L. M. Nesbet Jan.

# REPORTS

OF

# CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

## SUPREME COURT OF ILLINOIS.

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By NORMAN L. FREEMAN,
REPORTER.

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VOLUME LX.

CONTAINING ADDITIONAL CASES SUBMITTED AT THE SEPTEMBER TERM, 1871.

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PRINTED FOR THE REPORTER.

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SPRINGFIELD:
1874.

JOURNAL COMPANY,
STEREOTYPERS, PRINTERS AND BINDERS
Springfield, Ill.

# JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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JOHN M. SCOTT, WILLIAM K. McALLISTER,

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# CASES

IN THE

# SUPREME COURT OF ILLINOIS.

---

## NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1871.

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SAMUEL S. GREELEY *et al.*

*v.*

THE PEOPLE OF THE STATE OF ILLINOIS.*

1. SPECIAL CHARTERS *for towns—under constitution of* 1848. The constitution of 1848, by authorizing the adoption of township organization, did not prohibit the general assembly from creating towns with special charters. In the absence of such a limitation, that body has power to create municipal corporations, as well in regard to a town six miles square, as to a village with less territory.

2. SPECIAL ASSESSMENTS. Such a charter authorizing special assessments to be levied, is not unconstitutional because it does not require them to be made on the principle that the benefits must at least be equal

*This case, and the two following, are considered in the same opinion: *Marcus D. Gilman* v. *The People*, and *George Merriman* v. *The People*.

to the assessment. But the constitution of 1848 requires assessments to be so made, and an assessment in excess of benefits would be void.

3. An ordinance requiring a specified sum to be assessed on the property in the town, benefited by the improvement, without reference to whether the property is benefited to that amount, and without requiring it to be levied on the principle of equality of benefit and burthen, is void, and the levy of an assessment under it can not be enforced.

4. MUNICIPAL CORPORATIONS—*their powers.* Under a charter creating a general municipal government, with all the ordinary machinery thereof, such a body has the power to erect a town hall in which to hold town meetings, elections, and for other corporate purposes, and whether such a building is necessary, is a question that must be left, in a great degree, to the people and the officers, and an application of the fund to such a purpose, in the absence of evidence, will not be held such a perversion of the fund as is not included in the provisions of the charter.

APPEALS from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Messrs. GEORGE SCOVILLE and W. E. FURNESS, for the appellants.

Mr. FRANCIS ADAMS, for the appellees.

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

In these cases, a judgment was rendered against certain lands in the town of Cicero, county of Cook, for the amount of the State, county, town and school taxes alleged to be due thereon, and also for a special assessment levied for the improvement of a highway, called Riverside Parkway. These taxes, and the special assessment, were levied by virtue of certain powers given in the act incorporating the town of Cicero, to be found in Private Laws of 1867, vol. 3, p. 385, and the first objection taken by appellants is, that the act is unconstitutional. It is claimed that the constitution of 1848, by requiring the legislature to pass a general law for township organization, forbade, by implication, the granting to towns of special charters. We consider this position wholly untenable. It is true, the court held, in *The People* v. *Brown*, 11 Ill.

478, that the legislature could not impose a general township organization upon the people of a county in any other manner than that provided in the constitution. But that decision has no relation to the present question. There was nothing in the constitution of 1848 prohibiting the general assembly from granting special municipal charters. In the absence of a prohibition, this power clearly belonged to that body, and it could exercise it as well in regard to a town six miles square, as to a village with less territory. This was all matter of legislative discretion.

It is further claimed, that the provisions in the charter authorizing special assessments, are void, because they do not require such assessments to be made upon the principle of an equation between benefits and burdens. But, nevertheless, the general grant of power was valid. It was not necessary to prescribe the precise mode of its exercise. When the town desired to avail itself of this power, it would, of course, be necessary to exercise it in the manner required by the constitution, and not impose an assessment in excess of special benefits, nor distribute the assessment in unequal proportions over the property benefited. *Larned* v. *City of Chicago*, 34 Ill. 203.

This brings us to an objection that is well taken. The ordinance directing this special assessment, orders the sum of $125,200.11 to be assessed "upon the real estate deemed benefited by such improvement, in proportion, as nearly as may be, to the special benefit resulting to each separate lot or parcel thereof." The commissioners took an oath worded in a similar manner, and, we must presume, made the assessment as required by the ordinance and their own oath.

It will be perceived, at once, this ordinance is fatally defective. It assumes there is property which will be specially benefited to the extent of this very large assessment, although the town has taken no measures to ascertain that fact, and arbitrarily directs the imposition of this sum as a tax upon property benefited, though it might well be that the aggregate of all special benefits to be derived from the

improvement would be but a small fraction of the sum assessed. The cardinal principle of equation between burdens and benefits, upon which it was necessary, under the constitution of 1848, that all special assessments should be based, was here entirely ignored. The principle of proportion between different lots was indeed preserved, but that was all. Inasmuch, then, as the ordinance disregards the principle of equality between burden and benefit, and imposes this tax upon the property benefited, though the benefit may be but a fraction of the tax, we must hold it void, upon principles well settled in this court.

It is further objected, that the judgment for the town taxes was erroneous, because the warrant included a tax for $15,000, imposed for erecting public pounds and building a town hall. It is claimed the charter does not authorize the appropriation of money for building a town hall; it does, however, create a general municipal government with all the ordinary machinery thereof, and for the working of which it is necessary to hold town meetings and popular elections. The charter expressly authorizes the appropriation of so much money as may be necessary to carry out its provisions. It may be that a town hall, to be used for public purposes connected with the affairs and government of the town, is necessary, and whether it is or not, is one of those questions which must necessarily be left, in great degree, to the judgment of the people, and of the officers whom the people elect. At least, this is not an appropriation of the public funds for a purpose which a court, in the absence of all evidence, can say is plainly unnecessary, and not included within the purposes of the charter. This objection to the general tax warrant is not well taken, but the judgment must be reversed because it included the special assessment.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

JAMES STEELE

*v.*

THE FIRST NATIONAL BANK OF JOLIET.

1. EQUITABLE LIEN—*debtor and creditor—control of partnership funds.* Where several persons, acting together, borrowed a sum of money from a bank, and shipped a lot of cattle to market consigned to another person to sell, who, after making sale, paid the expenses and charges attending the shipment and sale, and also paid off and discharged a mortgage on the cattle, and held about half of the proceeds in his hands, and one of the partners directed him to pay it to the bank, and he agreed to hold it subject to the order of the partners, and it was paid to one of the partners by his, and the direction of another, who constituted a majority: *Held*, that by the direction of one partner to pay to the bank, and what he said, gave the bank no lien on the fund, and the agent was authorized to pay it, as he did, under the direction of the other two partners, and as he paid the money before the bank filed their bill to enforce payment out of the fund, there was nothing upon which an equitable lien could attach.

2. VERBAL PROMISE—*statute of frauds.* But even had the person, to whom the shipment was made, promised to pay the balance to the bank, as it was not in writing, and signed by him, the promise would have been for the payment of the debt of another, and within the statute of frauds.

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

Messrs. RANDALL & FULLER, for the appellant.

Messrs. GOODSPEED, SNAPP & KNOX, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in chancery, filed in the circuit court of Will county, by appellee, to reach money alleged to have been in the hands of appellant, Steele. The bill was filed in April, 1867, and alleges that appellee recovered a judgment by confession in the Will circuit court, against Pope, Morgan and Longworth, about the 2d day of March, 1867; that executions had been issued, and returned no property found, by the sheriffs of Will and Grundy counties, to which they had been

directed, and in which defendants resided. The bill alleges that, during the months of December, 1866, and January, 1867, the defendants in that judgment owned, as partners, one hundred and fifty head of cattle, of the value of $8000; that, in the latter part of January, they entered into an arrangement with Steele by which the cattle were taken to Chicago, consigned to his care, to be sold by him; that, at that time, the cattle were sold, the avails went into the hands of Steele, amounting to over $4000, and was held in trust by him for the benefit of defendants to the judgment, or some of them, and it is charged that it should be applied to the payment of the judgment; that the defendants in the judgment were combining and confederating with Steele to cheat and defraud appellee; and they claim that, inasmuch as the money was loaned to the defendants in the judgment, jointly, and formed a part of the purchase money of the cattle, they have the right to be first satisfied; that if any sale of the cattle was made to Steele, it was only colorable, and to place them beyond the reach of creditors; that Pope, Morgan and Longworth have no property.

Appellant, Steele, answered, denying any knowledge of the judgment, but states his belief that one was recovered; denies any knowledge whether Pope, Morgan and Longworth were partners as alleged, but believes they were; he denies that he made such an arrangement with them as charged in the bill, and denies that he took possession of the cattle as charged, but states that the cattle came to him from Pope and Morgan, incumbered by a mortgage to Casey; that he paid Casey $2218.95, and he sold the cattle for $5504.65; that by arrangement, he deducted from that amount the sum he paid Casey to release them from the mortgage, with ten per cent interest and all costs, charges, and expenses of bringing the cattle to Chicago and selling them; that the expenses amounted to $715, leaving the sum of $2530.70, which, about the first day of April, 1867, he paid to Pope and Morgan; and he denies that he has any money or property belonging to the

defendants in the judgment, and denies that any sum belonging to them was in his hands when the bill was filed; denies all combination, etc., and concludes with a general traverse of the allegations of the bill.

