell the same.

The bill in this case was then filed, alleging error or mistake in the amount for which the note was given, stating a complicated course of dealing between the parties, involving a long bank account, the borrowing of money at different times on different kinds of securities, the purchase and sale of property, the giving of a large number of notes, in renewal and otherwise, by Bressler to Sanborn.

It is alleged in the bill that, during the time these transac-

tions were occurring between the parties, Bressler was in such condition of health that his mind and memory were temporarily impaired, and to such an extent that, during said time, he was not in a fit condition to take charge of, or attend to, his financial affairs, but did, during that time, to a great extent, entrust the management of his business affairs to the care and control of the defendant Sanborn, and that Sanborn had, from time to time, complicated the affairs between himself and Bressler to a great extent by frequently and repeatedly causing him to give new notes, claimed to be in renewal or extension of other notes, and, at the same time, retaining the old notes for which the new notes were given in renewal or extension, and, in various other ways, so complicated their affairs that, at the time the note of the 9th of January, 1869, was given, Bressler did not know the true state of the accounts between them, and was in that condition of mind that he could be most easily and readily imposed upon.

When the answer of the defendant Sanborn was filed to the original bill, the appellants obtained leave and filed an amended bill, in which they stated the details of the transaction between the parties somewhat differently from the statements in the original bill. The same is also true of the answer of Sanborn to the amended bill. In his answer to the amended bill he states the transactions between himself and Bressler totally unlike his statements in his former answer to the original bill. Both answers were sworn to, although the oath was expressly waived. This fact itself is the strongest possible evidence that neither party knew the exact state of the accounts existing between them at the beginning of this litigation, and that neither one of them could then give any clear history or statement of the transactions out of which the note in controversy originated. The mental condition of Bressler at that time affords a reasonable explanation for his want of a clear understanding of the state of the accounts between himself and Sanborn at the time of the execution of the note, but the evidence fails to afford any

explanation for the confused accounts on the part of Sanborn. The evidence discloses that Sanborn is a banker, and that Bressler is a farmer.

The bill prays for an injunction, and asks that an account may be taken to ascertain the true state of accounts between the parties, and offers to pay whatever amount shall be found due to the defendant Sanborn.

Upon filing his answer, the defendant Sanborn entered a motion to dissolve the injunction. The evidence on this motion was taken before the judge in vacation. A very large mass of evidence was then taken, consisting of *ex parte* affidavits, the bank books of the defendant, and oral testimony, all of which is preserved in the record by the certificate of the judge who heard the cause in the court below.

The final decree, however, made in the cause, recites that at the May term, 1870, and on the 23d day of the month, the injunction hereinbefore granted was dissolved, and that on the 25th day of the same month, on motion of the solicitors for the complainants, the cause was set for hearing on the amended bill, answer and replication; and, the cause coming on to be heard, the bill was dismissed for want of equity.

These different orders all appear in one order on the record, and, so far as the record discloses, the cause was heard immediately upon its being set for hearing, and the bill was dismissed on the same day.

The record also shows that the cause was set for hearing on the motion of the solicitor for the appellants. How it happened that the cause was brought to a hearing immediately upon its being set down for hearing, the record does not disclose, nor are we in any manner advised.

It is insisted, on the part of the appellees, that no evidence was heard upon the final hearing of the cause, and inasmuch as the answer denied the material allegations of the bill, the bill was, therefore, properly dismissed.

The rule is undoubtedly well stated that, when a cause is regularly set for final hearing on bill, answer and replication,

and where the answer denies the material allegations of the bill, if the complainant would obtain the relief sought, he must maintain his bill by the necessary proof. *Reese* v. *Darby*, 4 Scam. 159; *James* v. *Bushnell*, 28 Ill. 158.

From an inspection of the record we can not say that this cause was heard at the final hearing simply on bill, answer and replication, without evidence. If depositions are regularly taken in a chancery cause and filed therein, they will be taken and considered as a part of the record without any certificate of the judge for that purpose, and the court will presume that such depositions were read at the final hearing of the cause, although there is no recital in the final decree to that effect. The same rule prevails as to exhibits made a part of the bill and regularly filed therewith, and the court in like manner will presume that they were considered on the hearing. *Ex parte* affidavits produced on a motion to dissolve an injunction can not be read as evidence on the final hearing, except by consent of parties, which should appear from the certificate of the judge who heard the cause. In this instance the evidence heard on the motion to dissolve the injunction was made a part of the record by the certificate of the judge. No time or opportunity appears to have been afforded the appellants to offer any additional evidence to that already embraced in the record, before the cause was brought to a final hearing. Neither party offered any additional evidence, and it may be, that the parties deemed that in the record sufficient for the purposes of that hearing. It will be presumed that the court considered the whole record upon the final hearing; if so, it must have considered the oral evidence heard on the motion to dissolve the injunction, for it was made a part of the record. It was wholly unnecessary to re-read that evidence on the final trial, for the reason that the chancellor had once heard it and fully considered it. We may presume that the evidence had been fully discussed by the respective counsel before the court on the motion to dissolve the injunction, and that from such consideration of the evidence thus preserved in the record, the

court made up its judgment that the bill ought to be dismissed. We have carefully considered the record and the evidence thus preserved, and we are not entirely satisfied that the full amount of the note of the 9th of January, 1869, is due to the defendant Sanborn. There is enough in the record to awaken our suspicion of the fairness of the transaction. But the evidence is so conflicting, and of such an unsatisfactory character, that we think the court below, in conformity to the well established rules of chancery practice, ought to have referred the cause to a master to take and state the accounts between the parties, and to ascertain accurately the true amount due the defendant Sanborn. This is the well recognized and established practice in all cases of a complicated character, and ought to have been adopted in this case. *Steere* v. *Hoagland*, 39 Ill. 264.

There is evidence in this record that tends very strongly to show, and we may say does satisfy us, that the note of the 9th day of January, 1869, now in controversy, does not represent the true amount of indebtedness from the appellant Peter Bressler to the defendant Sanborn; but because the evidence is complicated and, to some degree, unsatisfactory in its character, this decree will be reversed and the cause remanded, with instructions to the court to refer the cause to a master, to take and state the account between the parties, and with leave to either party to take new and additional testimony.

The injunction originally awarded in this cause has been revived in this court, and will be continued in force until the cause is finally disposed of in the circuit court.

A majority of the court concurring herein, the decree of the circuit court is reversed and the cause remanded.

Decree reversed.

LAWRENCE, C. J., THORNTON, J., and SHELDON, J., dissenting.

THE PEOPLE, ETC., *ex rel.* WILLIAM BILLINGS *v.* DAVID RIGGS.

1. LEGAL TENDER NOTES — *redemption from tax sale under revenue law of* 1853. Where land was sold for taxes while section 43 of the revenue law of February 12, 1853, was in force, which required that the redemption money from such sales should be paid in specie, it was *held* incompetent for the legislature, after the sale, to provide for the redemption to be made in United States legal tender notes. And so much of the act of January 12, 1863, as provided for the redemption from sales for taxes theretofore made, in legal tender notes, was unconstitutional and void.

2. Nor did the several acts of congress of 1862 and 1863, making United States treasury notes a legal tender for debts, have the effect of making such notes a legal tender for the redemption of lands sold for taxes before their passage, and while the provision of the revenue law of this State, of February 12, 1853, requiring such redemption to be made in specie, was still in force.

THIS is an application to this court, in the name of the people on the relation of William Billings, for a writ of mandamus, to compel David Riggs, as sheriff of Warren county, to execute to him a deed to certain premises, purchased by the applicant at a sale thereof for taxes. The questions arising are fully presented in the opinion of the court.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

The defendant entered his appearance, waived the issuing of an alternative writ, and, it is agreed, that he, as sheriff of Warren county, had refused to make the tax title deed when demanded, and that the former owner had paid the proper sum to redeem the land from the tax sale in United States legal tender notes, within two years after the sale, and

that the clerk, at the time, gave a certificate of redemption. It is also agreed that all other questions are waived, and only the question whether this is a valid redemption is presented for decision.

The owner of the land is not, nor can he be, a party to this proceeding; and the defendant has filed no argument, nor has he referred to any authorities, nor has the owner of the land caused any argument to be presented.

The forty-third section of the revenue act (Gross' Comp. 606), in force at the time this sale was made, declares that the owner of lands sold for taxes may redeem at any time before the expiration of two years from the date of sale, by the payment, in specie, to the clerk, etc., of double the amount for which the same was sold, and all taxes, etc. Under this provision the right became vested in the owner, and it was an absolute, unconditional right, to redeem from the sale, on the terms and conditions specified in the act. It was not contingent or uncertain, nor could the purchaser alter or deprive the owner of the right, nor could he, by any means, be prevented from exercising the right within the period limited for the purpose; and the rights of the parties were reciprocal, the one to redeem, and the other to receive the redemption money when redeemed. It was, in the purchaser, a vested right to have a deed, if not redeemed within the time and in the mode pointed out by the statute; and there can not be the shadow of a doubt that, so long as this statute remained in force, he had the right to have the money when the land should be redeemed, in specie, as the statute had declared he should.

But the general assembly, on the 12th day of January, 1863 (Session Laws, p. 82), passed an act, the second section of which declares that all real estate heretofore sold, or hereafter to be sold, for taxes, may be redeemed in the manner now provided, with United States legal tender treasury notes and postage currency, the latter in sums, however, not exceeding five dollars.

As a general, if not a uniform, rule, vested rights, whether

executory or executed, are beyond legislative control, except in appropriating the property of the citizen to public use upon compensation made for the deprivation of the right. Contracts between individuals, titles to property, compensation for injuries sustained, debts owing from one person to another, are all such vested rights as can not be transferred, released or discharged by legislative action. The legislature may change the remedy, but, by doing so, they can not impair the right itself. That must be left as perfect and complete as it was before the change of the remedy.

It must be perfectly apparent to every one, that the legislature, under the constitution, was powerless to release the owner of this land from its redemption. To have done so would have deprived the purchaser of his right, at the end of the two years from the time of the sale, to either receive a tax deed for the land, or to have received the redemption money; nor could they have authorized him to pay one-half of the sum the law had declared should be requisite; nor will it be contended that, after the purchase was made, the legislature could have compelled the purchaser to receive auditor's warrants, county orders, bank or promissory notes. And why? Because it would have deprived him of his right, under the purchase, either to obtain the title to the land, or the redemption money in specie, as the law declared he should when he entered into the contract to purchase the land for the taxes. This was his contract, and the legislature had no power to alter or abridge his rights under the agreement.

The States are prohibited by the constitution of the United States from making any thing but gold and silver coin a legal tender. So that it will not be urged that the legislature have made these notes a legal tender for this redemption. If it is a legal tender for that purpose, it is so not by State, but by national legislation. The legislature may, no doubt, declare that the State will receive all or any portion of the dues to itself, in any species of money or even in commodities of property or choses in action. It may, no doubt, declare that

in all future sales of land for taxes, the owner may redeem in notes, bills, money, grain, or any species of property, and if any one should become a purchaser, he could not object to such a redemption, because it was the law, and it entered into his contract for the purchase.

But it becomes necessary to determine whether the act of congress adopted on the 25th of February, 1862, was designed to make the treasury notes authorized to be issued, a legal tender in such cases as the present. It is deemed unnecessary to determine whether they are constitutionally a legal tender for private debts, as that question is not presented by this record. The act declares that such notes are a legal tender for all debts, public or private, except duties on imports and interest on the public debt.

Since the petition in this case was filed, the supreme court of the United States, in the case of *Bronson* v. *Rodes*, 7 Wal. 229, have held, that the clauses in the several acts of 1862 and 1863, making United States treasury notes a legal tender for debts, have no reference to a bond given in 1851, payable in gold and silver coin, lawful money of the United States, nor where it appears to have been the clear intent of the parties that payment or satisfaction of an obligation should be made in coin. *Butler* v. *Horwitz*, 7 Wal. 258. And again, in the case of *Hepburn* v. *Griswold*, 8 id. 603, the same court held, that those acts in no wise apply to private debts created by contracts entered into before they were passed.

The act of the legislature under which this land was sold, and providing for its redemption, having declared that redemption should be made in specie, the right of the purchaser to demand specie for redemption was as complete as if it had been a debt contracted before the passage of those laws. Such a redemption is as clearly within these decisions as are contracts for the payment of money entered into by parties before congress adopted those acts. As the effect of redemptions from such sales made after the passage of these acts by congress is not now before us, we, on that question, refrain from the expres-

sion of any opinion. There having been no redemption in gold or silver coin in this case, a peremptory writ of mandamus is awarded.

Mandamus awarded.

The Chicago, Rock Island and Pacific Railroad Company

v.

Michael Dignan.

Negligence *in a railroad — and herein of contributory negligence.* In an action against a railroad company to recover for personal injuries received by the plaintiff, from being run over by a train of cars on the defendants' road, it appeared the defendants and another company used the same grounds in the city of Chicago, the main tracks of the two roads being between six and seven feet apart. The plaintiff, being a track repairer, in the employ of the latter company, was engaged, with two other men, in replacing a rail on the track of this company, when a train of freight cars, which was being pushed backward, approached the workmen, unobserved by them until nearly upon them, when they heard the shouting of a brakeman on the rear car, and hastily jumped backward to the end of the ties on the track of defendants. While standing there waiting for the train to pass, the plaintiff and one of his fellow-laborers were struck by two freight cars belonging to defendants, and the plaintiff was severely injured. These cars were moving in the same direction as the train on the other road, by their own momentum, having been uncoupled from a train while in motion, and left quietly to run along the track without any person upon them to check their motion or to give an alarm: *Held*, the defendants were guilty of negligence in running their cars in the manner indicated, but the plaintiff was not chargeable with such negligence as would bar his recovery because of his omission, under the excitement and alarm of the occasion, to look along the track of defendants' road to see if there might not be a train approaching, although he had time to do so before the collision.

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

The opinion states the case.

Mr. George C. Campbell, for the appellants.

Mr. Tom Stuart Dickson and Messrs. Hervey, Anthony & Galt, for the appellee.