An amended bill was filed, charging that Steele had, after paying all liens and charges on the cattle, in his hands $2530.70 belonging to Pope, Morgan and Longworth, and Steele was informed by Longworth that there were no other partnership funds to pay appellee's debt, and that Steele agreed, and promised Longworth that he would hold the same and would not pay it to either partner without the consent of all; that Longworth then informed Steele that he desired the money paid to appellee, and that Steele agreed to hold it for that purpose. This is denied by Steele's answer to the amended bill. The court rendered a decree requiring Steele to pay to appellee the sum of $2530.70, with interest from the 24th day of April, 1867, from which Steele appeals to this court, and assigns as error the rendition of the decree by the court below.

The evidence shows the cattle were sent to Chicago, sold, and Casey's mortgage paid, as set forth in the pleadings; and that a few days subsequently Longworth went to appellant and requested him to pay this debt to appellee after paying Casey's mortgage; that appellant said he would pay the money as the parties should direct. Some of the witnesses state he agreed to hold it until they all agreed he should pay it to the bank. Abel Longworth states that appellant said he would hold the money until the partners should settle, and he would then pay it as they should direct. Morgan seems to have drawn all of it. He also states that appellant agreed not to pay it to any one without his consent, but fails to state that he did not consent to its being paid to Morgan.

With appellant's denial of the promise, the evidence on that point seems to be conflicting; but even if it were not, there is no pretense that Morgan and Pope ever consented that he should hold it for, or pay it to the bank, and their consent was

the condition upon which he could hold it for that purpose; and he swears, and is not contradicted, that he paid it by the agreement of two out of three of the partners. This was a legal payment, and discharged him from his indebtedness to the firm. One partner has an equal right with his co-partner to collect debts due the firm, and to give acquittances. Nor can one partner revoke the authority to his co-partner to collect firm debts by simply notifying their debtors not to pay to his partner. The bank acquired no claim by the promise, if it was made, as it was not in writing and signed by the appellant, as the statute requires for the payment of a debt of another person.

Appellant swears positively that on the day the bill was filed he owed the firm nothing; had no property or effects of theirs in his hands, nor has he ever had since that time. He states the manner in which he paid the balance of the proceeds of the cattle, and there is no evidence to overcome his testimony on that point; and if not indebted to defendants in the judgment, and having none of their property, goods or effects in his hands, we are at a loss to perceive how appellee has acquired any equitable claim upon him for the payment of its judgment. Generally, to give equity jurisdiction in such cases, the defendant must have property of the debtor in his hands, or be indebted to him, when the bill is filed. If he has, then if all of the precedent steps have been taken, and his remedies at law have been exhausted against the debtor, the filing of the bill creates a lien on the property, or amount the defendant owes to the debtor, and it becomes liable to the satisfaction of the judgment against the debtor. Nor can the defendant, in such a case, pay the debt or restore the property to the debtor so as to release himself, after the lien attaches. But, in this case, there was nothing upon which the lien could attach. Nor do we find any evidence in the record from which it can be inferred that there was a conspiracy entered into by appellant, Pope and Morgan, to defraud the bank. Steele swears that he was not aware that the firm owed the bank

until after he had sold the cattle, either in whole or in part. If this be true, and it is uncontradicted, he could not have obtained possession of the cattle for any such purpose. Nor do we perceive that the circumstances developed by the evidence warrant such a conclusion. Nearly the whole transaction seems to have taken the usual course of such matters, and there is no part of it so irregular as to warrant the conclusion that there was a conspiracy to defraud the bank.

For these reasons, the decree of the court below is reversed and the cause remanded.

*Decree reversed.*

---

## ANGELINE LONG, Administratrix,

*v.*

## ELMER B. THOMPSON, Guardian, *et al.*

1. NOTICE—*necessity thereof, in judicial proceedings.* The principle is very general, subject to few exceptions, that all persons whose rights are to be affected by an order or judgment of a court, must have notice, actual or constructive, of the pendency of the proceeding against them.

2. SAME—*in respect to an order of distribution of money of an estate.* In case of a surplus remaining in the hands of an administrator from the sale of lands directed to be sold to pay debts, an order made by the probate court for its distribution, without notice to those entitled thereto, is void.

3. ORDER *of distribution—setting it aside at a subsequent term.* Where a probate court improperly made an order for the distribution of money in the hands of an administrator, without notice to those entitled thereto, there having been no final settlement of the administration, and nothing done under the order of distribution, the whole matter was *in fieri*, and it was competent for the probate court, on notice to the administrator, to set aside such order at a subsequent term.

APPEAL from the Circuit Court of DuPage county; the Hon. SILVANUS WILCOX, Judge, presiding.

Messrs. VAN ARMAN & VALLETTE, for the appellant.

Messrs. PAGE & PLUM, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from a judgment rendered by the circuit court of DuPage county. Appellant, Angeline Long, as administratrix of her deceased husband, Abram Long, who died intestate, obtained an order of the county court of DuPage county to sell the real estate of the intestate to pay debts, subject to her dower right as widow. A sale was made, and after the payment of the debts there remained a surplus in the hands of the administratrix, subject to distribution, the sum of $942.53.

At a special term of that court, held on the 5th of September, 1866, without any notice served upon the heirs, or any notice published, or notice of any kind to the heirs, and in the absence of their guardians, an order of distribution of this surplus was made by the court, distributing to the administratrix one-third part thereof, being $314.17, and to the heirs the remainder, according to their respective rights and interests. It was further ordered, in and by the same order, that the administratrix make payment and distribution of the sum so remaining in her hands, to the parties entitled, according to their rights and interests as determined and decreed by the court, and that the administratrix file in court receipts of the parties for the amounts to which they are respectively entitled, taking, in case of minors, the receipts of their guardians.

The administratrix did nothing under this order, or take any steps in the direction of carrying it out, when a notice was served upon her by the parties interested in said order, that they would apply to the probate court at the February term, 1870, for an order vacating and setting the same aside.

The motion was heard by the probate court at that term, and an order duly entered vacating the same.

From this order the administratrix appealed to the circuit court, and on a hearing there the order was affirmed.

To reverse this order, the administratrix appeals.

Two principal questions are made by appellant on this record. The first is, that notice to the heirs of the distribution of the fund was unnecessary, the statute nowhere requiring notice; second, the probate court being a court of record, its judgments and orders entered at one term can not be vacated and set aside at a subsequent term.

These questions are elaborately argued, and we concur in much that has been urged in support of them. On the first question, counsel cite the proviso of the 8th section of the act of 1857, amendatory of the statute of wills, by which it is declared that the overplus arising from the sale of lands of an intestate, under an order of court, if there be any, shall be distributed among heirs and devisees, owners, or such other person as may be entitled thereto. Laws of 1857, p. 140.

As this statute does not, in terms, require notice to heirs and distributees, it is insisted distribution could be legally made without any notice.

We apprehend that the principle is very general, subject to few exceptions, that all persons whose rights are to be affected by an order or judgment of a court, must have notice, actual or constructive, of the pendency of the proceeding against them. Parties in interest must be parties in a suit or proceeding which may affect their interests. Mitford's Ch. 39; Story's Eq. Pl. 185. This case is a good illustration of the propriety of this rule; for, had the distributees, or their guardians, been notified that an order of distribution was to be entered, they could have resisted that portion of the order which allowed appellant, as widow, one-third of the surplus, the legality of which is not pretended by her counsel.

Was this a bill in chancery for distribution, it will not be denied all the distributees would be made parties. *Morris et al.* v. *Hogle et al.* 37 Ill. 150. Wherein this proceeding differs from a bill in chancery, in principle, we can not discover.

The principle that notice to parties must be given, to conclude them, pervades the entire realm of jurisprudence. *Hopkins et al.* v. *McCann*, 19 Ill. 116.

As to the second point, it will be observed the administratrix had made no final settlement of her administration, nor had she paid the distributees under this order. Until this was done, the whole matter was *in fieri*. Under such circumstances, nothing having been settled, we do not question the power of the probate court to retrace its steps for any error which may have marked its progress.

The order entered at the special term, in September, 1866, was *ex parte*, and remaining unexecuted up to the date of the motion to vacate it, we can see no reason why it should not, on notice to the administratrix, be vacated. The authority so to do we must regard as incident to those general powers that a court possesses, and which are indispensable to their right exercise. It saves the delay and expense of appeals and writs of error, or proceedings in equity, and is otherwise productive of convenience and promotive of the ends of justice.

The order of distribution being void as to the heirs, they having had no notice, and nothing having been done under the order, there was no error in the court, at a subsequent term, in proceeding to set aside the order.

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

*Judgment affirmed.*

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## DUDLEY LAYCOCK

*v.*

## SEVERIN OLESON.

1. ADMINISTRATOR—*when he may sue in his own name—and whether he must prove his fiduciary character.* It has been held that, where a note is made specifically payable to a party described as administrator or guardian, such party may bring an action in his own name to recover the

money secured thereby, and will not be required to prove his fiduciary character. Words descriptive of such character, used in the instrument sued on or in the pleadings, are immaterial, and need not be proved.

2. So, in an action to recover the price of personal property purchased at an administrator's sale, the administrator may sue in his own name, and if he describe himself in the pleadings as administrator, he need not prove such words of description.

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

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

Mr. L. E. PAYSON and Mr. N. J. PILLSBURY, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This action was originally commenced before a justice of the peace, to recover for the price and value of a certain lot of corn alleged to have been sold and delivered by the plaintiff in error to the defendant in error.

The plaintiff was acting as administrator of the estate of Hannah Laycock, deceased, and it was at a sale of the personal effects belonging to the estate that the defendant purchased the corn in question.

On the trial of the cause in the circuit court, the defendant asked the following instruction, which was given: "The court instructs the jury that, unless the plaintiff has proven, by the production of his letters of administration, that at the time of the commencement of this suit, he was the administrator of the estate of Hannah Laycock, deceased, the jury will find for the defendant."

The giving of this instruction is now assigned for error, and is the only error to which our attention has been directed.

The contract upon which the action was founded was made with the plaintiff, and not with his intestate; and it was lawful for him to bring suit in his own name for the breach. The words, "administrator, etc.," in the summons, were merely

descriptive of the person, and it was wholly unnecessary to prove such description on the trial.

It has been repeatedly decided by this court that, where a note is made specifically payable to a party describing himself as administrator or guardian, such party may bring an action in his own name to recover the money secured thereby, and he will not be bound to prove that he was such administrator or guardian. Such words are held to be simply descriptive of the person, and therefore immaterial. *McKinly* v. *Braden*, 1 Scam. 66; *Baker* v. *Ormsby*, 4 Scam. 325; *Newhall* v. *Turney*, 14 Ill. 338.

It makes no difference whether the contract was verbal or written. In either case, the party with whom the contract was actually made, may bring the action in his own name, and the description given to himself in making the contract or in bringing the suit, will be regarded as immaterial, and need not be proved.

For the error of the court in giving the instruction, the judgment is reversed and the cause remanded.

*Judgment reversed.*

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## Henry McEwen

*v.*

## Stephen Morey.

1. Count *for goods sold and delivered.* It is essential to the *indebitatus* count for goods sold and delivered, that it should aver they were sold and delivered to the defendant at his request. Where such an averment is wanting in such a count, upon a special demurrer, the count would be bad.

2. Allegations and proofs. Where a count avers that the defendant purchased of plaintiff a quantity of corn at the highest market price for similar shelled corn in the city of Morris at the time of delivery, the

plaintiff could not recover on such a contract by showing a delivery of corn at another place, and under a contract which did not specify any price at any place.

3. Contract—*as to price to be paid.* Where one party said to another, when he got ready to shell his corn, haul it to his warehouse in Seneca and he would make it satisfactory as to price, and the corn was hauled and delivered at the warehouse, the law implies a contract to pay the market price at the time and place of delivery, for which a recovery may be had.

4. Receipt—*whether it amounts to a contract.* Where, upon the delivery of grain, a receipt is given therefor, subject to the market price of corn, on its return to the person giving it, by a day named, and storage to be paid, and on the back of the receipt there were dates and figures showing other deliveries at different times, and there was evidence tending to show that the person did not call for a receipt, but only for a memorandum of the dates, and amounts delivered, and that the person to whom it was given did not know its contents, it was for the jury to say whether the receipt expressed the contract of the parties, and whether the amounts indorsed on the back of the receipt were to be subject to the same terms.

5. Instructions—*oral explanation by the court.* Where the court had given instructions for both parties, and gave an instruction on his own motion, it was error to preface it by the oral remark, in the presence and hearing of the jury, that he had concentrated all there was in those instructions into this one, as embodying all the law necessary for the case, when it did not, in fact, present all the law of the case, and withdrew from the consideration of the jury evidence that was before them.

Appeal from the Circuit Court of LaSalle county; the Hon. Edwin S. Leland, Judge, presiding.

Messrs. Dickey, Boyle & Richolson, and Mr. S. W. Harris, for the appellant.

Mr. B. Olin, and Messrs. Blanchard & Silver, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

This was *indebitatus assumpsit* upon the common counts, brought by Morey against McEwen, to recover for a quantity of corn sold and delivered by the former to the latter. A trial was had upon issue joined, before a jury, terminating in

a verdict and judgment for plaintiff. Defendant brings the case to this court by appeal.

The first point made is, that there is a total variance between the contract as set out in the special counts, and the proofs. This point is not tenable. There are no special counts in the declaration. It originally contained three counts, preceding the regular common counts, which were neither special counts, nor in exactly the ordinary form of the common counts, but approaching nearer to those of that character than to special counts. To these first mentioned counts the defendant filed a general demurrer, and then the general issue to the same. Plaintiff's counsel moved the court to strike the demurrer from the files, but the court, overruling that motion, sustained the demurrer to the second and third counts, and overruled it as to the first.

The first count is, in substance, an *indebitatus* count; but, instead of following the proper form, it alleges that defendant was indebted to plaintiff in a sum stated, for the value of six hundred and seventy-four $\frac{6}{56}$ bushels of corn, before that time purchased of the plaintiff by the defendant *at the highest market price for similar shelled corn in the city of Morris*, at the time of delivery; that on, etc., said market price for such corn being about eighty-two cents per bushel, and being so indebted, he, the said defendant, in consideration thereof, promised the said plaintiff, etc.

It is essential that the *indebitatus* count, for goods sold and delivered, should aver that they were sold and *delivered* to the defendant at his request. 1 Chit. Pl. 345, 346; *Porter* v. *McClure*, 15 Wend. 189. Such an averment is lacking, and upon special demurrer the count would certainly be bad. The plaintiff, however, could not recover upon it by showing a sale and delivery of corn at another place than Morris, and under a contract that did not specify any price at any place. The two counts to which the court sustained the demurrer, must be regarded as out of the declaration so far as the question of variance is concerned. The remaining counts in the declaration

were the common counts in the usual form, for goods sold and delivered, money had and received, etc. No question of variance can properly arise in the case, and the only question that could arise in this particular, would be as to the adaptation of the common counts to the case made by the evidence.

The original verbal contract between the parties was simply a request on the part of the defendant that the plaintiff, when he got ready to shell his corn, would haul it to defendant's warehouse in Seneca, and the latter would make it satisfactory to plaintiff as to price. This was the substance of the contract, as testified to by both parties. The plaintiff complied, and delivered at the place designated six hundred and seventy-four bushels, which were received and accepted by defendant. There was nothing in the conversation out of which the contract springs, about the plaintiff having the market price at Morris, or having an option as to time of fixing the price; neither was any specific quantity agreed upon which plaintiff was to deliver, nor was payment to be made otherwise than in money. In such case, the law will imply a promise on the part of the defendant to pay the plaintiff the market value of the corn at the time and place of delivery, for which a recovery may be had under the common counts.

Upon the trial, the defendant introduced in evidence the following writing:

"Seneca, Ill., Aug. 31, 1869.

Received from S. Morey forty-five bushels fifty pounds of shell corn, subject to market price for corn in Seneca, on return of this receipt by the 15th day of October, 1869, less two cents per bushel for first thirty days, or part thereof, and one cent additional per bushel for each succeeding thirty days, or part thereof, risk of fire and heating excepted.

McEwen & Dow."

Upon the back of which appears a memorandum of dates and a column of figures, without any words to connect the same with the terms on the face of the instrument These indorsements can only be understood by the aid of extrinsic

evidence, and by which it was shown to mean the number of loads of corn and the time and quantity of each load delivered. The defendant gave evidence tending to show that this receipt was given by his clerk to the plaintiff at the time it bears date, and of the delivery of the first load; that plaintiff produced it and had each successive load indorsed upon it. While the plaintiff testifies, and is in some degree corroborated by other testimony, that when he had finished the delivery of the corn he asked for a memorandum of what he had delivered, and that this paper was furnished him in pursuance of that request; he swears, positively, that he never assented to the terms upon the face of the receipt, and did not even know what they were until a considerable time afterwards, and that he never called for any receipt.

If the plaintiff only called for a memorandum of quantities of corn delivered, and this paper was handed to him in pursuance of that request, and he retained it as the memorandum called for without knowing that it purported to be a special contract, and he did not otherwise assent to it than by so retaining it, then there was no such meeting of minds, by acceptance, as will constitute a contract.

It was insisted below, as appears by instructions asked on behalf of defendant, and is so here, that the receipt given in evidence constituted a written contract covering the entire subject matter, merging all previous and contemporaneous negotiations, and affording the only basis of recovery.

It is essential to a valid contract that there should be a meeting of the minds of the contracting parties. The usual mode of manifesting that result is by the signature of the parties. But it is the settled law, that if a party, without negligence, sign and seal one instrument, actually supposing it to be another and wholly different one, he will not be bound by, and may avoid it, even at law; and this, upon the ground that the mind of the signer did not accompany the signature.