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

This was an action brought by Michael Dignan against the Chicago, Rock Island and Pacific R. R. Co., to recover damages for injuries received by the plaintiff from being run over by a train of cars belonging to said company. It appears the defendants and the Michigan Southern Railway Co. use the same grounds in the city of Chicago, the main tracks of the respective companies being between six and seven feet apart. At and near the place where the injury occurred numerous side tracks are connected with the main tracks by switches. The plaintiff was a track repairer, in the employ of the Michigan Southern Company, and in October, 1869, was engaged, with two other men, in replacing a rail on the track of this company. While thus engaged, they were interrupted by a long train of freight cars passing over the track. The train was backing slowly and they did not discover it until nearly upon them, when their attention was arrested by the shouting of the brakeman on the rear car, and they hastily jumped backwards to the end of the ties on the track of the defendants. While standing there, waiting for the train to pass, the plaintiff and one of his fellow-laborers were struck by two freight cars belonging to the defendants. The plaintiff fell in such a manner that he was passed over by the cars and his arm was crushed, and he was otherwise severely injured. His companion, who was also struck, so fell that he was not seriously injured. The third laborer was not touched. These two cars were moving northwardly, in the same direction with

the train on the other track. They, with several other cars, had just before been taken from a side track to the main track, over a switch south of where these men were standing, and then had been backed up the main track. When the train had acquired sufficient momentum, the two rear cars were uncoupled and continued on their course from the motion already acquired, while the locomotive with the other cars moved off in the opposite direction. These two cars, thus left quietly to move along the track by their own momentum, without any person upon them to check their motion or to give an alarm, were the cars which struck the plaintiff.

It is not objected that the damages are excessive. Objection is taken to the modification by the court of defendants' instructions, but this modification was in accordance with the well settled principles so frequently announced by this court in regard to comparative negligence. There is no error in the record unless in the refusal of the court to set aside the verdict as not sustained by the evidence, and we have very carefully examined the testimony, which is a little obscure, but the application of which to the diagram contained in the record we think we understand, and have, with some hesitation, concluded that the judgment must be affirmed.

We have no doubt as to the negligence of the defendants. Every person who has had frequent occasion to visit the grounds of a railway company where freight trains are made up, must have observed how noiselessly one or two empty freight cars will move along the track after having been uncoupled from the locomotive or from the main body of the train, and what a distance they will pass over by their own momentum. That it is negligence to set a car or a couple of cars in motion, and, after giving them a momentum that will carry them onward at the rate of three or four miles an hour, to disconnect them from all controlling power, and allow them to move along where workmen are engaged, with their attention absorbed by their employment, and where persons are constantly passing to and fro, with no one on the cars to apply

a brake or sound an alarm,—that this, we say, is negligence, is a proposition which can not well be denied. The sense of hearing alone will give warning of the approach of an ordinary train, but one of these cars, thus set in motion, gives to the ear no token of its approach, and it is undoubtedly true that many a life has been destroyed, and many a limb crushed, by agencies substantially like those disclosed by this record. The plaintiff offered in evidence various rules of the company, one of which expressly forbids what are called "flying switches." The mode of switching adopted in the present case, it appears by the evidence, was not what is technically called a "flying switch," but it seems to us to possess substantially the same elements of danger. In this case, as in the flying switch, cars are left to pursue their own way along the rail, with no person to control or check their course or to give warning of their approach, and with a speed which, though slow, is the more noiseless for being slow, and is still sufficient to prostrate whatever person the cars may strike.

But the counsel for appellants, in his argument, relies chiefly on the alleged negligence of the plaintiff as a ground for reversal, and we certainly have not found the question free from difficulty. If the testimony of the plaintiff himself and that of the witness Mesner, who was struck by the car at the same time, stood alone, there would be no doubt. They both swear that when they stepped back from the track of the Michigan Southern Company, they cast a glance in each direction along the track of the defendants, and no train was on the track. They also swear that about fifteen cars had passed on the track of the Michigan Southern before they were struck. The theory of the case presented by their testimony would be that the train of the defendants, of which the two cars in question were a part, had not come from the side track on the main track when the plaintiff and the witness Mesner stepped back from their work. They had no reason, therefore, to anticipate sudden danger from that direction, and if their testimony is correct, when the two cars were uncoupled, the per-

sons in charge of the train, or at least the man who uncoupled the cars, might have seen they would almost certainly run down the men who were standing so near the track with their attention absorbed by the other train. Here, then, would be the most wanton recklessness on the part of defendants' employees, with no want of ordinary care on the part of the plaintiff.

But we are of opinion that the other testimony in the case, and other portions of their own testimony, refute the statement that the cars of the defendants were not on the main track and moving northward at the time the plaintiff stepped back from his work.

Joseph Smith, a witness called by the defendants, swears that he was on the hind car of the train on the Michigan Southern road as it was backing north. He saw these men at work as the train slowly approached them, and they did not get out of the way. When within two car lengths of them he shouted to them to get off his track, which they immediately did by stepping to the other track. Just then he discovered the two cars moving in the same direction with his own train, on the defendants' road, the first car being only about a car length behind the end of the train where he was standing. Then he says, quoting his own language, "I hallooed to them again, and told them to look out for the cars. They did not have time to get off, for my train was only about a car length ahead."

This witness is disinterested, and was in a position to know the precise manner in which the accident occurred, and is corroborated by other witnesses. We have no doubt he states the case truly, and in this we agree with the counsel for appellants.

On this view of the facts can the plaintiff be charged with not having exercised ordinary diligence? We readily concede that a person coolly approaching a railway, with intent to cross it, and knowing that trains are liable to pass at any moment, would be guilty of carelessness if he did not look in both

directions for an approaching train. But the question of negligence can be measured by no fixed and unbending rule. Each case must be tested by its own peculiar facts. An act which might justly be regarded as inexcusably careless if done coolly and deliberately, and with nothing to disturb the ordinary action of the brain, may, on the other hand, be pardoned as not unnatural if done under the excitement of sudden peril and alarm. How is the act of the plaintiff to be regarded in this case, and would it be just to apply to him, under the circumstances, the rule applied by this court in the case of *C. & N. W. R. R. Co.* v. *Sweeney*, 52 Ill. 325, cited by plaintiff's counsel?

The three men were engaged in spiking the inside rail, and so intent upon their labor that they neither saw nor heard the train approaching on their own track. When it was but two car lengths distant, they were suddenly alarmed by the shout of the brakeman and started back, as almost all men would have done under the circumstances, on the same side of the track upon which they were at work. They did not step within the rails of the defendants' road, but in their natural anxiety to place themselves beyond all danger, two of them stepped back two or three feet further than was necessary, and thus brought themselves within reach of the projecting cars, as they passed on the defendants' line. As they stepped back, their attention was of course engaged by the danger they were escaping, and the shouting of the brakeman, and they were probably not conscious how near the defendants' road they placed themselves. The brakeman again shouted, but, as he testifies, before they had time to get out of the way the defendants' cars had struck them. We do not suppose there was not sufficient time for the plaintiff to have turned his head in each direction, and have looked north and south along defendants' road, before the collision. But, we are of opinion that he can not be charged with having shown less than the prudence of ordinary men merely because, in the hurry and excitement of his unpremeditated movement to escape from

danger on one line he forgot, for a few seconds, that he might be exposing himself to it on the other.

In examining this case it is worthy of observation that, here were three men each acting for himself, and none of them, we must suppose, desirous of exposing himself to the loss of life or limb, all doing precisely the same thing under the influence of a sudden alarm. The fact that they all acted alike, certainly tends to show that they did what it would have been natural for men in general to do under like circumstances. The fact that one of them did not step back quite so far as the other two, and thus escaped injury, was probably accidental, and we have little doubt that they were all for the moment entirely unconscious that either of them was liable to injury from cars on the defendants' road. It would, we think, be unreasonable and unjust to say that this plaintiff is to be charged with such negligence as will bar his recovery in this case, merely because he did not use all the means to guard against the danger of an approaching train which may properly be required of one who places himself upon a railway line under no circumstances of excitement, and with nothing to divert his attention from the fact that his position is one of peril.

These are the conclusions at which we have arrived after a full examination of the case. The defendants are chargeable with carelessness. The plaintiff, under the peculiar circumstances, can hardly be said to have acted otherwise than most men of ordinary prudence would have acted under similar circumstances. The case is certainly not free from doubt, but it is impossible to say that the verdict is clearly unsupported by the evidence.

The difference between this case and that of the *C. & N. W. R. R. Co.* v. *Sweeney*, cited by counsel for appellants, and above referred to, is very palpable, both as to the question of negligence on the part of the company, and that of the absence of negligence on the part of the plaintiff.

Judgment affirmed.

Syllabus.

WILLIAM J. WARD

v.

HENRY H. TAYLOR.

1. GOODS SOLD AND DELIVERED — *action therefor; of the delivery.* In order to maintain a count for goods sold and delivered it is essential that the goods should have been delivered to the defendant or his agent, or to a third person, at his request, or that something equivalent to a delivery should have occurred.

2. SAME — *and herein what amounts to a delivery.* While it is the rule that the delivery of goods bought, to a carrier, to be conveyed to the vendee, is a complete delivery to the latter, and vests the property in the goods in him, yet the delivery to the carrier is incomplete to charge the vendee for the price of the goods if lost, unless the vendor, in so delivering them, exercises due care and diligence, so as to provide the consignee with a remedy over against the carrier.

3. So, where a vendor of goods delivered them to a carrier to be transported to the place of residence of the vendee, but consigned to the former, in the care of the purchaser, and upon the arrival of the goods at the place of destination, the vendee refused to receive them, whereupon the carrier delivered them to a warehouseman at another place, it was *held*, there was no delivery to the vendee, and an action for goods sold and delivered would not lie against him.

4. Nor would the fact that the goods came into the possession of an agent of the vendee at an intermediate point, to whose care they were shipped, as helper-on of the forwarding of them to their destination, constitute a delivery to the vendee. No greater effect, as regards delivery, would be given to the reception of the goods by the agent for that purpose, than to the receiving of them by the carrier in the first instance.

5. THE REMEDY in such case can only be had under a special count upon the contract for not accepting the goods, or, may be, a count for goods bargained and sold.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

The opinion states the case.

Messrs. FULLER & SMITH, for the appellant.

Messrs. HIBBARD, RICH and NOBLE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by Taylor against Ward, to recover the price of a threshing machine.

The declaration was for goods sold and delivered.

The question which we shall consider is, whether, upon the facts in this case, an action lies for goods sold and delivered.

In order to maintain the count for goods sold and delivered, it is essential that the goods should have been delivered to the defendant or his agent, or to a third person at his request, or that something equivalent to a delivery should have occurred.

It is claimed that the delivery of the machine to the railroad company, at Canton, for transportation to the defendant, was a delivery to him.

While it is the rule, that the delivery of goods bought, to a carrier, to be conveyed to the vendee, is a complete delivery to the latter, and vests the property in the goods in him, yet, the delivery to a carrier is incomplete to charge the vendee for the price of the goods, if lost, unless the vendor, in so delivering them, exercises due care and diligence, so as to provide the consignee with a remedy over against the carrier. Chitty on Contracts, 440; *Buckman* v. *Levi*, 3 Camp. 414; *Clarke* v. *Hutchings*, 14 East, 475.

Taylor consigned this machine not to Ward, but to himself, to the care of Ward. Whether the delay in carrying the machine to its place of destination was occasioned by the loss of time between the manufactory at Canton and Cincinnati, or between Cincinnati and Metropolis, Ward was cut off from any remedy against the carrier. The contract for safe carriage is between the carrier and consignee, and the latter has the legal right of action.

In *Evans* v. *Martell*, 1 Ld. Raym. 271, it was held *per totam curiam:* "If goods, by bill of lading, are consigned to A, A is the owner and must bring the action against the master of the ship, if they are lost.

But, if the bill be special, to be delivered to A to the use of B, B ought to bring the action. But if the bill be general to A, and the invoice only shows that they are *upon the account*, of B, A ought always to bring the action, for the property is in him, and B has only a trust."

This question can not be determined by the relations between Ward and Taylor merely. The carrier is a third party, and in case of an action, has the right to insist that the party alone entitled should sue. Ward could maintain no action against the carrier; Taylor could.

Had the machine been lost, the delivery to the railroad company would have been incomplete, under the authorities cited, to charge Ward for the price of it. And, although the machine was not lost, that should not change the effect of the act of delivery to the carrier, as to whether it amounted to a delivery to Ward.

It is further urged, that the machine coming into the possession of J. F. Mills & Co., at Cincinnati, the agents of Ward, that amounted to a delivery to Ward.

But it came to them only in pursuance of the shipment, *en route* to Metropolis, "*via* Cincinnati, care of J. F. Mills & Co.," as helpers-on of the forwarding of the machine to its destination to Taylor, and no greater effect, as regards delivery, is to be given to their reception of it for that purpose, than to the receiving of it by the railroad company.

There was no actual delivery of the machine to Ward at Metropolis, nor was it stored or left there for him; but on the failure to pay the freight and charges, the boat carried away the machine, and delivered it at St. Louis to Koenig & Co., agents of C. Aultman & Co., and correspondents of Taylor, who assumed to pay the freight and charges for Taylor.

He has never parted with the machine, and is not entitled absolutely to the price. The evidence shows no more than a breach of contract in refusing to receive the machine, and we are of opinion that the delivery to the railway company did not constitute a complete delivery to Ward, so as to charge him

for the price of the machine; because, being consigned to Taylor himself, it was not put into such a course of conveyance as that in case of a loss, Ward might have had his indemnity against the carrier.

In *Turner* v. *Trustees, etc.*, 6 Eng. L. & Eq. R. 507, the consignment being to the consignors or order, it was held, notwithstanding the goods were placed on the ship of the vendee, that there was no delivery as such to him, because the vendors had purposely restrained the effect of delivery on board the vessel, still reserving to themselves the *jus disponendi*.

As Taylor intentionally reserved to himself the rightful power of disposition of the machine in question, as against Ward, he can not, because he was not called on to exercise it, be permitted to deny his possession of that right which he expressly reserved, and would have asserted, had occasion required.

We think the common count for goods sold and delivered is not maintainable in this case, and that a recovery can only be had under a special count upon the contract, for not accepting the machine, or, may be, a count for goods bargained and sold.

This being a sufficient ground upon which to reverse the judgment, it is unnecessary to consider the various errors assigned.

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

Judgment reversed.

EDMUND S. HOLBROOK

v.

ELLEN FELLOWS DICKENSON.

1. LIMITATION ACT OF 1839 — *payment of taxes — what constitutes.* A redemption from a tax sale is not a payment of taxes, within the meaning of the act of 1839.

Syllabus. Opinion of the Court.