Here, it is not sought to hold plaintiff bound by a contract, his assent to which is manifested by his signature, for he did

not sign it, and it was of a form and character not requiring his signature; but it is sought to make it obligatory upon him, by assent manifested by acceptance. Such acceptance may be expressed by words, or implied from acts and circumstances.

If he asked for a receipt at the commencement of delivery of the corn, and received this, and produced it at every successive load to have the quantity indorsed, this would be strong presumptive evidence of assent; but if at the close, or nearly so, of the act of delivering the grain, he asked for a memorandum, and this was given him with a memorandum on the back, and he, without knowing that it was otherwise than a memorandum, retained it, such retention is not, of itself, sufficient evidence of assent to the special contract, but is evidence of an attempt by defendant to impose upon him, and he is not bound by its terms. These were questions of fact for the jury, upon which there was conflicting evidence, and as to which it was their province to decide.

But, there is a further consideration. If it be conceded that plaintiff assented to the contract expressed in the receipt, the terms of it embraced only forty-five bushels and fifty pounds of corn. There are no words upon the face, or upon the back of the receipt, which bring the quantities of grain, noted on the back, within the terms of the *written* contract. The memorandum is no part of the contract.

It is not even pretended by the defendant that, from the time of the original contract respecting the corn until the completion of the delivery, there were any new negotiations between him and plaintiff as to the terms of the sale. Still, it was competent for the parties, before performance of the original contract, to vary it by the substitution of a written one in the form of a receipt, embodying a special contract respecting the same subject matter. Whether this was done, is a question involving both law and facts. The facts were to be found by the jury. The plaintiff based his theory of the case upon the original contract and the delivery of the corn under it.

Whether such contract was made, and whether the corn was delivered under it, were questions for the jury. The defendant rested his defense upon the ground of the substitution of the written contract, the delivery under that, and a want of compliance by plaintiff with its terms. This was perfectly legitimate, and he had the right to have the case properly submitted to the jury by instructions embodying that theory. Instructions were given on behalf of both plaintiff and defendant, in accordance with their respective views of the case.

The bill of exceptions states, that after the giving of said instructions for both plaintiff and defendant, the court then and there, of his own motion, unasked by either party, gave to the jury the following instruction, prefacing the giving of the same by the following remark to counsel, in presence of the jury, to-wit: "I have taken upon myself to concentrate all there is in those instructions into this one, as embodying all the law necessary for the case:"

"If, prior to the commencement of this suit, the plaintiff sold and delivered to the defendant some corn, whether it was or was not in store with the defendant at the time of sale, or if the plaintiff stored some corn with the defendant, the latter sold it and got the money for it, the jury should find for the plaintiff; and if there was a sale by plaintiff, and no contract as to price, the price at the place and time of sale and delivery, less storage, if any, would be the amount of the verdict. If plaintiff never sold the corn, but stored it, and defendant sold the plaintiff's corn so stored, the plaintiff should recover what defendant got for it, less storage. The fact that the defendant had a partner, is of no consequence. If neither the plaintiff nor the defendant had sold the corn before this suit was commenced, the plaintiff can not recover. Any agreement between plaintiff and defendant, by which they intended and understood that the title to the corn should cease to be in the plaintiff and should pass to the defendant, would be a sale. If the defendant stored the plaintiff's corn before the same was

sold by plaintiff to defendant, or before the defendant sold it to another, the jury should allow defendant what the storing was reasonably worth, if there was no contract price for storing, or the agreed price, if one was agreed upon."

The counsel for plaintiff and defendant both excepted to the giving of the instruction and the remarks of the court thereon.

The statute of 1847, p. 63, provides: "That hereafter, no judge of the circuit court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing"—"and he shall in no case, after instructions are given, orally qualify, modify, or in any manner explain the same to the jury."

The counsel for appellant insists that the court erred in orally qualifying or superseding the instructions already given, by the remark prefacing the giving of said instruction. The bill of exceptions does not state that the remark was orally made, though it is fairly inferable that it was. If oral, it was in violation of the spirit of the statute, because it would have the direct effect, though directed to counsel in the hearing of the jury, to induce the jury to disregard all the other instructions, and regard only that given by the court of its own motion, "as embodying all the law necessary for the case." If in writing, and directed to the jury, it would operate as a supersedure of all the other instructions; and the one given of the court's own motion did not embody all the law necessary for the case, because it withdrew from the jury all consideration of the question respecting the issuing and acceptance of the receipt given in evidence. The evidence upon that point was properly before the jury, and the defendant had the clear right to have it passed upon by the jury under the instructions which the court had given as applicable to it. If the receipt became a contract by acceptance on the part of plaintiff, it controlled the rights of the parties as to the corn mentioned in it; and the jury might have found, from the acts of the parties, if the question had been submitted to them,

and the evidence was sufficient, that, although the residue of the corn was not embraced in the written contract as such, yet that it was mutually understood that it was to be governed by the same terms.

If the receipt became a contract, and fixed the rights of the parties as to the corn expressed in it, and the residue was governed by the same terms, the plaintiff would not be entitled to recover simply on the ground that defendant sold the corn at any time before the commencement of the suit. The contract embodied in the writing is one of sale, and not of bailment. *Ives* v. *Hartley*, 51 Ill. 520; *Lonergan* v. *Stewart*, 55 Ill. 44.

There was no evidence in the case tending to show that there was any other contract under which the corn was delivered, except the original verbal contract, or that contained ir the written receipt. In the conversation out of which the original arose, there was nothing said about storing the grain, but compensation for storage is provided for in the written one, if it ever became a contract. Still, the legal effect of that instrument is a contract of sale and not one of bailment, or for storage merely. In the instruction given by the court, the jury were told that, "If plaintiff stored some corn with defendant, and the latter sold it and got the money for it, the jury should find for the plaintiff." There was evidence tending to show that defendant had sold the corn, but there was no evidence at all of a contract for storing it, in the sense that would make a sale of it wrongful, unless the receipt was construed to be such contract. The court, therefore, submitted that proposition to the jury, either without any evidence at all to base it upon, or left it to them to construe the written contract. In either case it was wrong.

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

*Judgment reversed.*

Syllabus. Statement of the case.

## JAMES H. BOWEN *et al.*

*v.*

## ROBERT RUTHERFORD.

1. PARTNERSHIP—*proof thereof—by reputation.* Whether persons are partners *inter se*, or *quoad* third parties, must be established by facts, by the acts of the party, or by circumstantial evidence, which induce the belief of a partnership. The question turns upon the assent of the person to be charged, and not upon general repute. A partnership can not be proven by general reputation.

2. INSTRUCTIONS—*need not be repeated.* Where proper instructions have been given in a case, it is not error to refuse to repeat them.

3. NEW TRIAL—*newly discovered evidence.* It is not error to refuse to grant a new trial on newly discovered evidence which is only cumulative and inconclusive in its character.

4. On such an application it must appear that the party asking a new trial, has used due diligence to discover evidence before the trial.

5. PLEA—*notice of defense.* When a plea, denying a partnership, is filed, it is notice that such a defense will be made.

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

This was an action of assumpsit brought by James H. Bowen, George S. Bowen, Chauncey T. Bowen and George R. Whitman, in the Superior Court of Cook county, against Robert B. Rutherford and Robert Rutherford, upon certain notes purporting to have been executed by the defendants as partners. There was a default entered against Robert B. Rutherford, but Robert Rutherford filed pleas: first, the general issue; second, a plea that he was not a partner of the other defendant, and was not jointly liable; third, a plea denying the execution of the notes. These last two pleas were verified by affidavit. A trial was had by a jury, resulting in a verdict in favor of Robert Rutherford. A motion for a new trial was overruled, and a judgment on the verdict, from which this appeal is prosecuted.

Messrs. THOMPSON & BISHOP, for the appellants.

Mr. JOHN W. KREAMER, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

There was no error in the rejection of the evidence offered, that appellee held himself out as a member of the firm.

The offer was too general, and the only inference to be drawn from it is, that the design was to prove the partnership by general reputation, and thus make both defendants liable for the act of one.

Such testimony was held competent in *Whitney* v. *Sterling*, 14 Johns. 214, and in *McPherson* v. *Rathbone*, 11 Wend. 97.

In the first case, the court remarked that there was no objection to the testimony of general reputation, and it must therefore be considered. In the last case, it is simply said that it is undoubtedly competent to prove the partnership by general reputation.

No authority is referred to in either case, and no argument offered in favor of the rule established.

The propriety of these decisions was seriously questioned in an able opinion by Cowen, J., in *Halliday* v. *McDougall*, 20 Wend. 81.

He said: "There is scarcely a question upon which common reputation is more fallible. A contract of partnership is, in its nature, incapable of being defined by laymen; and whether an apparent partnership be really so, or a contract of some other character, is often a most embarrassing legal question with the ablest lawyer. General reputation of the more ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be a much more proper subject of proof by general report. This, the law always rejects, and yet I am not aware that there is any necessity for a resort to such proof, in the one case more than the other."

We have been furnished with no authority in favor of the rule, and are aware of none, either English or American, which goes to the extent of the earlier cases in New York.