2. EVIDENCE *as to payment of taxes.* Where a defendant in ejectment relies upon the limitation act of 1839, the record of the county clerk's office, showing a sale of the premises for taxes assessed for a certain year, and redemption therefrom, will be deemed decisive evidence of such sale and redemption against the testimony of one who states, merely from his recollection, that he paid the taxes regularly each year for a series of years, embracing that for which the tax sale is shown by the record to have been made.

3. BANKRUPT SALE OF LAND—*prior unrecorded deed.* The purchaser at a sale of real estate by the assignee of a bankrupt, will hold the title against a prior unrecorded deed of the bankrupt.

APPEAL from the Circuit Court of Will county; the Hon. J. McROBERTS, Judge, presiding.

The opinion states the case.

Mr. E. S. HOLBROOK, *pro se*, and Mr. C. BLANCHARD, for the appellant.

Mr. E. C. FELLOWS and Messrs. GOODSPEED, SNAPP & KNOX, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Holbrook brought an action of ejectment against one Cook. Ellen Fellows, as landlord of Cook, was made defendant. She afterward married Dickenson, and hence the present title of the suit.

Appellant's title to the land was evidenced by a patent to James B. Campbell, proof that the lot in controversy was a part of the land, and a decree in bankruptcy against Campbell, and a deed to appellant by the assignee of the bankrupt.

Appellee claims that Campbell, previous to bankruptcy, conveyed all his interest in the lot in question to Gurdon S. Hubbard. The deed to Hubbard was never recorded.

Color of title and the payment of taxes for seven successive years are also set up in bar of recovery. Conceding color of

title in Hiram Fellows, there was not the payment of taxes for seven successive years. Elisha C. Fellows, a witness for appellee, testified that he paid the taxes for eight years consecutively, commencing in 1839. He is contradicted by the records of the county clerk's office. He relied entirely on his memory and produced no receipts. The record introduced showed a sale of the lot in 1845 for the taxes of 1844, and that it was redeemed in 1846, by Hiram Fellows; also, a sale in 1852, to Leach, for the taxes of 1851, and a deed to Robert Fellows, in 1866; also a sale, in 1854, to E. C. Fellows, for the taxes of 1853.

A redemption from a tax sale is not a payment of taxes, within the meaning of the statute. This has been repeatedly decided by this court.

Appellee urges that, as there was a conflict of evidence in regard to the payment of taxes, we should not disturb the finding of the jury. We consider the record produced as decisive evidence of the sale and redemption, when only opposed by the recollection of a witness as to old transactions.

The only remaining question is, does the purchaser at a sale of real estate by the assignee of a bankrupt, hold against the unrecorded deed of the bankrupt? We have been referred by appellee to the cases of *Talcott* v. *Dudley*, 4 Scam. 427; *Strong* v. *Crawson*, 5 Gilm. 346; *Ontario Bank* v. *Mumford*, 2 Barb. Ch. 596, and others. These cases do decide that the assignee of a bankrupt succeeds to the rights of the bankrupt, subject to all equities, liens and incumbrances existing against them; that nothing vests in the assignee except such estate as the bankrupt had a beneficial and legal interest in; and that the purchaser from an assignee takes subject to the same equities. They do not decide the real question presented.

The bankrupt, at the time of the assignee's sale, had the legal interest in the property. It was liable to sale by his creditors. He might have conveyed to a third person, and the subsequent recorded deed would hold against the prior unrecorded deed. The deed to Hubbard was not even an equity,

except as against Campbell. It could not be enforced against third parties without notice. It was neither a lien nor an incumbrance as against others whose rights intervened before its record.

The opposite view would nullify the registry laws. The object of the legislature, in the enactment of these laws, was the complete protection of titles. They were intended to disclose their true condition. Hence, when the record shows the title to be in a particular person, purchasers have the right to regard him as the real owner. *Kennedy* v. *Northup*, 15 Ill. 149; *Black & Farwell* v. *Hills*, 36 id. 376.

The theory of the whole bankruptcy system is, that the assignee takes all the property of the bankrupt which can be made available for the payment of his debts. Parsons says: "In this country it seems to be settled by the highest authority that the requirement of record is peremptory. An assignee would hold where the insolvent had made a mortgage which was not recorded." 3 Pars. on Con. 472, 476.

We think, then, that the purchaser, from the assignee of the bankrupt, holds against the unrecorded deed of the bankrupt.

The judgment is reversed and cause remanded.

Judgment reversed.

JOSEPH H. CLEVELAND, impleaded, etc.,

v.

OSCAR SKINNER *et al.*

1. SEVERAL DEFENDANTS — *default against one — mode of bringing the others into court.* In an action against several co-obligors in a bail bond where only one is served with the original summons, and against whom an interlocutory judgment by default is rendered, it is not necessary, in order to bring in the other co-obligors to answer in that suit, to resort to the writ of *scire facias*, but it may be done by the ordinary *alias* summons.

Syllabus. Statement of the case.

2. PLEADING *in an action against several — after default against one.* In such a case where one of the co-obligors, not served with the original summons, upon being brought in at a subsequent term of the court, by service of an *alias* summons, filed a plea simply denying his joint liability, intending thereby to present the question as to the effect of the judgment by default in destroying the joint character of the indebtedness, it was *held*, the plea was but a departure from the form of *nil debet*, which was not admissible in such an action, and could not properly draw into question the effect of the judgment by default. Where matters exist *dehors* the pleadings, upon which a release or merger may be predicated, such matters must be incorporated into the plea.

3. BAIL — *surrender of principal — its effect in discharging the several sureties.* When several become bound as bail, and suit is commenced upon the bond against all, the surrender of the principal, either by himself or by one of his bail before the return day of the original summons in that suit, would, upon notice and payment of costs, discharge all.

4. But if service of the summons be upon one only, and he, failing to make the surrender of the principal, becomes fixed as bail, and an *alias* summons is issued, but before the return day thereof another of the bail surrenders the principal, then, although such surrender will not discharge him whose liability is already fixed, yet, upon notice and payment of costs, will discharge not only the one making the surrender, but all his co-defendants not served with the original summons.

5. SAME — *pleading the surrender.* The notice and payment of costs required by the statute are indispensable prerequisites to the discharge of the bail, and it is as essential that those facts should be averred in a plea designed to set up the surrender of the principal as a defense in an action on the bond as the fact and mode of the surrender itself.

6. SAME — *notice of surrender — its character.* The notice required is not of the intention to make the surrender, but of the fact after it has been made.

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

This was an action of debt upon a bail bond, brought by appellees against Finch, as principal, and appellant, one P. R. Morgan and W. J. Chamberlain, as sureties. The record contains no summons, but the declaration is entitled of the October term of the superior court, 1869. On the 19th same month, Morgan's default was entered. On the 1st November,

Statement of the case.

1869, Cleveland entered his appearance and filed four several pleas, in substance as follows: 1. That he did not owe the debt *jointly* with the other defendants. 2. That he was served with summons in this case on the 22d day of October, 1869, and on the 25th same month he, as bail, took Finch, the principal, into the circuit court of that county, the same being the court in which the proceedings were had against Finch, wherein the bail was given, and there, in open court, surrendered him into the custody of the sheriff, and the court ordered the surrender and commitment of Finch into custody of the sheriff to be entered of record. Third plea substantially like the second. Fourth plea like the second, except that a surrender was alleged to have been made in the superior court.

To the first plea the plaintiffs demurred. To the second and third, replied, that after judgment in original suit, the issuing and return of *ca. sa.* upon that judgment, and on the 20th of September, 1869, they commenced this suit by summons against all the defendants, returnable to the October term, 1869, which was served by the sheriff on Morgan, the 22d September, and as to the other defendants, the sheriff, on the 4th October, 1869, made return that they were not found. That on the 18th same month an *alias* summons was issued, which was the same writ served upon Cleveland on the 22d, and referred to by him in his plea, wherefore they alleged that the surrender, after the return of the original summons served upon Morgan, was invalid and nugatory.

To the fourth plea plaintiffs replied double: 1st. The same matter as to second and third pleas; and 2d. That the surrender in the superior court was without notice to them, and they were not present at the time. Defendant Cleveland demurred to all of plaintiffs' replications specially.

The court sustained plaintiffs' demurrer to Cleveland's first plea, and overruled his demurrers to plaintiffs' replications, and rendered final judgment against appellant and Morgan. Cleveland brings the case here by appeal, and he alone assigns error upon the record.

Messrs. KNOWLTON, JAMIESON & SCALES, for the appellant.

Mr. JOHN LYLE KING and Messrs. BACON & NORTON, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The position taken by appellant's counsel, that after the judgment taken against Morgan, his co-defendants not served with the original summons could be brought in only by *scire facias*, is not tenable. That judgment was but the ordinary interlocutory judgment by default; and then a continuance to assess damages, which was done at the same time of assessing damages against appellant. This practice was regular and proper.

The only other questions requiring consideration arise upon the decision of the demurrers. The demurrer to appellant's first plea merely denying a joint indebtedness was properly sustained. A plea of *nil debet*, good in form, would not be admissible in this action. The plea in question was but a departure from the form of *nil debet*. It is a mere denial of the *operation* of the instrument, without denying its execution. It does not and could not properly draw into question the effect of the judgment by default against Morgan. Where matters exist *dehors* the pleadings, upon which a release or merger may be predicated, such matters must be incorporated into the plea. If the plaintiff, at the time of the judgment against Morgan, instead of taking it, had come into court and acknowledged, by entry of record, a release of Morgan, appellant could not avail himself of the release, by denying a joint liability, but to do so, should plead the release.

The remaining question arises upon the judgment of the court in overruling appellant's demurrer to appellees' replications. This question involves, not only the sufficiency of the replications, but of the pleas also. It is an established rule,

that, upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance. 1 Chitty's Pl. 668.

The replications to the second and third pleas, and the first replication to the fourth, set up as matter of avoidance, that an original summons returnable on the 4th of October was served upon Morgan, one of the bail, on the 22d of September, and that the service mentioned in the pleas was of an *alias* summons issued on the 18th of October and returnable on the 1st Monday of November, and though the surrender set forth in the pleas was made before the return day of that summons, yet, inasmuch as no surrender could be made after the return day of the original, even by one not served with it, the surrender was, therefore, void. To these replications appellant demurred, and the demurrer was overruled. The replications were based upon an erroneous view of the statute, and, consequently, were bad. The whole subject of the law, as to the steps to be taken, and by whom, to discharge bail by surrender of the principal, is settled by the provisions of section 5, chapter 14 of the Revised Statutes. *Gear* v. *Clark*, 3 Gilm. 64.

By that section it shall be lawful for the defendant, in an action in any court of record, when bail shall have been given according to that chapter, to surrender himself, or for his bail to surrender him, to the court in which the suit may be pending, during the sitting thereof, or, in vacation, to the sheriff of the county in which the process was served, at any time before the return of the process which may be sued out against him as bail. If the surrender shall be made during the sitting of the court, an entry shall be made on the records of the court, stating the surrender and commitment of the defendant to the custody of the sheriff; if in vacation, the bail or principal shall obtain a certified copy of the bail bond from the sheriff or clerk, in whosesoever possession the same may be, and shall deliver himself, or be delivered by his bail, to such sheriff, who

shall indorse on the copy an acknowledgment of the surrender and file it in the office of the clerk of the court where the action is pending. When all this is done, the bail is not discharged, for the section proceeds thus: "Upon giving notice of the surrender, whether made in term time or vacation, to the plaintiff, or his attorney, and paying the costs of the action against the bail, if any have accrued, the bail shall be discharged from all liability; the defendant shall be committed to the jail of the county, there to remain until discharged by due course of law."

The construction we give to this section is, that when several become bound as bail, and suit is commenced upon the bond against all, the surrender of the principal, either by himself or by one of his bail, before the return day of the original summons in that suit, would, upon notice and payment of costs, discharge all. But, if service of the summons be upon one only, and he, failing to make the surrender of the principal, becomes fixed as bail, an *alias* summons is issued, but before the return day thereof another of the bail surrender the principal, then, although such surrender will not discharge him whose liability is already fixed, yet, upon notice and payment of costs, will discharge, not only the one making the surrender, but all his co-defendants not served with the original summons. This construction of the statute shows these replications to be bad.

The second replication to the fourth plea, alleging that the surrender in the superior court was made in the absence of the plaintiffs, and without notice to them, is likewise bad. The notice required by the statute is, not of the intention to make the surrender, but of the fact after it has been made.

It is, no doubt, a great hardship, and is one to which we are not insensible, but we are compelled to affirm this judgment. The appellees declared upon a bond duly executed by appellant and others. The declaration contained a cause of action. The pleas filed on behalf of appellant denied neither the execution or breach of the bond, but attempted, aside from the one

first pleaded, which we have already seen was bad, to set up the surrender of the principal as a discharge. In neither of the pleas setting up that defense is it averred that any notice of the surrender was given to the plaintiffs or their attorneys, or that the appellant, or any other person, had paid, or caused to be paid, the costs of the action against the bail. Indeed, so far from averring payment of costs, the pleas purport to be a defense to all the cause of action, except the costs. From this circumstance it is inferable, though of no consequence in deciding upon the pleas, that the costs of the suit against the bail were not, in fact, paid at all.

The notice and payment of costs required by the statute are indispensable prerequisites to the discharge of the bail, and it is as essential that they should be averred in the plea as the fact and mode of the surrender itself. As appellant's pleas were all bad, he was the party whose pleading was first defective in substance, and the judgment against him upon the demur rers was proper.

The judgment of the court below must be affirmed.

Judgment affirmed.

HANFORD LOCKWOOD *et al.*, Executors,

v

ADDISON ONION.

1. WITNESS — *competency under act of* 1867. Where it was sought to recover a claim against the estate of a deceased person, and certain notes given by the plaintiff to the testator in his life-time were pleaded as a set-off, it was *held* incompetent for the former, by his own testimony, to impeach the consideration of the notes, no witness in interest having testified to any fact that would bring such testimony by the plaintiff within any of the excepted cases provided for by the second section of the act of 1867.

2. MEASURE OF DAMAGES — *for nursing the sick.* In an action to recover

the value of services rendered in nursing a person sick with a loathsome and offensive disease, the measure of recovery for one not usually engaged in that business should not be greater, in the absence of any express contract on the subject, than what would be a fair compensation to one who renders such services as a business or occupation.

3. NEW TRIAL — *excessive damages.* In an action for board and services rendered by the plaintiff in nursing the defendant's intestate during his illness, it appeared the deceased boarded and lodged with the plaintiff for a period of some fourteen months. During all that time, except the last month or six weeks of his illness, he was able to get out and attend to business. He was well and kindly attended, and was a most disagreeable patient to have in the house, and, at times, very offensive on account of the character of his disease. For this service the plaintiff was allowed $3,938, which was regarded so excessive as to call for a reversal of the judgment for that cause.

4. Where the verdict of a jury is the result of passion or prejudice, or undue influence, it should be set aside. It is the duty of the court to see that the verdict is not oppressive, and that it is the clear and deliberate judgment of the jury, uninfluenced by improper motives.

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

This was a claim filed by Addison Onion, against the estate of Ralph Lockwood, for services as nurse, rendered deceased in his life-time, and for board and lodging. A trial by jury in the court below resulted in a verdict and judgment for the plaintiff. The defendants appeal.

Messrs. BANGS & SHAW, for the appellants.

Messrs. BURNS & BARNES, Mr. G. L. FORT, Mr. N. W. LOWS and Mr. BOAL, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This cause was before this court at the September term, 1868, and a succinct history of the case may be found in the opinion then delivered. *Lockwood et al.* v. *Onion*, 48 Ill. 325. The judgment at that time was reversed, because the damages

assessed by the jury ($3,411.60) were deemed excessive and oppressive in proportion to the services rendered by the appellee.

On the cause being remanded, the same was again tried at the April term, 1869, and the jury found for the appellee, and assessed his damages at $4,680, which verdict the court set aside, and awarded a new trial. At the August term, 1869, the cause was again tried, and resulted in a verdict for the appellee for $3,938.40, and the court overruled a motion entered for a new trial, and rendered judgment on the verdict. To reverse this judgment, the appellants now prosecute their appeal to this court.

The only errors assigned, that we deem necessary to consider, are, first, that the court erred in admitting improper testimony offered by the appellee; second, that the damages awarded were excessive.

The court permitted the appellee, against the objection of appellants, to testify to the consideration of certain notes given by the appellee to the testator in his life-time, and which notes had been filed by the executors as a set-off to the appellee's supposed claim. This, we think, he was not authorized to do. Parties to the record, and in interest, are made competent witnesses solely by the statute, and the admissibility of the evidence objected to must be determined by the construction to be given to that statute. The evidence given by the appellee tended to impeach the consideration of the notes, and to show that he had never received the amount of money from the testator that the notes expressed on their face. That was a fact occurring prior to the death of the testator, and the testimony offered was, therefore, clearly prohibited by the second section of the act of 1867. It is provided by that section that no party to any civil action, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the first section of that act, when any adverse party sues or defends as executor of any deceased person. To that section, however, there are

a number of exceptions, but the evidence given by the appellee does not come within the provisions of any one of them. No witness in interest had testified to any fact that would bring the testimony, given by the appellee, within any of the excepted cases provided for by the exceptions to that section.

The serious question involved in this record is, whether the damages awarded by the jury, in view of the services rendered by the appellee, are not excessive and oppressive in their amount. When the cause was before this court at a former term, the verdict was not then so high as now, upon substantially the same evidence as is contained in the present record, and the damages were then pronounced to be excessive. It is true that some additional evidence was taken and heard on the last trial. But, for the most part, it is simply cumulative as to the value of the services rendered by the appellee in his attention and care bestowed on the deceased. The only evidence that can be properly denominated new is that which defines, with more accuracy, the disease with which Lockwood was afflicted. There is evidence tending to show that the disease was of the most loathsome and revolting character. There is, however, some evidence tending to show that the physicians who pronounced on the character of the sickness were mistaken in the pathology of the disease with which he was afflicted. By whatever name the disease may be called, it is very apparent that it was of such a character as to render the duties of the nurses very disagreeable. Few persons could be employed to undertake the care of the person thus afflicted, and, as was said in the former opinion, the faithful nurse ought to be well and liberally paid. In the absence of any special contract, such services, like all other labor, can only be remunerated by a reasonable compensation. Such is the rule of law. If the appellee did not stipulate for extraordinary compensation, the law implies that he undertook to perform the services for a reasonable compensation. The appellee was under no legal obligation to perform the services, and if he was not willing to do so for reasonable wages, it was his plain duty to advise the

decedent that he would expect extraordinary compensation or to decline to enter upon the discharge of the services. Having failed to make a contract for himself, he is estopped from complaining that the rule of compensation that the law fixes in the absence of any special contract is unreasonable and inadequate.

The evidence discloses that the deceased boarded and lodged with the appellee for a period of some fourteen months. During a large portion of that time, and perhaps all the time, except the last month or six weeks of his sickness, he was able to go out and attend to business. He was kindly attended by the appellee and his wife, and was furnished with every comfort that their small apartments would afford while he was in their house. The evidence also shows that he was a most disagreeable patient to have in the house, and very offensive at times. For this service, the jury allowed the appellee at the rate of between $8 and $10 per day for the entire time that the deceased was at his house.

A multitude of witnesses were produced on the trial, all of whom testified that it was worth $10 per day to take care of the deceased as appellee and his family did. It is perfectly manifest, from the manner in which these witnesses testify, that they were not speaking of the reasonable value of such services to a person who was willing to embark in the business of nursing a person so afflicted. They seemed to fix the value of the services by their own unwillingness to engage in that kind of business. The most of these witnesses were frank enough to say that they had no personal knowledge of the value of any such services, nor what would be deemed reasonable wages for persons who would be willing to undertake to render such services. It is not intended to impugn the motives of any of these witnesses. Doubtless they intended to speak frankly and honestly when giving their testimony. But there is certainly some very extraordinary and extravagant testimony to be found in this record. Some of the witnesses fix the compensation for the services of appellee at most fabulous prices per day, and one witness testifies that he would not be willing to per-

form the services for a million of dollars a day. These witnesses certainly did not intend that their testimony should be taken and understood literally by the jury. It was only an extravagant way of saying that they, themselves, could not be induced, for any reasonable compensation, to undertake to perform the services. If this was their meaning, and they certainly did not intend that their evidence should have a literal meaning, it is doubtless the truth. This is true also with reference to other avocations in life. There are certain kinds of labor, not at all disreputable in their character, that it is not possible to employ a certain class of persons in society to perform for any reasonable compensation. Yet, if they do undertake to perform such services, in the absence of any special contract the law will allow them for such services only a reasonable compensation; that is, such wages as are usually charged by persons engaged in that kind of labor.

It is well known that there are persons whose sole occupation in life is the nursing and taking care of the sick. It is, with them, a kind of profession, and the price and value of their services is as well known and understood as that of any other profession or business occupation.

The evidence in this case discloses, that the reasonable wages of an experienced nurse is very much less than what the jury have allowed the appellee. There is no dispute in the evidence that the services of such a person can be procured for from $3.00 to $5.00 per day. The witnesses testify that they would not do it for any such compensation. Certainly not, for that is not their occupation. But, if a party undertakes to perform services out of his line of business, he must expect to receive only such compensation as is usually paid to persons engaged in that business or occupation.

It is insisted by the appellee, that,where there is a conflict of evidence, and the jury have fixed the damages at an amount between the highest and lowest estimates of the witnesses, the verdict will not be disturbed. As a general rule, that is true, but it is only true where the court can see that the ver-

dict is the result of the deliberate and unprejudiced judgment of the jury. There is a class of cases sounding merely in damages, where the testimony touches the sympathies or excites the prejudices of a jury, in which the court must always retain a supervisory control of the verdict, otherwise great injustice would frequently be done. We can not say that the verdict in this case is the result of the clear, cool and dispassionate judgment of the jury. Indeed, we think it was not. The very fact that some of the jurors who tried the cause at the former trial were called as witnesses, and required to state their judgment of the value of the services of appellee, not from any actual knowledge of their own, but upon the hypothetical case that the evidence they heard was true, shows that it was the intention of the counsel to produce a sensational effect upon the minds of the jury. In this the counsel succeeded in producing this very verdict, which is of no benefit whatever to the appellee, but a positive injury.

In the case of *Booth et al.* v. *Hynes et al.*, 54 Ill. 363, we said there was no fixed and inflexible rule on this question of granting new trials, and especially is this true in actions sounding purely in damages. Where there is a conflict of evidence, or where the credibility of witnesses is involved, and there is nothing in the evidence to produce an undue impression on the minds of the jury, the almost universal rule is, that the verdict will not be disturbed. But, in cases like this, where the evidence is of such a character as tends to arouse the sympathies of the jury, it is the plain duty of the court to supervise the judgment of the jury, and if the court can see that the verdict is the result of passion, or prejudice, or undue influence, it should, in every instance, set aside the verdict and award a new trial. In other words, it is the duty of the court to see that the verdict is not oppressive, and that it is the clear and deliberate judgment of the jury, uninfluenced by any improper motives. If such was not the general rule, the sympathies and passions of the jury, which for the time may cloud the

better judgment of the jurors, would fix the rule by which the damages are to be assessed, and not the law and the evidence.

For the reasons given in this and the former opinion, this judgment will be reversed and the cause remanded.

Judgment reversed.

PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY

v.

ASBURY F. FAWSETT *et al.*

1. PAYMENT *to an agent — evidence.* In an action by a shipper of stock upon a railroad, against the company, to recover the amount of certain drawbacks, to which he claimed he was entitled in respect to such shipments, it appeared, the contract on the subject of such drawbacks was made with the shipper by a party who acted as agent for the company, but only for the purpose of procuring cattle shipments over their road, and that the contract was made with knowledge on the part of the shipper that, by the routine of such business as transacted by the company, the money for the drawbacks would come to him through the hands of such agent, and to that routine the shipper gave his assent: *Held,* under such circumstances the agent of the company became the agent of the shipper for the purpose of receiving the money, whether the latter gave him distinct authority so to do or not, and a payment of the money, by the company, to such agent, would exonerate the former from any further liability to the shipper in respect thereto.

2. And certain documentary evidence, tending to prove that the company had paid the money to the agent, consisting of an account concerning the drawbacks, approved by the proper officers of the company, and a check drawn in favor of the agent for the money, and indorsed by him, was held to be admissible in behalf of the company.

3. SETTLEMENT OF ACCOUNTS — *inference as to what is embraced therein.* In an action to recover a sum of money alleged to be owing to the plaintiff from the defendant, it appeared the latter had paid the money to a third person, who stood in the relation of agent to the plaintiff in respect thereto, and that such agent and the plaintiff, after the payment to the former, and

prior to the bringing of the suit, had a settlement of certain transactions between them, involving an amount much larger than the sum so paid to the agent, but it did not appear what specific matters were embraced in that settlement: *Held*, it was fair and reasonable for the jury to infer that the subject matter of the suit was included in the settlement.

4. CONTRACT — *whether it relates to past transactions.* A shipper of cattle made a contract with a railroad company, by which he was to have certain drawbacks upon shipments over their road, it being agreed the shipper should be allowed the same drawbacks which other companies were paying him. The contract was construed not to relate to shipments made prior to the time it was entered into.

5. CONSIDERATION. Moreover, as to such prior shipments there would be no consideration to support a promise to pay drawbacks.

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

This was an action of assumpsit, brought by Asbury F. Fawsett and Jacob J. Bankard against the Pittsburgh, Ft. Wayne and Chicago Railway Company, to recover certain claims alleged to be owing by the defendants to the plaintiffs. It appears, that during the years 1863, 1864 and 1865 the plaintiffs were extensive shippers of live stock from the city of Chicago to Baltimore, in the State of Maryland, and their stock passed over the defendants' road from Chicago to Pittsburgh, thence, by the way of the Pennsylvania Central and the Northern Central railroads, to the city of Baltimore.

It appears, from the evidence, that the officers of the trunk lines of railroad, from Chicago to the east, at certain intervals, met and fixed a tariff of freight charges from Chicago to certain eastern points, among which was Baltimore. As the competition for business between the different lines was sometimes very sharp, the custom arose of allowing to very heavy shippers what were called *drawbacks*, that is, a certain rate, per car, or per hundred pounds, to be refunded to them by the railroad company, in consideration of their making all of their shipments over some one of the competing routes.

The proof shows that the Pennsylvania Central and the Northern Central railroads made an agreement to and did pay

to the plaintiffs certain drawbacks upon the shipments over their portions of the through line, from Chicago to Baltimore. The plaintiffs claim that the defendants, through one Joseph McPherson, the stock agent of the company in Chicago, had agreed to give them the same amount of drawbacks as were allowed them by the other companies, and that these drawbacks, for the recovery of which this suit was brought, had never been paid. A trial by jury in the court below resulted in a verdict for the plaintiffs of $28,200, on which judgment was entered. The defendants appeal.

As tending to show that these drawbacks to the amount of $995 on 398 cars of cattle, at $2.50 per car, a portion of the cars for which the plaintiffs sought to recover, had been paid, the defendants offered certain documentary evidence, which was excluded by the court. As to the manner in which claims for drawbacks were paid, and the custom of the company in that regard, *Louis Erickson* testified, that he was McPherson's book-keeper; that in cases of drawback contracts, vouchers would be sent from McPherson's office to Pittsburgh (where was situated the principal office of the defendants, and where all accounts against the company were sent for approval by the general superintendent, before being paid), and there be approved, and then returned to Glover, the cashier, at Chicago. The vouchers would be an order on the railroad company to pay so much money to Glover for drawbacks. On their being returned to Glover, he would give McPherson credit for the amount. These vouchers, showing the amount the party was entitled to, were signed, and sent by McPherson to inform the officers at Pittsburgh, that a certain contract had been made by McPherson with the shipper to allow so much drawback. After the voucher was signed in Pittsburgh and McPherson's contract approved, it would be sent back to Glover or the witness, and witness would get the money on it from Glover and pay it over to the shipper. He did the business as McPherson's book-keeper, and would get the money of the cashier and pay it over to the parties

entitled. He collected, in the usual way, on McPherson's order, on the 6th September, 1865, the $995, for 398 cars at $2.50 per car, but could not tell whether it was paid over to Fawsett or not.

John Wolwork testified, that he was in the employ of McPherson as shipping agent at the Fort Wayne stock yards; that whenever McPherson made a drawback contract, the freight would always be billed at the regular rates, and the drawback afterward paid back by the company on McPherson's order. The company would pay the drawbacks through McPherson.

The following is the evidence excluded by the court:

Accounts Payable.