In *Brown* v. *Crandall,* 11 Conn. 92, it was decided that general reputation was inadmissible to prove a partnership. In this case, the court said: "A person of doubtful credit might cause a report to be circulated that another person was in partnership with him, for the very purpose of maintaining his credit. His creditors also might aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts." See, also, *Bryden* v. *Taylor,* 2 Harr. & Johns. Md. 396.

It is a fundamental principle of the law of evidence, recognized and approved from the earliest times, that hearsay is not generally to be admitted in courts of justice. There are certain exceptions to the rule, but reputation of partnership has never been regarded as one of them.

The exceptions have been allowed, because it has been supposed that greater inconvenience might arise from the exclusion than the admission of the exception.

The mischiefs resulting from the admission of general report in proof of partnership, either between the parties or as to third persons, would be ten-fold greater than its exclusion.

Creditors, by ordinary precaution and inquiry, can protect themselves from imposition. They need not part with money or goods until they ascertain the fact of partnership, or the joint liability of the persons to whom the credit is given.

On the other hand, the innocent might be involved in difficulty, and ruined by a reputation created by bad and designing men.

Whether persons are partners *inter se,* or *quoad* third parties, must be established by facts; by the acts of the party; or, by circumstantial evidence, which induce the belief of a partnership. The question turns upon the assent of the person to be charged, and not upon general repute.

A contract of this character, which often perplexes the closest inquiry, should not be determined by the loosest of all testimony, excited, perhaps, by interested creditors.

The modification of the second instruction was right. It required that the jury should find that the goods were furnished upon the belief that appellee was a partner.

If this was not true, then the appellants were not injured. They must be influenced and induced to give the credit by the indirect representations of the party, arising from his conduct. There must also be such publicity in the acts of the party charged, as to afford the reasonable presumption that the creditor had a knowledge of them, and acted upon such knowledge. The law presumes that the party who thus holds himself out as a partner, does so voluntarily, and that the creditor, under the belief of a partnership, gave the credit. *Waugh* v. *Carver*, 1 H. Black. 235; *Fox* v. *Clifton*, 6 Bing. 776; *Dickinson* v. *Valpy*, 10 Barn. & Cress. 128.

The law applicable to the facts was fully and correctly stated in the instructions given.

Some of the refused instructions are defective; and all, which was essential in them, was embraced in those given by the court.

The motion for a new trial was properly overruled. The newly discovered evidence is cumulative, and can not be regarded as conclusive. Besides, the reasonable diligence which the law requires, to prepare for trial, has not been shown.

This suit was pending in court nearly four years. Mattoon, the place of business of the makers of the note sued on, was easily accessible from Chicago, and yet, during all this time, the only effort for the procurement of testimony was the writing of a letter to an attorney in Mattoon, who made no reply. Another letter was written after the lapse of some time, but no information was elicited. Reasonable diligence required more active measures.

The affidavit of the attorney, for the purpose of showing diligence, impliedly states that he did not know of the denial of the partnership until after the deposition of appellee was taken.

The plea denying the partnership, was filed in December, 1868, and was notice of the fact of denial.

There is no error for which the judgment should be reversed. It is accordingly affirmed.

*Judgment affirmed.*

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## REBECCA HETFIELD

*v.*

## WILLIAM FOWLER *et al.*

1. WILL—*trustees—legatees—residuary estate.* A testator, by his will, bequeathed, after willing all of his property to his executors in trust, and giving specific legacies, the residue of all his property, real and personal, to his three sisters, limiting it to their use during their natural lives, and at their deaths, respectively, to their children; but by another clause, he gave to these three sisters each a legacy of $3000, absolutely: *Held*, that this bequest only conferred a life estate on the legatees, with the remainder to their children; nor does the word "fee," as used in the will, overcome the clear intention to give a life estate; nor does it limit such estate to the realty.

2. BEQUEST OF PERSONAL PROPERTY—*life estate.* A testator may bequeath a life estate in personal property to another, and limit a remainder on it.

3. WILL—*carrying it into effect.* In such a case, if there was power to order the money to be paid to the legatees, to secure those in remainder, it would be proper to require of the legatees to execute bond with good security for the faithful application of the fund, but a fair construction of the will requires the fund to remain in the hands of the trustees, and that they should pay to the legatees the income arising from the trust fund.

4. CROSS ERRORS. When the court below, in such a case, ordered the executors to pay the fund to the legatees on their giving bond with good security, the executors, upon an appeal by the legatees, may assign cross errors, and have such an order reversed.

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

Messrs. RANDALL & FULLER, for the appellant.

Messrs. ROFF, DOYLE & MCCULLOUGH, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The only question on this record, is upon the construction of the will of John White, deceased, and especially its sixth clause, whether, thereunder, the three sisters of the testator, of whom appellant was one, took the residuary estate thereby given to them, absolutely, or only the use of it during their natural lives.

The sixth clause is as follows:

"Sixthly.—I give and bequeath the residue of all the proceeds of all my real and personal estate to my three sisters, Nancy Sherman, Eleanor Fowler, and Rebecca Hetfield, to be divided equally among them, it being the intention of this, my last will, that each and all of my three full sisters, aforesaid, shall have the use of all the real estate and personal property willed to each of them, respectively, or the proceeds of said real estate if they should see fit to sell the same, and the use only for their natural lives, and at their death to go respectively to their several children, in equal parts, in fee."

Another clause of the will gave to these sisters a legacy of $3000 each, absolutely.

It seems very clear, that it was the intention of the testator to give only a life estate in this residuary property to his sisters. He took pains to emphasize his meaning in this respect, that they were to have the use only of the property, by a repetition of it in the words, "and the use only for their natural lives."

There is hardly room for construction as to the meaning of the testator. Whatever question the language might raise in regard to the power to sell the real estate, it leaves the meaning clearly expressed, that the proceeds of the real estate, if

sold, should not go to the sisters of the testator, absolutely, but that they should enjoy the use thereof only for their natural lives.

It is said that the word "fee" is a term applicable only to real estate, and that the limitation over, after their death, to their children, in equal parts, in fee, evinces that only the real property was to go to the children, and was limited over to them, and that the personal property was given, absolutely, to the sisters.

But the use of the word "fee," in that connection, can not be accepted as controlling a clearly expressed intention, to give the use, only, of the personal property.

It is contended that there can be no life estate in personal property; that having the entire use of it can not be anything but ownership. But the law is clearly settled otherwise. *Boyd et al.* v. *Strahan*, 36 Ill. 355; *Waldo et al.* v. *Cummings et al.* 45 Ill. 423, and authorities cited.

This case arose on a motion made by the appellant in the county court, that the appellees, the executors of the will of John White, pay over the residue of the estate remaining in their hands to the appellant and her two sisters, the residuary legatees named in the will.

The court ordered the same to be paid over on the legatees giving bond, with good security, that the moneys, at the time of their death, should go to their children.

It is objected that the executors had no right to raise such a question of giving a bond; that the testator did not require his sisters to give any bond; that the executors had no authority to require it, neither had the county court. And the case of *Waldo* v. *Cummings, supra,* is referred to as precisely in point, in support of the objection. In that case, the will directed that, when the younger of the two children of the testator should arrive at the age of twenty-one years, the executors should pay to them the personal estate; and it was held, that where trustees under a will receive property to hold for a limited period, and then to be paid to persons named in the will,

they have no option in the matter; they have only to execute the will, without imposing conditions not contained in the will, and that they had no right to require a bond for the preservation of the property for those in remainder.

But the case before us presents a marked difference. The testator here devises all his real and personal estate to his executors, in trust, after the payment of debts and legacies, to distribute the residue as designated in the will, giving them full power to sell and dispose of the estate, as to them should seem for its best advantage, and requires them to give bond in the sum of $150,000, with three sureties, naming one of them, for the faithful performance of the trusts of the will.

There is no direction to the executors to pay over the residuary property to these sisters at any specified time, or at all. The intention is not manifested that the latter were to have the absolute control of the property, but only the use of it.

What is to execute the will in this case? In the case cited, it is clear that it was to pay over the money at a specified time. But here, as these residuary legatees were to have the use, only, of the property for their natural lives, and then it was to go to their children, was it not, in the fair execution of the will, and in the performance of one of its trusts, to retain in the hands of the executors the principal, to pay over to the children upon the happening of the event when they would be entitled to it, and pay the interest on it to the testator's sisters? This would seem to be better carrying out the purposes of the will, than to pay the fund to the sisters, placing it under their absolute control and power of disposal, whereby, at their death, there might be nothing left of it to pass to their children. The reception of the interest would, essentially, be enjoying the use of the fund. At least, the exacting of reasonable security, on payment over of the funds, for its preservation for those entitled in remainder, would seem to be no more than acting in the line of the faithful performance of the trusts of the will.

The taking of the bond we regard as but a reasonable precaution, and a proper requirement of the court.

The errors assigned on the part of the appellant are not well founded; but, on the contrary, we are of opinion the executors should not have been required to pay over the money to these residuary legatees, even on the condition prescribed by the court. The testator, by his will, placed all his property in the hands of his executors, in trust, requiring of them a large bond for its fulfillment, with a prescribed number of sureties, designating one of them by name, and we think it fit, and that the wishes of the testator, with regard to all the objects of his bounty, would, in that way, be likely to be better carried out, that the principal moneys should remain in the hands of the executors, trustees of the testator's own selection, they paying over to those legatees the income thereof.