The Pittsburgh, Fort Wayne and Chicago Railway Company.

To A. F. Fawsett, Dr.
Address, Baltimore.

State at what station, or in what subdivision, and for what particular purpose the articles were used.

1865 Order No. . . .	Amount of drawbacks on 398 car loads of cattle shipped from Chicago to Baltimore, *via* Pittsburgh, from February 1st to April 30th, 1864.		
	398 cars at $2.50.....	$995	00

The above items have been received at this day of 186 , inspected and found correct and in good order.

"Authorized, examined and found correct,

(Signed) JNO. J. HOUSTON, G. F. A.

"Examined and approved,

Supt. Division.

Approved (Signed)

J. N. McCULLOUGH, *Gen. Supt.*

"General Purchasing Agent,

Mr. HOUSTON.

"J. McPherson says it was a contract and should be paid."

Following the above, was a statement in detail of stock shipped to Baltimore, by Fawsett, *via* the defendants' road, from February 1st to April 30, 1864, showing he had shipped during that time 6,738 head of cattle in 398 cars.

"ACCOUNTS PAYABLE.

"The Pittsburgh, Fort Wayne & Chicago Railway Company, to A. F. Fawsett, Dr.

Address, Baltimore.

"1865. For amount of drawbacks on 398 car loads of cattle shipped from Chicago to Baltimore, *via* Pittsburgh, from February 7th to April 30th, '64.

398 cars, at $2.50 ..... $995 00

U. S. Int. Rev. stamp 2 cents.

I certify that the above is a true copy of an original account, duly authorized and approved by general superintendent, that the same has been examined by me and found correct; that it has been duly registered and filed in the comptroller's office, and is hereby approved for payment.

"J. P. FARLEY, *for Comptroller.*"

"Received, October 10th, 1865, of the Pittsburgh, Fort Wayne & Chicago Railway Company, $995, in full for the above account.

"$995. SAM. J. GLOVER, *Cash.*"

"NOTE.—The above receipt must be dated and signed by the party in whose favor this voucher is made, or when signed by another party, the authority for so doing must, in all cases, accompany it."

Attached to the above receipt is the following:

"Pittsburgh, Fort Wayne & Chicago Railway Company will pay S. J. Glover, or bearer, the amount due me for drawbacks on 398 cars cattle, from Chicago to Baltimore, from February 1st to in the month of April 30th, 1864.

"A. F. FAWSETT."

Witness, .

"NOTE.— Orders for different kinds of service, or for different months, should be made on separate blanks."

"Received 186 , of the Pittsburgh, Fort Wayne & Chicago Railway Company, for the sum of dollars ($995) in full for the month of 186 , as above specified.

Witness, .

(CHECK REFERRED TO ABOVE.)

"No. . September 8, 1865.

FIRST NATIONAL BANK,
and
DEPOSITORY OF THE UNITED STATES,
CHICAGO, ILLINOIS.
South-west corner Lake and Clark streets.

"Pay to Jas. McPherson, or order, nine hundred and ninety-five dollars.

$995.

{ 2 cents. U. S. Int. Rev. stamp. } { Treasury Department Seal. }

SAM'L GLOVER,
Cash'r."

Indorsed:
J. MCPHERSON,
S. ERICKSON.

S. J. Glover testified: "I am the cashier of defendants at Chicago; vouchers for drawbacks were paid through McPherson, the stock agent. It was customary for me to draw money on orders similar to the one attached to this voucher (meaning

the above order, purporting to have been signed by Fawsett); that is the kind of order on which drawback contracts were usually paid. McPherson would settle with the parties entitled to the drawbacks; the check for $995 was drawn by me, payable to McPherson, and paid by me on this order in the usual way of making payments. I don't recollect who presented the check, but it is made payable to McPherson; they were always paid through McPherson's office; that is the usual form of voucher; they must be approved at Pittsburgh, at the main office, after which they come to me and I pay them. We have regular systems for doing this business. McPherson was the stock agent at Chicago, and drawback vouchers came through him; when they came from him I sent a check to him to be paid over to the parties."

Mr. F. H. WINSTON and Mr. GEORGE C. CAMPBELL, for the appellants.

Messrs. WALKER, DEXTER & SMITH, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only questions raised on this record important to be considered are, first, the ruling of the court on the documentary evidence offered by appellants on the trial below; second, the time at which the contract for drawbacks commenced, as affecting the amount of the verdict; and last, instruction five asked by the defendants and refused.

That the documentary evidence offered by appellants, in regard to drawbacks on three hundred and ninety-eight cars, saving and excepting the order purporting to have been indorsed by Fawsett, but not in his handwriting, was proper to go to the jury, will be apparent from the consideration of the character of appellees' claim.

It is in proof McPherson was not connected with appellants in any other capacity than as agent to procure cattle shipments

over appellants' road; that he contracted with Fawsett in June, 1863, that appellants should allow him the same drawback on his shipments of cattle that was allowed him by the Pennsylvania Central and Northern Central, over whose roads the cattle shipped by appellants' road would pass to the Baltimore market.

Fawsett, in his testimony, says, he looked to McPherson to have the papers arranged so that he could get the drawbacks; intended to take the general routine to do the business; repeatedly asked McPherson to get the papers into shape; thinks very likely he knew the general course of business was that the money was paid by the company to McPherson.

This testimony was given when recalled to rebut the testimony of McCullough, given in his deposition. In his first examination in chief, he testified that he never received money from appellants on account of drawbacks; he applied only to McPherson for payment of drawbacks; during the period of his shipments, he never stated the contract to any officer of the road; went often to McPherson in 1863–4–5, demanding his drawbacks, but did not go to the officers of the road; made his contract with McPherson; he promised to pay.

Fawsett distinctly states, the usual routine of doing such business was to be taken. What that routine was is shown by the testimony of Louis Erickson and John Wolwork, employees of McPherson, the first named as book-keeper and the other as shipping agent, and by S. J. Glover, the cashier of appellants. From the testimony of these witnesses, the routine of business in regard to drawbacks is clearly established, and was pursued, as the documentary evidence excluded shows. By pursuing that routine, with which Fawsett had full knowledge, the money for drawbacks would necessarily come into McPherson's hands, and that it did so come on these 398 cars there can not be the least doubt. It is immaterial whether Fawsett gave McPherson distinct authority to receive the money or not; by the routine of the company in such cases it was bound to come to McPherson's hands, and to this Fawsett testifies he sub-

mitted. There can not be the least doubt that the drawback on these cars, amounting to $995, was paid by the company to McPherson, and the evidence excluded should have been admitted as tending to show it at least.

In another aspect of the case this testimony was proper, for it appears in the year following, in 1866, — a few months after the receipt of this money — McPherson brought an action against Fawsett, claiming from him more than $20,000 on a cattle contract. To this action Fawsett pleaded a set-off, and swore to the plea. In answer to the question, "Had you then a set-off against McPherson for the whole amount of his claim," Fawsett answered: "There was something coming to me — money that had been loaned, or got into his hands some way or another; I gave him $21,000 or $22,000, and whatever was coming to me at that time; I think it was $4,000 or $5,000 McPherson owed me, which he allowed in this settlement."

Now, as no figures, vouchers or other papers were produced by Fawsett, showing the basis on which this settlement was made, was it not a proper question for the jury, did not these $995, which the documentary evidence excluded tended to show McPherson received as drawbacks on these cars, form a part of the $4,000 or $5,000 McPherson allowed Fawsett on the settlement made in 1866? It would be fair and reasonable so to argue before the jury, as, in a settlement of a claim so large as the one in suit, it is highly improbable Fawsett, in defending against it, would have omitted so large an item as $995. McPherson's lips are sealed in death; probabilities must plead in his favor. While Fawsett says he is positive, in his settlement with McPherson, he did not set off his claim for drawbacks, he must be understood to mean, not this particular item of money collected for drawbacks by McPherson, but the claim out of which this suit arises; for Fawsett always knew, so we infer from the testimony, that the company had not paid all the drawbacks claimed.

In this connection the third question may properly be dis-

posed of, and that is, the refusal of the court to give this instruction:

"V. If the jury believe, from the evidence, that Fawsett authorized and directed McPherson to collect his drawbacks for him, then any payment made by the defendants to McPherson, on account of such drawbacks, was a payment to the plaintiffs, and they can not recover payment for such drawbacks a second time.

"And if the jury believe, from the evidence, that McPherson, as agent for Fawsett and Bankard, did collect the drawbacks for them upon three hundred and ninety-eight cars of cattle, then no further drawbacks can be collected from defendants upon the three hundred and ninety-eight cars."

From what we have already said, this instruction was proper, because the evidence is incontestible, that the drawbacks were to be paid to McPherson; that they were to come through his hands. He was the agent of Fawsett to receive the drawbacks, as appears from Fawsett's testimony. He never applied to the company for the drawbacks, always expected to get them through McPherson, and if McPherson received this particular drawback, the company should not be obliged to pay it a second time, the more especially when it is seen that these parties, Fawsett and McPherson, shortly after the receipt of the money by McPherson, had a full settlement of heavy claims, in which, it is extremely probable, this sum of $995 was fully accounted for by McPherson.

The remaining point is, at what time did this contract to pay drawbacks commence?

It appears Fawsett had been shipping cattle on this road from April, 1863, to May 2, 1865, but no contract was made in relation to drawbacks until the summer of 1863, as appears by Fawsett's testimony, and that of Charles Karn. Karn says, the contract he was called to witness was in the summer of 1863, and Fawsett says, that is the contract alluded to in his testimony. That contract was, that Fawsett was to receive the same percentage that he got on the other roads he shipped over. McPherson agreed to see that he should have it.

"That was the exact understanding." The shipments, prior to this time, had been paid for, and no drawbacks claimed or allowed until June, 1863. Fawsett says: "I talked to McPherson about it at different times, but we did not agree on a rate until June, 1863. I told him I was getting a rate from the Pennsylvania road and what it was, and he said he would give me the same."

That this related to future shipments there can be no doubt. Fawsett told McPherson what the Pennsylvania road was then paying, and he agreed to allow the same. Such language would not be used in regard to a past transaction, and if it is sought to apply it to such a transaction, then there was no consideration for the promise.

The contract should take effect from June, 1863. All allowances of drawbacks prior to that time, by the jury, were unauthorized, and to that extent the plaintiffs recovered more than they were entitled to recover.

For the reasons given the judgment is reversed and the cause remanded.

Judgment reversed.

DAVID GOODWILLIE *et al.*

v.

DAVID MILLIMANN.

1. CONTEMPT — *refusing to pay a money decree — mode of enforcing payment of such decree.* Even if a court of chancery has the power to commit a party to jail for a failure to comply with a decree of the court, and there is no other ground for regarding him as in contempt, such remedy should not be resorted to unless there are no other reasonable means for its enforcement. In analogy to the constitution the remedy of enforcing decrees by imprisonment should be limited to cases of necessity only.

2. There seems to be no more reason for declaring a party in contempt

of court for failing to pay a money decree than for refusing to pay a judgment at law.

3. And *quære*, whether, in any case, the statute authorizes a court of equity to imprison for a failure to pay a money decree.

4. In a proceeding for the partition of lands, a decree of partition being entered on a default by the defendants, together with their admissions, the court, under the act of 1869, authorizing the chancellor, in cases of that character, to decree the payment of a solicitor's fee, allowed and taxed a counsel fee of $2,500, and decreed that the same be paid forthwith: *Held*, upon failure of one of the parties to pay the portion of such fee decreed against him, the action of the court, in adjudging him guilty of contempt for such failure, and ordering his committal to the county jail, was without authority of law.

5. The statute having declared that such fees should be taxed as costs, and no mode being provided for their collection, the statute having failed in terms to provide any, it must be presumed it was intended they should be governed by the cost act in the mode of their collection, as also in re-taxing, replevying and other incidents. And that provides their collection may be compelled by execution.

6. COSTS — *re-taxing the same.* The amount of the solicitor's fee having been ascertained by the court, from evidence heard in open court, but, in the absence of the defendants, a motion made by them to re-tax the fee should have been allowed. Though if the parties had been in attendance in court, or had they been specially notified of the time when the motion to tax the costs of the solicitor's fee would be made, and they had failed to introduce evidence, or they had been heard on the motion, they would then have had no reason to urge a re-taxation.

7. PRESERVING EVIDENCE — *in the record.* As a rule of practice the evidence upon which such an allowance is made should be preserved in the record.

8. COSTS — *solicitor's fee — how ascertained.* In taxing such fees the chancellor, having the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, while he should consider the opinions of witnesses, and evidence of the sum usually charged and paid for such services, should exercise his own judgment and not be wholly governed by the opinion of attorneys as to the value of the services rendered.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

Messrs. SPAFFORD, McDAID & WILSON, for the plaintiffs in error.

Mr. THOMAS SHIRLEY, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Defendant in error filed his bill in equity in the Superior Court of Chicago, for the partition of certain real estate owned by him and plaintiffs in error as tenants in common. A decree of partition was entered on a default by the defendants in the court below, together with their admissions. The court allowed and taxed a counsel fee of $2,500, and decreed that the same be paid forthwith. The decree required plaintiff in error Goodwillie, to pay one-twelfth part of the fee. The amount of the solicitor's fee was ascertained by the court from evidence heard in open court, but in the absence of plaintiff in error Goodwillie, and without special notice to him. A motion was filed to re-tax the solicitor's fee, and an offer was made to support it by evidence, but the court refused to hear the evidence or entertain the motion. For having failed to pay his share of the fee decreed to the counsel, Goodwillie was adjudged to be in contempt of court, and was ordered to be committed to the common jail of the county until the further order of the court.

Even if a court of chancery has the power to commit a party for a failure to comply with any decree, and there is no other ground for regarding him as in contempt, the remedy seems to be harsh, and should not be resorted to unless there are no other reasonable means for its enforcement. In a large class of money decrees the constitution has prohibited imprisonment, unless there is fraud on the part of the debtor, or he shall refuse to surrender his property for the satisfaction of his debts. When such a regard is shown by the people, in adopting the fundamental law, for the liberty of the citizen, the remedy of enforcing decrees by imprisonment should be

limited to cases of necessity only, in accordance with the spirit that dictated the constitutional restriction. Courts of equity proceed upon the principles of justice, and should act as justly in regard to the liberty of parties as to their rights of property. We fail to perceive any more reason for declaring a party in contempt for failing to pay a money decree than he would be for refusing to pay a judgment at law. We are not prepared to say that the statute authorizes a court of equity to imprison in the first instance for a failure to pay a money decree.

In this case, however, there can be no question that such imprisonment was unauthorized by law. This decree was under the act of 1869, which, for the first time, authorized the chancellor, in cases of this character, to decree the payment of a solicitor's fee. That act declares that the fee shall be taxed as costs. Having declared that it shall be taxed as costs, it thereby becomes costs, and has all of the incidents of costs, as no mode has been provided by that statute for their collection. Having failed, in terms, to prescribe any mode, we must conclude that it was intended it should be governed by the cost act, not only in its collection, but in re-taxing, replevying and other incidents. The statute relating to costs (Gross' Comp. 144, § 15) has provided that, on the dismissal of complainant's bill, the defendant shall recover full costs, and in all other cases in chancery not otherwise provided for, it shall be in the discretion of the court, and the payment of costs, when awarded, may be compelled by execution. This section has pointed out, in clear and unequivocal terms, the manner in which costs shall be collected in chancery cases. And it is so clearly expressed, that the language will not bear construction. The legislature manifestly intended this mode to be pursued and to exclude all others. But if it was susceptible of construction, we should not give it so harsh an interpretation, and thus deprive the citizen of his liberty. The canons of construction have always required the courts, in favor of liberty, to give doubtful statutes a benign interpretation. If, then, it could be said that this class of costs might be held, without doing vio-

lence to the language of the law, not to be embraced in this section of the cost act, we would not adopt it when a less rigorous one presents itself. Courts have no right, unless clearly required to do so, to deprive individuals of their liberty. The court below erred in ordering the committal of Goodwillie for a contempt in failing to pay these costs.

It is next urged that the court below erred in refusing to re-tax these costs. The legislature having required the solicitor's fees to be taxed as costs, no reason is perceived why they may not be re-taxed as other costs. If the parties had been in attendance in court, or had they been specially notified of the time when the motion to tax the costs of the solicitor's fee would be made, and they had failed to introduce evidence, or they had been heard on the motion, they would then have had no reason to urge a re-taxation. It is so obviously just and equitable that a party should have the opportunity of being heard on a motion of such importance as this fee has proved on its allowance, that we feel constrained to say that either a special notice should have been given of the motion, or a re-taxation should have been allowed.

As a rule of practice, the evidence upon which such an allowance is made should be preserved in the record. Where such large sums are allowed, and the rights of litigants are likely to be so materially affected, they should not be deprived of having the decree reviewed in an appellate court. But in this case we can see, from the transcript of the record returned to this court, the nature of the services rendered by the attorney, and we can, from it, determine the degree of skill that was employed in rendering the service. And while we can not determine therefrom the precise sum those services were worth, we can see that the sum allowed is out of all proportion to the value of the services rendered and the skill employed. It is so largely out of proportion that we regard it oppressive on the administration of justice. It bears no kind of proportion to the services of the circuit judges of the State who, until recently, received an annual salary of less than this fee, and

their salary is now but a few hundred dollars above the sum here allowed for the labor of but a short time at the most, and only required ordinary legal skill for its performance.

In taxing such fees the chancellor should exercise his own judgment, and not be wholly governed by the opinion of attorneys as to the value of the services. He has the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, and he should exercise that judgment. He should, no doubt, consider the opinions of witnesses and evidence of the sum usually charged and paid for such services, but should not be wholly controlled by the opinions of attorneys as to their value. It would seem that to impose such burdens upon the administration of justice, great wrong must be suffered, because many will not be able to pay the fee to enable them to vindicate their rights. If the administration of justice is to be thus burdened, the courts must be virtually closed to many, as but the few can afford to seek their rights. In the absence of other evidence than the bill, decree, report, etc., we are unable to determine what would be a fair compensation for the services for which the fee was allowed. The order taxing the solicitor's fee, and the order of commitment are reversed, and the decree is, in other respects, affirmed. The cause is remanded for further proceedings.

Decree modified.

CHRISTIAN VAN OHLEN

v.

HENRY VAN OHLEN.

EASEMENT; LICENSE. Where a party, holding a bond for a deed to a tract of land, sold a portion of the tract to a third person, and procured a bond for a deed thereto, to be executed to him by the original vendor, in consideration of an agreement in writing, though not under seal, between

the original purchaser and his vendee, that the latter should keep open a ditch, across the portion so sold to him, sufficient to carry off the water from two ditches on the other portion of the tract, it was *held*, such agreement was not a mere license, revocable at the will of the party who agreed to keep the ditch open, by reason of the agreement not being under seal, but it was supported by a valuable consideration, creating a vested right of the character of an easement.

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

The opinion sufficiently states the case.

Messrs. PARKS & ANNIS, for the appellant.

Mr. CHARLES J. METZNER, for the appellee.

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

The declaration in this case avers that the plaintiff, holding a bond from one Lewis for a deed to a quarter section of land, upon which he had paid $50, and was to make further payments before receiving his deed, sold his interest in the south half of the land to the defendant, and surrendered his bond to said Lewis, who thereupon gave to plaintiff a new bond for the north half, and to defendant a new bond for the south half, and defendant went into possession. The declaration further avers, that the consideration for this arrangment was an agreement by defendant to make and keep open a ditch across the south half of the quarter section, sufficient to carry off the water from two ditches on the north half, which agreement was in writing, and duly executed, and avers a breach, to the damage of the plaintiff. The general issue was pleaded. On the trial the plaintiff offered in evidence the written agreement, and to prove its consideration as set out in the declaration. The court ruled out the evidence.

It is insisted by counsel for appellee that this is a mere license, revocable at will, and can not become a vested right of the character of an easement, except by deed under seal. But the cases cited in support of this position differ from the one at bar in this essential particular: Here, there was a valuable consideration passing from the plaintiff to the defendant, for which the latter agreed to perform a certain act, the effect of which would be a benefit to the plaintiff. The cases cited were mere licenses without consideration, and, of course, revocable when not created by deed.

The case at bar is not one of license. There was here a mutual agreement to do certain things by each party. It has been fully performed on the one side, and justice requires that it shall be performed on the other, or an equivalent rendered in damages. The evidence should have been admitted. The judgment is reversed and the cause remanded.

Judgment reversed.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

SEPTEMBER TERM, 1869.

AUSTIN SUMNER *et al.*

v.

JOHN M. WAUGH *et al.**

1. ASSIGNEE OF A MORTGAGE—*holds subject to what defenses.* A mortgage, not being assignable by the common law, or by any statute in this State, it being a mere *chose in action*, a purchaser thereof takes it subject to all the infirmities to which it would have been liable in the hands of the assignor, except the latent equities of third persons of whose rights he could know nothing.

2. A mortgagor of lands sold and conveyed the same to a third person, subject to the mortgage. Such grantee sold to the mortgagee, the mortgage to be taken in part payment of the purchase price, and to be given up and canceled, as shown by a written contract between them to that effect. Afterward the mortgagee assigned the mortgage to a person who had notice of the rights of the vendor of the lands under such contract, and it was *held*, the assignee took the mortgage subject to those rights.

* This and the case following, were submitted at the September term, 1869, but were unavoidably omitted from the report of the cases of that term.

3. The mortgagee purchaser, going into and retaining possession, under his purchase, could allege nothing against the binding force of the contract under which he had agreed to surrender his mortgage as a part of the purchase price of the land, and his assignee, under such circumstances, would hold no better position in that respect.

4. And where such vendor of the mortgagee, upon his own purchase, and prior to his sale to the mortgagee, executed a mortgage on the same premises, to secure a part of the purchase money due to his vendor, the first mortgagor, his subsequent contract with his vendee, the original mortgagee, under which the first mortgage was to be canceled, would operate to make the lien of the second mortgage superior to that of the first, whether in the hands of the original mortgagee, or of his assignee with notice.

5. SAME — *of the mode of enforcing the assignee's rights.* In order to enforce such equities as might remain to the assignee, if any, under such circumstances, a foreclosure should be had of the second mortgage, which had thus become the prior lien, and such lands as were embraced therein, not included in the mortgage held by the assignee, should be first exhausted to satisfy such prior lien, before resorting to those embraced in both mortgages, and any balance remaining due on the prior lien, to be satisfied out of lands embraced in both mortgages, and the residue of the proceeds of the lands covered by both mortgages, applied first, to satisfy the claim of the party who sold to the original mortgagee, and next, what might be due to the assignee of such original mortgage.

6. SAME — *what constitutes notice in such case, to the assignee.* The vendor of the original mortgagee, in such case, commenced a suit in chancery, in the county in which the property was situate, to compel a specific performance of the agreement in respect to the surrender of the mortgage, and service of process therein had upon the party executing the contract, and the pendency of that suit was held to be notice to the assignee of the mortgage so to be surrendered, of the equities of the vendor of the land, under such agreement.

7. RESCISSION OF CONTRACT — *by bringing suit at law.* In order that the bringing of a suit at law shall operate to show an election to rescind a contract between the parties, it should appear that the subject matter of such contract was involved in the suit.

8. ALLEGATIONS AND PROOFS — *must correspond.* Upon a simple bill for foreclosure, filed by an assignee of the mortgage, the complainant can not obtain relief by being substituted to the rights of one of the defendants who sets up a prior equity, the pleadings not being framed with the view to such relief.

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

The opinion states the case.

Mr. E. S. SMITH, for the appellants.

Messrs. MCCOY & STEVENS and Mr. D. MCCULLOCH, for the appellees.

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

This was a bill in chancery, brought originally to the circuit court of Mercer county, and by change of venue taken to the Peoria circuit court, the object of which was, to foreclose a mortgage alleged to have been executed by John M. Waugh and wife and Henry B. Ellis and wife to Benjamin T. Sisson, and by him assigned to the complainants. Waugh and Ellis and Sisson were made parties defendant, together with Thomas B. Ellis, and others named, on the allegation that they claimed to have some interest in the lands described in the mortgage, as purchasers or otherwise, and that the interest accrued subsequent to the execution of the mortgage, and that such interest was subject to the rights and interests of the complainants.

The mortgage was alleged to have been executed on the 15th of February, 1858, to secure the payment of $9,280.58, payable on or before the 20th day of July, 1862, with interest annually, at the rate of ten per centum per annum, and to have been assigned to complainants on the 8th day of February, 1862, by an assignment executed and delivered on that day.

All the defendants, except Thomas B. Ellis and Henry B. Ellis, were defaulted. In their answer they give a history of the transaction out of which the mortgage arose.

It would appear that John M. Waugh was the owner of certain lands at Richland Grove, in the county of Mercer, includ-

ing the premises mentioned in the mortgage, and arranged with Sisson, his son-in-law, to erect a steam flouring mill upon it, Waugh to own one-third and Sisson two-thirds. Before the mill was completed, Waugh conveyed to Henry B. Ellis, his brother-in-law and son-in-law also, an undivided interest in the lands; thereupon, Waugh and H. B. Ellis executed the mortgage in question, to Sisson, to secure him for the money he had advanced in the erection of the mill, which was the entire interest of Sisson in the property. While the mill was in the course of erection, Thomas B. Ellis, also a brother-in-law of Waugh and the brother of Henry B., sold to Waugh and Sisson a large amount of machinery and fixtures for the mill, worth about $6,000, and afterward, he sold to Waugh and Ellis machinery amounting to about $2,000. Waugh was also engaged in retailing dry goods, and he and Henry B. had became involved in debt, not only to Thomas B. Ellis, but to others, and to secure Thomas B., they proposed to sell to him the store, mill and lands attached thereto, to which Thomas assented, taking a deed therefor on the 5th of May, 1858, for the sum of $26,417.65, subject to the mortgage of Sisson, described in complainants' bill; and on the same day he purchased their entire stock of dry goods, groceries, horses, mules, etc., at a valuation of $4,700, taking a bill of sale of the same, and, after deducting his own claim and Sisson's mortgage, a balance was found against Thomas B. of $14,989.54, to secure which he executed to them notes and a mortgage on the land purchased, except five acres thereof.

It appears Thomas B. run the mill some time, and then, on the 30th of September, of the same year, sold out, as he says, to Waugh, Sisson and one John B. Rathbun, also a brother-in-law of Waugh, all the property, real, personal and mixed, on the terms stated in the following contract of that date, signed by Sisson and Rathbun, of the second part, and Thomas B. Ellis, of the first part:

"Articles of agreement made and entered into this thirtieth day of September, A. D. one thousand eight hundred

and fifty eight, by and between Thomas B. Ellis, of Richland Grove, Mercer county, and State of Illinois, of the first part, and Benjamin T. Sisson & John B. Rathbun, of the same place, of the second part.

"Witnesseth, that the said party of the first part, for himself, his executors, administrators, or assigns, agrees to sell, release and convey, to the said parties of the second part, all his paid-in interest in the Richland Grove Steam Mill, store, and lands attached to the same, amounting to ten thousand dollars, more or less, as shall appear from authenticated bills rendered at the final closing up of this contract, which shall take place within three weeks from this date, when the said party of the first part shall make to the said parties of the second part, their heirs, executors, administrators or assigns, a good and sufficient deed of conveyance of all the lands, mills, house, and all other appurtenances of whatsoever kind, as set forth in a certain mortgage given by the said party of the first part to John M. Waugh & Henry B. Ellis, dated June 5th, 1858, reference to which will fully explain boundaries, conditions, etc.; also for a certain mortgage given to John M. Waugh by said party of the first part, for the payment of eleven hundred and forty dollars, on five acres, and appurtenances, out of the south-east corner of the south-east quarter of the south-west quarter of section No. (16) sixteen, township fifteen (15), one (1) west of the fourth (4) principal meridian, and to yield up to the said parties, or their authorized agents, all of the aforesaid premises peaceably, at the signing of this article, and the said parties of the second part agree to and with the said party of the first part, that they will make over the balance, after deducting the amount held by Benjamin T. Sisson, $9,280.00, and the said ten thousand dollars, more or less, paid in by the said party of the first part, and sold to John B. Rathbun (the said John B. Rathbun agreeing to pay to the said party of the first part, the said sum of ten thousand dollars at the expiration of seven years, secured by mortgage on the premises sold, and interest at ten per cent per annum; at the end of three years the said

Rathbun agrees to pay the interest then due, if convenient, if not, to give additional security for that amount, and so on annually until the expiration of the said seven years), by mortgage on the premises in the same manner and on the same or like terms as the said parties of second part may agree with the said John M. Waugh, and it is further agreed, that all the parties named in this article shall deliver up all bonds, mortgages, deeds, and receipts and papers of whatsoever kind, relating to their contract, so soon as the same is lawfully canceled. The said parties of the second part agree to assume the payment of the following bills of goods bought by the said party of the first part in St. Louis, viz.: Memick & Scudder, grocery bill, of $311.55, at 30 and 60 days, dated September 2d, 1858, Jacob S. Merrell's job bill of $43.95, and Fife, Hubbard & Vogel's shoe bill, $242.30, and bill of dry goods bought of Campbell (bill not rendered yet), at six months.