For the error in this respect, urged on the part of the appellees, the order of the court below is reversed and the cause remanded, at the costs of the appellant.

*Judgment reversed.*

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## EDWIN MEAD

*v.*

## JEFFERSON MUNSON.

FRAUD AND CIRCUMVENTION—*diligence required of the maker of a note.* Where a party was induced to sign a promissory note upon the representation of the payee that a guaranty should be written upon the back of it that the note should not be paid unless the consideration therefor should prove to be profitable, and he delivered the note, supposing such guaranty had been indorsed upon it, but the same was, in fact, written upon another piece of paper, and the consideration turned out to be worthless, it was *held*, it appearing the maker of the note could read and write with facility, that the defense that the execution of the note was obtained through fraud and circumvention, would not avail him as against an innocent assignee

before maturity, as the maker of the note could not have been so imposed upon if he had exercised due diligence.

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

This was an action brought by Munson against Mead, on a promissory note executed by the latter in favor of Horn & Hanna, the payees having assigned the note to the plaintiff. The defense interposed was, that the execution of the note was obtained through fraud and circumvention. The plaintiff recovered a judgment in the circuit court, and the defendant appeals.

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

Mr. W. H. RICHARDSON, for the appellee.

Per CURIAM: Was there fraud and circumvention in obtaining the execution of the note?

The maker of the note was the only witness.

He testified that the note was given for the privilege of selling the patent right of a hay-loading machine within certain territory; that it was represented to him that if he would give his note, a guaranty should be written upon the back of it that it should not be paid unless the machine proved to be profitable; and that the machine was worthless.

The note was introduced in evidence, and had no guaranty indorsed upon it.

On cross examination, the witness stated that he took a daily newspaper; could read very well; could read writing; that he knew the contents of the note before signing it; that the guaranty was written on another piece of paper, and that he supposed it was written upon the note.

The note was assigned by the payees before maturity.

Under the proof, we can not infer the fraud and circumvention intended by the statute, which shall void the note. To do so, would be to offer a premium for gross negligence.

The maker of the note could read and write with facility, and could not have been imposed upon if he had exercised the most ordinary prudence.

The principle involved in this case is fully settled in *Taylor* v. *Atchison,* 54 Ill. 196; *Leach* v. *Nichols,* 55 Ill. 273.

The judgment must be affirmed.

*Judgment affirmed.*

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## WILBUR F. STOREY *et al.*

*v.*

## MARY WALLACE.

1. SLANDER—*proceedings of courts—privileged communications.* A faithful report of the proceedings of courts of justice, is a privileged publication, and shall not be held a cause of action for libel. It would appear that slanderous statements, made by witnesses, which are not pertinent to the matter under investigation, are not privileged. Nor is it settled that coroners' inquests may be for this purpose classed with judicial proceedings.

2. A statement made upon the authority of a newspaper, and not purporting to be a report of such proceedings, is not privileged. Responsibility can not be evaded by offer of proof that the libel was in fact matter in evidence.

3. Proprietors of newspapers, though ignorant, at the time, of the publication of libellous matter, are responsible.

4. ACCORD *and satisfaction—retraction.* The publication of a retraction satisfactory to the injured party does not constitute accord and satisfaction, or release claim for damages without express agreement to that effect.

5. MITIGATION *of damages.* Want of express malice may be shown, also that a retraction of the slander is made, in mitigation of damages, but the retraction must be effective.

6. EXCESSIVE DAMAGES—*setting aside verdict.* Except in a case of flagrant wrong, a verdict will not be disturbed, especially when the damages have been reduced upon a second trial.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Messrs. WALKER, DEXTER & SMITH, for the appellants.

Mr. FRED. W. BECKER, for the appellee.

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

This was an action for libel, brought by Mrs. Mary Wallace against the proprietors of the Chicago "Times," on account of the publication in that paper, on the 8th of September, 1868, of the following article:

"OVER-DRINKING.

"James Wallace, a blacksmith by trade, forty years of age, but of late a saloon keeper at No. 133 Canal street, died suddenly at his saloon, in a fit, on Saturday, while sitting at breakfast. Wallace had formerly lived with his wife and family at Muskegon, Mich. In 1861 he enlisted, and was absent three years. On his return he was astounded to find an infant child in his wife's arms—progeny which he could not father. He left his wife, and has since that time drank very hard. At the time of his death he had been on a spree of a week's duration. An inquest was held yesterday at the saloon, and a verdict of 'died while in a fit of over-drinking.'"

The plaintiff resided in the State of Michigan, and, on seeing this article, proceeded to Chicago, and called at the "Times" office. She there saw the city editor, and after stating the falsehood of the paragraph, demanded its retraction. This was readily promised, and an article was at once written for that purpose and read to her. She said it was satisfactory, and, according to a witness for defendants, who was present at the interview, said a retraction was all she desired, though this last statement is denied by the plaintiff. This witness further testifies that she inquired if the retraction would be published the next day, and was told it would be. The next day was Sunday, and in the Sunday's edition of the "Times" the retraction was published, but it does not appear that it was

published or referred to, in any manner, in any subsequent paper. It is in proof that the Sunday "Times" is not a part of its regular issue; is not sent to the subscribers to the daily paper by virtue of such subscription, and has a much less circulation in the country than the regular edition of the paper. The plaintiff returned from this interview to her home in Michigan, and, as her daughter testifies, looked very eagerly for the promised retraction, but looked in vain, for the reason already given. On the 29th of the same month she commenced this suit.

The paragraph retracting the libel, and published in the Sunday "Times," was as follows:

"An item was inserted in the 'Times' a few days ago, which did great injustice to a worthy, hard working woman. At the inquest on the body of James Wallace, who died from the effects of intemperance, it was stated that the deceased had left his wife for the reason that he had come home from the army, after a three years' absence, and found a three months' old baby in her arms. Mrs. Wallace has evidence, in the form of an affidavit from her attending physician, Dr. S. W. Leonard, of Muskegon, Mich., that her husband was at home at the proper time, previous to the child's birth, and that she has the reputation of being an exemplary, hard working woman. The slur upon her character was, therefore, an unjust and unfounded one, for which the witness who uttered it was responsible."

There were three trials. On the first the jury found for the plaintiff a verdict for $3850, which the court set aside. On the second, the jury did not agree. On the third, the jury again found for the plaintiff, a verdict for $2500, and the court gave judgment.

The first ground assigned by appellants' counsel for reversing this judgment is, that the libellous paragraph was only a statement of the evidence given at the coroner's inquest, to

which reference is made in the article, and that its publication was therefore privileged.

It has become the settled law, both of England and of this country, that a faithful report of the proceedings of courts of justice is a privileged publication, and shall not be held a cause of action for libel. The courts consider the advantage to the community from such publication so great, that private inconvenience must yield to the general good. The English courts, however, have shown themselves disinclined to apply this rule to coroners' inquests, on the ground that the evidence upon such inquests is *ex parte*, and the proceedings decide nothing, and are but *quasi* judicial. *King* v. *Fleet*, 1 B. & Al. 380; *Duncan* v. *Thwaites*, 3 B. & C. 556; *Rex* v. *Fisher*, 2 Camp. 563. The authorities on this point are not, however, entirely harmonious.

While no case is cited on the other side so directly upon the point as those above quoted, yet the language used by several of the judges, in *Wason* v. *Walter*, 4 Law Rep. 73, and *Ryalls* v. *Leader*, 1 Law Rep. Exch. Cases, 296, is broad enough to apply the doctrine of privilege to inquisitions before a coroner. We shall not undertake to decide now whether, in this State, such inquests should be classed, for this purpose, with judicial proceedings, nor shall we determine another question suggested by counsel, whether, even if the publication of evidence given before a coroner is privileged, the privilege extends to slanderous statements made by witnesses, which are not pertinent to the matter under investigation. We will only remark, upon this last point, that it is difficult to see how the public is to be benefited from giving publicity to statements of that character, or upon what ground of public policy their publication is to be defended.

These questions may be passed over in this case, because the libellous paragraph does not purport, upon its face, to be a report of the evidence given upon the coroner's inquest. That the plaintiff was guilty of adultery, is stated as a fact on the authority of the newspaper, and not as evidence given upon

the inquest. The imputation is then made, on the same authority, that this adultery of the wife caused her husband to leave his home, and led to his intemperate habits, and finally to his death. After giving utterance to this monstrous libel, and giving it all the weight of its own authority, the paper states the fact that an inquest had been held, and what was the verdict. It nowhere professes to give the evidence, or to base its statements upon it, and only by a remote inference would the reader suppose that the facts alleged in the paragraph were derived solely from the testimony before the coroner.

That this paragraph does not fall within the rule of privileged publications is, then, too plain for argument. The newspaper was not professing to report evidence, but gave these statements to the public, upon its own responsibility, as true, and that responsibility it can not now evade.

Equally untenable with this is the next position of appellants' counsel, that the judgment should be reversed because the publication of the retraction, under the circumstances, was an accord and satisfaction. The court below instructed the jury that, if the retraction was published with the understanding between the parties that its publication should be a satisfaction to the plaintiff of all causes of action on account of the alleged libel, the plaintiff could not recover.

Without pausing to inquire whether the plaintiff might not have justly complained of this instruction, if the verdict had been the other way, it is sufficient to say that the jury found there was no such agreement between the parties, and found rightly. Giving to the evidence the most favorable construction for the defendants, it only shows that the plaintiff demanded a retraction from them, which they were very willing to make, on being satisfied they had been wrong, but does not show any stipulation or agreement that they were to be released from all claims for damages, as a condition of such publication. The evidence shows what is far more honorable

to the defendants, that they published this retraction as a simple act of justice to the plaintiff, and not as a condition of their being discharged from liability. Its publication was a matter to be considered by the jury in mitigation of damages, and they were so instructed by the court, but it had no other bearing upon the action.

It is suggested by appellants' counsel, in the conclusion of their argument, though only suggested, that the judgment should be reversed because of excessive damages. It must be a case of flagrant wrong, one in which the jury has been manifestly led away by prejudice or passion, to justify a court in setting aside a verdict in an action for libel, on the mere ground of excessive damages, where there have been two verdicts for the plaintiff, and the first has been substantially reduced on the second trial. This is not a case of that character, and we can not reverse the judgment merely upon this ground.

The verdict is for $2500. The proof shows the "Times" newspaper to be worth $200,000. The libel, directed against a woman whose character, on the record, stands unassailed, was one of singular cruelty. True, there was a retraction, but a retraction in any case is but poor atonement for such a wrong, and, in this instance, of much less than ordinary value, because so published that it would never be seen by many readers of the libel, and perhaps seen by none in the neighborhood of the plaintiff's home.

It is said the plaintiff inquired, in her interview with the city editor, if it would be published the next day. The jury probably thought the plaintiff knew nothing of the Sunday edition, and that she referred to the next issue of that edition of the paper which contained the libel. They probably further considered that the city editor knew her residence, for she showed to him the certificate of character brought by her from Michigan, and must have known her object was to have the retraction receive the same publicity and circulation as the libel. He knew its publication in the

Sunday edition would not accomplish the purpose she had in view; and if he had been as anxious as he should have been to render all the atonement in his power for the wrong the paper had committed, he would have caused the retraction to be published on Monday, whether published on Sunday or not. While obeying the mere letter of the plaintiff's demand, he knew he was not meeting its spirit, and that the publication on Sunday alone was not the atonement she expected. These considerations, doubtless, occurred to the jury, and we can not say they gave them undue weight.

Doubtless, too, the jury, in determining the amount of their verdict, thought something was due to the protection of the public. The article in question, grossly libellous as it is, is of a kind lamentably frequent in the columns of American newspapers. There is probably no other country in the civilized world where private character has so little security against newspaper assault. The conductors of the press are neither better nor worse than other men, but they are singularly reckless in the exercise of their great power. The anonymous mode of its exercise blunts the sense of personal responsibility. In pandering to the morbid taste of their readers for personal and worthless gossip, they assail private character with contemptuous indifference, and are sometimes unwilling, and always unable, to fully redress the wrong. That is the nature of the case before us. Here was a cruel libel published merely to make a paragraph. Here was an explanation so published as to show that the persons having the matter in charge thought it of no moment that the retraction should receive the same publicity as the libel, though the latter had outraged the sensibilities and sullied the character of an innocent and unoffending woman. The jury probably intended to show, by their verdict, that persons who have been libellously assailed by the public press, need not resort to acts of violence, but can find redress by appealing to the laws. It would ill become this court to teach a different lesson.

The defendants in this case probably had no personal knowledge of either of these articles until their publication, but they must be held responsible as the proprietors of the paper.

The judgment of the court below is affirmed.

*Judgment affirmed.*

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## THE HIGHWAY COMMISSIONERS OF THE TOWN OF RUTLAND

*v.*

## THE HIGHWAY COMMISSIONERS OF THE TOWN OF DAYTON.

1. HIGHWAY COMMISSIONERS—*their official character.* They are a *quasi* corporation. Suits by, or against them, should be brought in their official, not individual names.

2. TOWNS—*joint liability.* In order to enable a town to compel an adjoining town to contribute to the making or maintaining a bridge over a stream dividing them, under section 18, article 16 of the township organization law, a legal liability to such contribution must be shown.

3. LIABILITY—*how shown.* This may be, by the record of official acts; by acts of possession and control; by the recognition and use of the easement, or in any manner evincing a complete understanding to that effect. The mere use of a bridge or easement, opened by private enterprise or general subscription by the public, creates no liability.

4. *But,* it seems that if a bridge, built by private means and dedicated to public use, is not indicted as a public nuisance, but, on the contrary, if it be used so much and so long by the public as to evince its usefulness to them, it should not continue to be a burthen to those who built it, and may become a public charge. In such case, facts which do not, of themselves, afford a legal estoppel, or conclusion that there is an acceptance, may be treated as affording proof of acceptance.

5. APPROPRIATION—*effect of protest.* When the people of a township petition for, and the highway commissioners recommend, a tax to repair such bridge, but protest against being further liable, and the county supervisors levy a tax and appropriate money for the purpose prayed for, the

act, coupled with the want of authority to repair other than public highways, would seem to be a recognition, notwithstanding the protest.

6. INSTRUCTIONS. It is error to instruct the jury that certain facts constitute acceptance, facts being proper for the consideration of the jury.

7. MEASURE OF DAMAGES. Liability being established, the town which made the repairs, and paid or became responsible for the cost, can not recover more than is shown to be one-half of the sum reasonably and judiciously expended.

8. IMMATERIAL ISSUE. It can not be pleaded in such a case, that the bridge is unlawful by reason of a law declaring the river a navigable stream.

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

Messrs. BUSHNELL & BULL, and Mr. G. S. ELDRIDGE, for the appellants.

Messrs. DICKEY, BOYLE & RICHOLSON, Mr. J. B. RICE, and Mr. D. S. SNOW, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellees in the county court of LaSalle county, against appellants. It appears that the towns of Dayton and Rutland are organized under the township law, and are adjoining; that they are divided by Fox river; that a highway, leading in a northerly direction through these towns, crosses the river at the village of Dayton; that, in 1853, a bridge was built across the river at that point, which became a part of the highway, and was used for public travel by the people generally. It is claimed by appellees that the bridge became a public bridge which both townships were bound to keep in repair, and having become dangerous to travel and needing repair, appellees notified appellants that the bridge was unsafe, and requested them to unite with them in repairing it; and again gave them written notice to repair within twenty days, or appellees would do so and look to appellants for one-half of the cost.

Appellants denied that the bridge was built as a town bridge, or ever became such, and that it was built by private enterprise, and that the town of Rutland was in nowise required to aid in repairing the same, and refused to contribute for the purpose. Thereupon, the commissioners of highways of the town of Dayton proceeded to and repaired the bridge, and brought this suit to recover contribution from the town of Rutland for half of the expenditure. On a trial in the court below, the jury rendered a verdict in favor of appellees for the sum of $1317.36, upon which judgment was rendered, and from which this appeal is prosecuted, and a reversal is asked.

Appellants assign as error, that the court below admitted improper evidence; rejected proper evidence; the court gave improper instructions on behalf of appellees; refused proper instructions asked by appellants; in overruling the motion for a new trial and in arrest, and that the verdict and judgment are against the law and evidence.

It is first argued that the suit was improperly brought; that it should have been brought in the individual names of the officers, as commissioners. By section 2 of article 12 of the township organization law, it is provided that, in all suits, the several towns shall sue and be sued by their names, except where town officers shall be authorized by law to sue in their name of office for the benefit of the town. Section 9 provides that, in suits by or against town officers in their name of office, costs shall be recovered as in like cases between individuals.

Section 18 of article 16 provides that, whenever any adjoining towns shall be liable to make or maintain any bridge or bridges over any stream dividing such towns, or on the line dividing such towns, such bridge or bridges shall be built and repaired at the equal expense of said towns, without reference to the town lines.

Section 20, of the same article, declares that, if the commissioners of highways of either of such towns, after reasonable notice in writing from the commissioners of highways of any other of such towns, shall neglect or refuse to rebuild or repair

any such bridge or bridges, it shall be lawful for the commissioners so giving notice, to make or repair the same, and then to maintain a suit *in their official capacity* against said *commissioners so neglecting or refusing to join in such making or repairing;* and in such suit the plaintiff shall be entitled to recover one-half of the expenses of such building or repairing, with costs of suit, and interest.

The 21st section provides, that any judgment recovered against commissioners of highways in their official character, shall be a charge on the town, and collected in the same manner as other town charges, except when the court shall certify that the neglect or refusal of the commissioners was wilful or malicious, in which case they shall be personally liable for such judgment, and the same may be enforced against them in the same manner as against individuals. These seem to be the only provisions relating to the question under consideration.