"And it is further agreed that said mill shall be kept insured by the said parties of the second part, to commence as soon as a policy can be obtained, and kept in good running order, usual wear and tear and elements excepted, and for the faithful performance of all the foregoing articles of agreement, the said parties severally bind themselves each in the penal sum of ten thousand dollars lawful money of the United States. In testimony whereof the said parties hereunto set their hands and seals the day and year first above written."

It is alleged by T. B. Ellis that, by some arrangement between Waugh, Sisson and Rathbun, Waugh was not to, and did not, sign the contract as a party to it, though he was really a party, and so understood by all.

It is also alleged that, upon this contract being made, Waugh, Sisson and Rathbun went into possession of all the property, receiving the profits of it, selling the merchandise, and running the mill, and have ever since enjoyed the same, but refused to comply with their contract.

It is also alleged that, on the 26th of March, 1861, he, Thomas B. Ellis, filed a bill of complaint against Waugh, Sis-

son and Rathbun, in the Mercer circuit court, for a specific performance of this contract, which bill was pending at the time complainants took the assignment from Sisson, of the mortgage. The prayer of the bill, among other matters, was that Sisson should be compelled to release this mortgage, and surrender the notes therein described, to be canceled. It is alleged that Sisson had been summoned on that day to appear and answer the bill, and that the summons was served upon him, and that Waugh, Sisson and Rathbun had filed their separate answers to the bill, and the cause brought to issue, and was still pending.

It is claimed by T. B. Ellis, that the mortgage, only, having been assigned to the complainants, his right was equitable only, but they, T. B. Ellis and H. B. Ellis, had an equitable right to have the same released prior to the assignment to complainants. They, the complainants, took the assignment subject to the rights of Ellis; that, as they took the assignment pending the bill, they took it subject to any decree which might be rendered against Sisson, and it is alleged complainants had constructive notice of Ellis' equities, by the pendency of this bill.

Thomas B. Ellis also, after replication to his answer, filed a cross-bill against the complainants, setting up the same facts as are contained in his answer, and alleging that he was always willing to comply with the contract on his part, and use all the means in his power to induce Waugh, Sisson and Rathbun to settle with him within the time fixed in the contract, and repeatedly offered to, and did, render authenticated bills, as required by the contract; that he tendered a deed of the property to Sisson and Rathbun, duly executed, within the time required by the contract, and that he filed a copy of the deed with his bill. He alleged the transfer of the mortgage by Sisson to complainants, the defendants in the cross-bill, was fraudulent, and that they knew, before the assignment, of his rights in the premises. The bill prayed that the defendant be barred from a foreclosure of the mortgage, and be required to

satisfy the same upon the record, and an answer required, under oath.

The complainants answered under oath, not admitting any knowledge of any of the facts stated in the bill, and denied all the allegations thereof, and denied all information, save by the cross-bill. They admit they claimed the mortgage in virtue of the assignment by Sisson, of February 8, 1862; that they had filed their bill to foreclose the same, and deny that the assignment was fraudulent in any respect, and that they had no knowledge of the contract set up in the bill, nor any information or belief about it, save as informed by the cross-bill. A replication was put in to this answer.

The court, on the bill of complainants, decreed in favor of the defendants, and in their favor as complainants in the cross-bill, and dismissing both bills. To reverse this decree, dismissing complainants' bill of foreclosure, they appeal to this court.

Much testimony was taken on the hearing, the principal and most important part of it that of the parties defendant, and of complainants and defendants in the bill for a specific performance of the contract of September 30, 1858, which it is unnecessary to detail. The points made by appellants are alone necessary to be considered.

The first point made by appellants is, that a mortgage security, valid in its inception, and free from fraud, in the hands of an assignee, is good against a latent equity residing in a third party, no matter when the latent equity existed, and the assignee will be protected by a court of equity, and in this connection they insist that the pendency of a suit is not notice, unless the property is described so as to be unmistakable, and the prosecution of the suit must be active and vigilant, and reference is made to *Olds* v. *Cummings*, 31 Ill. 192; *Worden* v. *Williams*, 24 id. 74, and *Rodgers* v. *Kavanaugh*, id. 584.

The mortgage in question was assigned by an instrument in writing, acknowledged before a notary, and, not being assignable by the common law, it being a *chose in action*, or by any law of this State, the right vesting in the assignee thereby was

an equitable one only, to be enforced in a court of equity. But when a person buys that which is not assignable at law, relying upon a court of equity to protect and enforce his rights, he takes it subject to all the infirmities to which it would have been liable in the hands of the assignor. This is the doctrine of *Olds* v. *Cummings*, and though it is there said the assignee would be protected against the latent equities of third persons of whose rights he could know nothing, it implies he would not be protected against such equities, had he notice of them. So, in *Fortier* v. *Darst*, 31 Ill. 212, it was held, that, by taking an equitable title, which can be enforced only in equity, the title is taken with all the equities and infirmities existing against it, and can claim nothing under it which his assignor could not have claimed. Equity deals with the purchaser of an equitable title as the law deals with the purchaser of a legal title, and regards the purchase as incapable either of defeating rights or creating them. The true principle is, that the purchase of an equity simply gives the purchaser the estate which he buys, in the condition in which it is when bought, without giving it additional validity, on the one hand, or prejudicing his right, on the other, to fortify his acquisition by bulwarks or safeguards, obtained from other quarters, as was said by STORY, J., in *Flagg* v. *Mann*, 2 Sumner, 487.

Upon the other branch of the proposition, that the pendency of the suit to enforce the performance of the contract of September 30, 1858, was not notice, the property described in the bill not being unmistakably described, and its prosecution was not active and vigilant, *Worden* v. *Williams*, and *Rodgers* v. *Kavanaugh*, are cited.

It is urged, in support of the proposition, that there was not such a statement in the bill filed for performance as legally amounts to a notice, the bill charging that the contract was made with Waugh, Sisson and Rathbun, while the written contract was signed by Sisson and Rathbun only.

In the view we have taken of this case, we do not deem this an important feature in it.

The controlling facts are, there was this bill pending, for a specific performance of the contract of September 30, 1858, to which Sisson was certainly a party, and a subpœna to appear and answer had been served upon him. That contract was set out in the bill, by which it appeared that the mortgage in question had been disposed of by Sisson. It had become a part of the purchase price of the premises he, with others, purchased of appellees, and of which he was put in possession. It was not, therefore, in his power to rescind the contract without surrendering the possession. While he held the property the contract was binding upon him. He was bound to deliver up the mortgage to be canceled. The second, third and fourth points made by appellants relate to this contract of September 30th, alleging an inherent infirmity in it, such as would prevent a court of equity from enforcing it.

It may be it would not be enforced in a court of equity, still it is apparent, from the contract itself, that Sisson and Rathbun purchased the property incumbered by this mortgage, and it was to be delivered up by him, for such is the true interpretation of the language of the contract. It was a part of the price of the premises sold. Sisson went into possession, and, for aught that appears, is yet in possession, and being so, still holding it, he can allege nothing against its binding force, nor can the complainants, his assignees of the mortgage.

The remaining point made by appellants is, that this contract of September 30th, was rescinded by Ellis by his bringing a suit against Sisson and Rathbun in the Rock Island circuit court, in December, 1858, in an action of assumpsit for the amount of his paid-in interest, claiming $15,000. If this was so — if the suit had been brought by Ellis to recover his advances which made up his "paid-in" interest in this property — it would have been an election, and would have amounted to a rescission of the contract, on the authority of the case of *Herrington* v. *Hubbard*, 1 Scam. 569. But the record furnishes no evidence of the nature or purpose of this action, and we can not say that it was of such a nature as to operate as a rescission.

Upon the whole record, we have come to this conclusion: That the pendency of the suit in 1861, to enforce the contract of September 30, 1858, was notice to appellants, and they took the assignment of the mortgage subject to all the equities attaching to it by force of that contract. As we understand that contract, this mortgage was to be canceled, and as Sisson went into possession of the premises, and retained possession under this contract, and as, by it, appellee, T. B. Ellis, was to have a lien on the property for his "paid-in" interest, whatever it might be, neither Sisson nor the complainants, his assignees with notice, can now set up that mortgage as prior to the lien of T. B. Ellis, at least to the extent of his paid-in interest.

This contract postponed also, the mortgage in question, to the mortgage executed by T. B. Ellis to Waugh and H. B. Ellis. They were not parties to it, and could not be bound by its provisions. Although the contract seems to contemplate that their mortgage was also to be canceled, it does not appear how, or in what mode, and not being parties to the agreement they can not be affected by it. It is, therefore, the first lien on the property, and must be so held. The whole case, somewhat complicated, it is true, shows a contest between equities. That the complainants have some which should have been regarded by the circuit court and decreed to them, we can not doubt. The bill should not, therefore, have been dismissed.

In order that the equities of the complainants may be enforced, it seems necessary that there should be a foreclosure of the Waugh & Ellis mortgage.

As that mortgage contains lands which are not embraced in the Sisson mortgage, those lands, so far as now appears, should be first exhausted toward the satisfaction of the Waugh & Ellis mortgage before recourse is had to the property described in the Sisson mortgage.

As to the claim urged on the part of the complainants, that they have an equity to be substituted to the rights of Waugh in the Waugh & Ellis mortgage, to the extent of their claim

against Sisson, arising out of the transaction by which they took the Sisson mortgage, in consequence of alleged representations on the part of Waugh that the mortgage was good and valid, that question is not properly before us under the pleadings, and has not been considered.

The pleadings are not framed with a view to any relief as to the Waugh & Ellis mortgage, or as to any substitution of the complainants to the rights of Waugh in the Waugh & Ellis mortgage.

Leave will be given to amend the pleadings as the parties may be advised, and take further proofs.

If the Waugh & Ellis mortgage be found to be a valid and subsisting one, the proceeds of the sale of the lands contained in it which are not embraced in the Sisson mortgage should first be applied toward its satisfaction, and any unsatisfied residue should be paid out of the proceeds of the sale of the other property contained in both mortgages, and the balance of the last named proceeds should be paid first to satisfy what is due T. B. Ellis for his "paid-in interest," to be ascertained by the master in chancery, and next, what may be due complainants on the mortgage in question.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

LEONARD SCHOMMER

v.

JOHN V. FARWELL *et al.*

1. CONTRACTS — DURESS. A person prosecuting another upon a charge of crime, may receive from the accused private satisfaction for his private injury, and the fact that he receives this while the prisoner is in confinement, and forbears further prosecution, does not, of itself, render the transaction illegal.

2. But even if the imprisonment be lawful, yet if the prosecutor detain the prisoner in prison unlawfully, by covin with the jailor, this is a duress which will avoid a deed.

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

The opinion states the case.

Messrs. SPAFFORD & MCDAID, for the appellant.

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

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, filed by Leonard Schommer against John V. and Charles B. Farwell, to set aside a mortgage given by complainant to them under the following circumstances: It appears the Farwells employed a son of Schommer, a youth of sixteen, to keep an account of the loads of sand taken from a piece of land near Chicago, belonging to them, and to collect the money for each load. They became suspicious that the boy was defrauding them by not making honest returns, and gave the matter in charge to one Keefe, a professional detective, in the employment of the Farwells. He investigated the matter, and becoming satisfied the boy was practicing a fraud, and doubtless supposing his father was privy to it, procured a warrant from a magistrate and had the father arrested.

The arrest was made in the evening, about the last of October, 1867. Schommer was at once taken to jail, and placed in a cell without fire or a bed, where, as he testifies, he suffered greatly from cold during the night, being at the time in feeble health. In the morning he was taken from the cell up stairs, where he was confronted with Keefe, who charged him with being engaged, with his boy, in embezzling the money for the sand to a large amount, and, according to Keefe's own testi-

mony, offered to have the prosecution stopped if Schommer would pay over the money. Schommer denied the charge and Keefe went away. Schommer was put back in the cell. About noon Keefe appeared again at the police station, and Schommer was again brought from his cell to meet him. Another conversation ensued, the result of which was that Schommer agreed to pay the Farwells $300 in money, and give a mortgage on his property, for $900, if he could be released. An officer was then sent with him to his house, and, the money having been paid and the mortgage executed, he was released from custody. Keefe testifies Schommer, in the second conversation, admitted the embezzlement by him of $1,200, and that he owed the Farwells that amount. The bill, in this case, is filed for the purpose of canceling the mortgage, and recovering back the money paid.

It is quite true, as urged by counsel for appellees, that a person prosecuting upon a charge of crime may receive private satisfaction for his private injury, and the fact that he receives this while the prisoner is in confinement, and forbears further prosecution, does not, of itself, render the transaction illegal. This was so held in *Taylor* v. *Cottrell*, 16 Ill. 93. But as was said by PARSONS, C. J., in *Watkins* v. *Baird*, 6 Mass. 506, even if the imprisonment is lawful, yet if the prosecutor detain the prisoner in prison unlawfully, by covin with the jailor, this is a duress which will avoid a deed. There can be no doubt of the correctness of this principle, and it is applicable to the case at bar. Schommer swears he was told, while in confinement, that he could have neither lawyer nor trial, but must pay his debts. His testimony is, of course, to be received with caution, but Keefe himself testifies Schommer said he wanted to be tried, and was willing to go down and have his trial. There is no pretense that his examination before the magistrate who issued the warrant was delayed for the purpose of procuring testimony. Keefe himself was the witness on whose evidence the prosecution would have rested. When, therefore, Schommer demanded to be taken before the magistrate he should

have been taken there. Instead of this the jailor, after the first ineffectual interview between Schommer and Keefe, recommits Schommer to his cell until Keefe again appears, and Schommer, under the apprehension of further incarceration, accedes to Keefe's demands. He is then discharged without having been taken before the magistrate who issued the warrant at all.

It is evident that the sole purpose of Keefe in this prosecution was, by the agencies of the criminal law, to secure what he believed to be a debt due to his employers. The police officers seem to have paid no attention to the command of the magistrate's warrant, or to the rights of the prisoner, but to have used their official power merely in obedience to the wishes of Keefe, and to enable him to accomplish his private purpose. We presume Keefe believed Schommer's son had been guilty of embezzlement, and that the father was privy to it, but this did not justify him in prolonging the imprisonment of Schommer a single hour, merely for the purpose of compelling the execution of this mortgage, and if it was executed by Schommer as the only means of speedily terminating his confinement, and after being refused a hearing before the magistrate, then it was executed under duress and is void. That it was so executed is fairly to be inferred from the testimony.

The majority of the court are of opinion the complainant is entitled to have the mortgage canceled and the money paid refunded, with interest, and the Superior Court will make a decree to this effect. The decree is reversed and the cause remanded.

Decree reversed.

INDEX.

tract utterly forbid the interposition of a court of equity. *Rose* v. *Swann et al.* 37.

11. *Subsequent purchasers.* Where a purchaser of land has been guilty of such laches, that he could not compel a specific performance as against his vendor, a subsequent purchaser from such vendee would hold no better position. Ibid. 37.

12. *Laches on the part of the purchaser.* On the 5th of October, 1868, a purchaser of land from the agent of the owner paid $100 on the purchase price, which was $2,917; $1,017 to be paid in cash, and the balance in one and two years. Title to be satisfactory and proved to be so. Objection being taken, however, to the power of attorney under which he proposed to make the deed, a sufficient power was obtained on the 20th of January, 1869, and three times a week, for three succes sive weeks, he called on the purchaser's attorney through whom the business had been transacted, and offered to make the deed upon receiving the balance of the cash payment; but the purchaser had withdrawn his money from the hands of his attorney, and the latter finally declined to act any further. On the 18th of February, 1869, the agent of the vendor wrote to the purchaser where he then was, some eighty miles from the residence of the former, requesting him to complete the contract. After waiting eleven days and receiving no answer, he again tendered a deed to the attorney, who refused it, and the vendor then sold to a third person: *Held*, the vendee was guilty of such *laches* as to deprive him of any right to a specific performance. *Mason* v. *Owen et al.* 259.

13. *Duty of the vendor to return the money paid, before re-selling.* It was not required of the vendor, under such circumstances, to refund the $100 paid, in order to be justified in re-selling. It was paid rather as earnest money for which the purchaser was to have credit on the completion of the contract, and the failure to return it did not give to the vendee an equitable right to a specific performance. Ibid. 259.

14. *Defective title.* Where there is a contract of sale of land, and an agreement on the part of the vendor to convey with certain specified covenants for title, it is the right of the purchaser to have a specific performance, notwithstanding the vendor's title, in view of the character of covenants he agreed to make, may be found to be defective. *Harding* v. *Parshall*, 219.

15. *Of joint owners — failure to fulfill their agreement with each other.* The right of a purchaser of land from two joint owners, to have a specific performance of the contract can not be impaired by reason merely that one of the vendors has failed to comply with an agreement with the other in respect to the subject matter of the contract. Ibid. 219.

*See act March 27, 1869, Sess. Acts, p. 356; Gross' Stat. 75, § 53, and act of March 15, 1872, Sess. Acts, p. 337, § 50; Gross' Stat. vol. 2, p. 36.

INSURANCE.

OF THE APPLICATION.

1. *Mistakes or omissions in the application, when made by the agent of the company — estoppel.* Where an insurance company issues a policy, relying entirely on its own knowledge of the facts connected with the property insured and dispensing with any information from the assured, the agent of the company having himself, without any communication at the time with the assured, made out the application and signed the name of the assured to it, the company will be precluded from denying the truth of any statement in the application, or setting up any mistake or omission in the same. *Commercial Ins. Co.* v. *Ives et al.* 402.

2. Where matters set up in avoidance of a policy, are acts and omissions of the company's agents, which took place before the delivery of the policy, and would render it invalid, by its terms, at the time of delivery, they can not avail the company in their defense. The issuing of such a policy as and for a valid policy, and taking the premium for it as such, is a representation that it is a valid policy, and the company would be estopped by law to say or show the contrary. It is an estoppel *in pais.* Ibid. 402.

INSURANCE AGENTS.

3. *Who will be considered as agents of the company.* A property owner applied to an insurance agent for additional insurance. This agent wrote to another insurance agent, who resided at another place, on the subject. The latter replied that he might make out an application, and a correct diagram and full description of the property, and he would forward it to a company of which he was agent, for their approval or rejection. The first agent thereupon wrote the application and signed the name of the applicant without any communication with the latter at that time, and sent it to the other agent, who forwarded it to his company. A policy was returned to the agent who forwarded the application to the company, and was sent by him to the agent who first solicited the insurance, who delivered it to the assured, and received the premium. This soliciting agent had previously procured insurance on the same property, and was familiar with it: *Held,* although the agent to whom the application was originally made, and who wrote the application, was not employed as their agent by the company who issued the policy, yet he must be regarded as acting as their agent in this particular case, and not as the agent of the assured. Ibid. 402.

4. The policy provided "that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." This clause was held not to have the effect

LESSOR AND LESSEE.

MEASURE OF DAMAGES.

In an action by lessee against lessor. See MEASURE OF DAMAGES, 6.

ASSIGNEE OF A LESSEE.

Whether liable for rent. See ASSIGNMENT, 4.

LIENS.

OF AN ATTORNEY'S LIEN.

1. *Whether he has a lien on the subject matter of the suit for his fees — subsequent purchaser, with notice.* Where a widow employed an attorney to prosecute a suit for her dower in lands sold and conveyed by her husband in his life-time, the attorney to have a certain portion of what might be recovered, as his fee and for costs expended by him, and pending the suit the widow released her dower to one who stood in the relation of warrantor of the title, it was *held*, no lien upon the land could accrue to the attorney by reason of such agreement, although a remote grantee of the fee, for whose benefit the right of dower had been acquired, had notice thereof, because the attorney held no such relation to the title as would enable him to receive an interest in the dower right. *La Framboise* v. *Grow*, 197.

2. Nor did any lien accrue to the attorney, independently of the agreement under any law in this State. An attorney has no lien on the subject matter of the suit which he is employed to prosecute, that can in anywise impair the right of his client to transfer the same to a third person *pendente lite*. Ibid. 197.

LIMITATIONS.

LIMITATION ACT OF 1839.

1. *Payment of taxes — what constitutes.* In an action of ejectment the defendant setting up color of title and payment of taxes for seven years, but it appearing the land was sold one year during the seven, although bid in for the benefit of the defendant, the bid being paid with his money, it was *held*, this was not a payment of taxes within the meaning of the statute. *Woodruff et al.* v. *McHarry*, 218.

2. A redemption from a tax sale is not a payment of taxes within the meaning of the act of 1839. *Holbrook* v. *Dickenson*, 497.

3. *Evidence as to payment of taxes.* Where a defendant in ejectment relies upon the limitation act of 1839, the record of the county clerk's office, showing a sale of the premises for taxes assessed for a certain year, and redemption therefrom, will be deemed decisive evidence of such sale and redemption, against the testimony of one who states, merely from his recollection, that he paid the taxes regularly each year for a series of years, embracing that for which the tax sale is shown by the record to have been made. Ibid. 497.

PRACTICE IN THE SUPREME COURT.

ERROR WILL NOT ALWAYS REVERSE.

1. *Admission of improper evidence.* Where the undisputed facts disclosed by the record showed that the verdict was clearly right, the court refused to reverse merely upon the ground that some of the evidence in the record was improperly admitted. *Charter et al.* v. *Graham*, 19.

2. *Of erroneous instructions.* A judgment will not be reversed, although some of the instructions may be technically wrong, where they were not calculated to mislead the jury, and justice has been done. *Hardy et al.* v. *Keeler*, 152.

REVERSAL AS TO A PART.

3. *And affirmance as to parties not joining in the writ of error.* Where a decree is a joint one, and error has intervened, the whole decree must be reversed, not only as to those who sue out the writ of error, but also as to such as do not join therein. *Tompkins et al.* v. *Willberger*, 385.

4. So upon bill to foreclose a mortgage against several defendants who held separate interests in the premises, a decree was so rendered that each defendant, in order to protect his separate interest, was required to pay the entire mortgage debt. Upon writ of error sued out by only a portion of the defendants below, it was *held*, there being error in the decree, it should be reversed as to all the defendants below, as well those who did not join in the writ of error, as those who did. Ibid. 385.

WHEN ERROR MAY BE ASSIGNED.

5. *Effect of letting in defendant in chancery to answer after decree upon construction notice.* See CHANCERY, 31.

PRESUMPTIONS.

OF LAW AND FACT.

1. *Depositions in suits at law — presumption as to whether an affidavit was filed.* See DEPOSITIONS, 1.

2. *Non-user of highway — presumption of extinguishment.* See HIGHWAYS, 6.

3. *As to what evidence was considered on a final hearing in chancery.* See CHANCERY, 36.

PROCESS.

OF THE RETURN.

1. *Upon summons in chancery.* The return upon a summons in chancery set forth that the officer served the writ upon the defendant by leaving a copy at his place of abode, with a person named, "a mem-

1. *What constitutes the line of a railroad for purposes of delivery of freight.* In a proceeding, by mandamus, to compel a railroad company to deliver at the elevator or grain warehouse of the relator, in the city of Chicago, whatever grain in bulk might be consigned to it upon the line of their road, it appeared the company entered the city from different points upon separate tracks, these separate tracks or lines of road being called divisions. The elevator was situated upon a track used by the company in connection with the business of one of those divisions exclusively, but could be reached from the other division, though by a very indirect route, and subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to their regular trains and business on the latter division. It was *held*, the roads constituting these different divisions, though belonging to the same corporation, and having a common name, were, for the purposes of transportation, substantially different roads, constructed under different charters, and the track upon which the elevator in question was situated, having been laid for the convenience especially of one of those divisions, and only approachable from the other under the difficulties mentioned, it could not be regarded that the elevator was upon the line of the latter division in any such sense as to make it obligatory upon the company to deliver thereat freight coming over that

REVERSION.

WHERE LAND IS BOUGHT FOR A SPECIFIC PURPOSE.

1. If A buys a lot of ground of B, and it is declared in the deed that he purchases it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention. But if a grant be made by A to B, on condition B erects on the land granted a certain structure, and he fails so to do, the land might revert to the grantor. *Board of Supervisors of Warren Co.* v. *Patterson et al.* 111.

SALES.

CONTRACT OF SALE OF GOODS BY LETTER.

Construction thereof. See CONTRACTS, 11.

SETTLEMENT OF ACCOUNTS.

WHAT IS EMBRACED THEREIN.

1. *Inference in respect thereto.* In an action to recover a sum of money alleged to be owing to the plaintiff from the defendant, it appeared the latter had paid the money to a third person, who stood in the relation of agent to the plaintiff in respect thereto, and that such agent and the plaintiff, after the payment to the former, and prior to the bringing of the suit, had a settlement of certain transactions between them, involving an amount much larger than the sum so paid to the agent, but it did not appear what specific matters were embraced in that settlement: *Held,* it was fair and reasonable for the jury to infer that the subject matter of the suit was included in the settlement. *Pittsburg, Fort Wayne and Chicago Railway Co.* v. *Fawsett et al.* 513.

SPECIAL ASSESSMENTS.

IN THE CITY OF CHICAGO.

1. *By whom to be determined — validity of an ordinance in that regard.* Upon an application for judgment upon a special assessment for the curbing and filling of a certain street in the city of Chicago it appeared that, before the passage of the ordinance ordering the improvement, a considerable portion of it had been done by private individuals, of their own motion. The ordinance directed the improvement to be made, "excepting such portions of the above described work which have been already done in a suitable manner." There was no attempt, in any stage of the proceedings, by the council or the board of public works, to define by any public act what portion of the work had been done in a suitable manner: *Held,* the ordinance was void, because the responsibility of directing the mode, manner and extent of such improvements is with the common council, and this was an attempt to vest a discretion in that regard in the board of public works. *Lake Shore and Mich. South. R. R. Co.* v. *City of Chicago,* 454; *Foss* v. *City of Chicago,* 354; *Jenks* v. *City of Chicago,* 397.

SPECIAL ASSESSMENTS. In the city of Chicago. *Continued.*

2. *What character of defense allowed.* The defense which is allowed to property owners, upon an application for judgment upon a special assessment, may embrace every thing which shows that the tax or assessment to collect which the proceeding was instituted, ought not to be collected. *Foss* v. *City of Chicago*, 354.

3. So it is competent in such a proceeding for a property owner to set up, as a defense, that his property was damaged by the work in question, and that being so, an assessment upon it for benefits was necessarily fraudulent. Ibid. 354.

4. Upon an application for a judgment upon a special assessment in the city of Chicago, it is admissible to prove as a defense thereto, "that the commissioners, in making said assessment, knowingly and willfully assessed objector's real estate at more than its proportion of benefits to be conferred by said improvement;" and that the "commissioners assessed certain real estate benefited, for an amount grossly and very much less than it was benefited, and in so doing, increased the benefits assessed against objector's real estate." *Southeim et al.* v. *City of Chicago*, 429.

5. *Of evidence admissible — to show fraud in the assessment.* It is competent, on an application for judgment upon such an assessment, for an objector to prove that the assessment was made as if no part of the work had been previously done, as showing the fraud and injustice of the assessment. But proof of that fact was unnecessary because the ordinance was void without it. *Lake Shore and Mich. South. Railroad Co.* v. *City of Chicago*, 454.

6. *Of arrangements between the board of public works and individuals.* It was also competent, in such case, to show that the board of public works made arrangements with some of the parties who had voluntarily done the work thus embraced in the assessment, and who were in no way entitled to be allowed any thing for it, by which they were to be assessed a certain sum, and to be allowed for the work done by them as a set-off against the assessment. If such a set-off were allowable, the common council, not the board of public works, was the proper authority to make the arrangement. Ibid. 454.

7. *What defense allowable after confirmation — construction of statute.* Where it is alleged that the board of public works in the city of Chicago, in making a special assessment for the construction of certain improvements in the city, willfully and knowingly included in their assessment the cost of certain work in respect to such improvements, which had been done by persons other than the city, property owners affected by the assessment are not precluded from presenting such fact as a defense after confirmation of the assessment by the common coun-