Had the general assembly intended that these officers should sue in their individual names, it seems to us that it would have been so declared in terms. But the provision is, that they shall sue in their official capacity; and to ascertain precisely what is meant by the phrase, is a question by no means easy.

In the case of *Manlove* v. *McHatton*, 4 Scam. 95, it was held that where a note was given to the individual who was school commissioner, for the use of the inhabitants, etc., his successor might sue in the name of "school commissioner of the county;" and that the name of the individual might be stricken out as surplusage. It is true, in that case, the statute authorized the suit to be brought in the name of "school commissioner of the county;" and when the statute requires a suit to be brought in the official capacity of highway commissioners, we can see no objection to dropping the individual names of these officers. They are called in the statute, and are generally known by the name of, highway commissioners; and it is conceded that they are a *quasi* corporation.

If they were to sue in their individual names as commissioners, and their term of office should expire pending the suit, it would abate, as they would no longer act in an official character, and hence could not further maintain the suit in that capacity. And it may be a serious question, whether the suit could be revived in the names of their successors; and if it could, then the same difficulty would present itself, in case their predecessors had acted wilfully or maliciously, in rendering judgment, so as to hold them liable, as the successors could not be made personally responsible for the malice or neglect of their predecessors. When they have so acted, there is no difficulty in making proof of who the commissioners were who had thus rendered themselves liable, and having it so appear in the judgment. To carry out that provision of the statute, such would have to be the practice, in case their term of office had expired before the judgment should be rendered, whether the suit should be brought in one or the other mode.

Again, it seems to have been the practice to bring such suits in the mode adopted in this case. See *Commissioners of Highways, etc.* v. *Harper*, 38 Ill. 103; *Commissioners of Highways, etc.* v. *The People*, 38 Ill. 347. It is true, that the question here presented was not raised in those cases, but it shows that the construction was given in both of those cases that the suit should be brought in the mode here adopted. The statute will certainly as well bear this as the other construction, and as we can foresee no inconvenience arising from it, we have no hesitation in adopting it. A judgment against persons not occupying the office of commissioners, would not bind the town. If against the successors of those who committed the wrong, they could urge that they did not omit the duty, nor could a judgment be rendered against them *in personam* for the neglect of duty by their predecessors. For these reasons we are of opinion that the suit was well brought.

The case of *Galway* v. *Stimson*, 4 Hill, 136, does not apply, as the statute of New York is essentially different from ours. Their statute declares no suit shall abate by the death of such

officer, but the court shall substitute the names of the successors in such office. Our statute contains no such provision. The statutes being unlike in their provisions, different constructions must be given.

The 18th section of the act of 1865, is relied upon to render appellants liable for half the expense incurred in repairing this bridge. The question arises, whether appellants were liable to repair before the labor was performed on the bridge, as this section does not impose such a duty unless it be where the town had erected, or joined in its erection, or had previously become, in some other mode, liable to perform such duties. By erecting the bridge, or by joining another town in its erection, by recognizing its erection or repair as a duty devolving on the town by resolution, or by the proper town authorities making necessary repairs, the liability of the town would be created or recognized.

It appears that this bridge was originally built by private enterprise, in which the public authorities did not participate. Subsequently, the bridge being free to public travel, the ford near the river was abandoned, and the travel thenceforth was over the bridge. In February, 1855, the commissioners of highways of Rutland township laid out and established a public highway, commencing at this bridge, running in an easterly direction through the town. The road was traveled by the public and worked by the highway commissioners. The first bridge erected where the present structure stands was carried away by high water and ice in 1857; and when the bridge was subsequently erected, the board of supervisors appropriated $500 for the purpose, and a tax of sixty cents on the one hundred dollars was imposed on the property in Rutland on the petition of citizens and recommendation of the board of commissioners of that town, but there was a protest in the petition and recommendation against the town becoming liable for its future maintenance. Subsequently, the highway commissioners nailed boards across the end of the bridge in their town to prevent persons from passing over it and receiving injury on account of its unsafe condition.

We are clearly of the opinion, that the persons who erected the bridge intended to dedicate it to public use; and as equally clear that the officers of the town of Dayton regarded their town as liable to repair. The fact that they proceeded to make the contract for rebuilding the bridge, is evidence of that fact. On both of these propositions the evidence is clear and satisfactory, and they require no discussion.

But it is urged that the town of Rutland is not liable, as the officers of the town have never accepted the dedication, or done any act either recognizing or creating such a liability.

At the common law, slight circumstances have been held to warrant the inference of an acceptance of such a dedication. In the case of *The King* v. *The Inhabitants of West Riding*, 2 East R. 342, Lord ELLENBOROUGH, in delivering the opinion of the court, said that, at the common law, counties are chargeable with the repair of bridges unless it be shown, under the statute of the 22 Hen. 8, C. 5, that some persons, lands, tenements, or bodies politic, are chargeable with their repair. And it was held that, whilst public travel over a bridge did not necessarily fix the liability of the county for such repairs, it was sufficient to require the county to show that some other person was bound to repair; that the fact that it was adopted by the public travel over it, was evidence that it was not a nuisance; that no person could impose an unsafe bridge upon the public, and it may be treated as a nuisance and indicted as such. And it is held, that if the public lie by, without objection, and make use of it for some time, it is evidence that they adopt the act; and the bridge becoming of public benefit, the burden of repair ought properly to fall upon the public. Lord COKE is referred to, where he says, in 2 Inst. 700: "If a man make a bridge for the good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ* or *prescriptionis.*" He also says: "But admit that none at all were bounden to the reparation of the bridge, by whom should it be repaired, by the common law? The answer is, by the

whole county, etc., wherein the bridge is, etc.; because it is for the common good and ease of the whole county." Lord ELLENBOROUGH says: "Now, that this bridge is for the common good, is proved by the use of it by all of the King's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then, after having enjoyed the benefit of it, shall the public object to it when they begin to feel the burden of repair?"

The case of *Rex* v. *West Riding, etc.*, 5 Burrow, 2594, announces the same rule. This last case is, in very many of its features, similar to the one under consideration. The rule announced by Mr. Justice Aston, in that case, is still broader. It is, "That if a man build a bridge, and it become useful to the county in general, the county shall repair it." The case of *The State* v. *The Town of Crampton*, 2 N. H. 513, announces the doctrine that, though a bridge be erected, not by the public, it may still become a public charge in respect to repair. It is there said the true test is, that if the bridge is dedicated to the public, if used by the public and found to be of general utility, it should not continue a burthen to the individuals who built it. It is also said, though the use and repairs of it by the public may have been under a protest against their liability, and for a shorter period than twenty years, liability is nevertheless fixed if the bridge was not indicted as a nuisance, and it be used so much and so long by the public as to evince its usefulness to them.

Then, it only remained to show, that the town of Rutland accepted the dedication. This court has repeatedly held, that to render a dedication complete, the owner must intend to appropriate the easement in the land to the public, to be permanently appropriated to the particular use intended; and the public must accept it for the use intended by the donor. An acceptance may be manifested in a variety of modes. The most usual and satisfactory evidence of the fact is, by its appropriation to the specific use by the public officers having control of the easement. Where a road is dedicated, its acceptance

is inferred by the acts of those having the care of public highways, by recognizing and controlling it in the same manner as they do other highways; by repairing it when required; by having obstructions removed when needed, together with various other acts, which indicate a recognition that it is exclusively for public use. That they so regard it, may also be inferred from their declarations; by placing it on a map of the roads of the town, or any act which manifests a design by them to treat it as one of the highways of the town. And we have seen, from the authorities above quoted, that at the common law, the mere fact that a bridge was traveled by the public such a length of time as to create the presumption that it was of public benefit, caused it to become a public charge, unless the burthen was shown to be on others; and that the public authorities might have it indicted as a nuisance, if not of public utility.

In this case there are, in addition to the fact that the bridge was continuously traveled by the public without let or hindrance, which we do not hold, of itself, as affording a legal estoppel or conclusion that there was an acceptance, but simply as a fact tending to prove an acceptance, other circumstances tending to prove that fact. The bridge was not placed on the highway, but some distance from it, and yet the road was obstructed leading to the ford of the river, and travel turned over the bridge, and the record fails to disclose any evidence that those having charge of the roads, and whose duty it was to repair them and remove such obstructions, ever had, or attempted to have, them removed. On the contrary, they seem to have acquiesced in the obstruction of travel by way of the ford for the whole period, from the rebuilding of the bridge in 1857 until it was again rebuilt, and out of which this controversy arises.

Again, the road commissioners of Rutland established and opened a road from the east end of the bridge, running easterly through the town. They thus led public travel to the end of this bridge that it might travel over it, instead of the

ford of the river, where the public highway previously ran; and if the way leading to the bridge was private, and the bridge was private, they terminated a public highway in a private way and at a private bridge, when their duty required them to terminate the road at a point where the travel would have the right to pass therefrom in some other direction than by that over which they traveled to its terminus. But even if the private way leading to the bridge became a public road by locating a road to the end of the bridge, still, the bridge itself was private unless previously accepted, or was then accepted, by the commissioners, in locating the road.

Again, one of the highway commissioners of Rutland township boarded up the east end of the bridge so as to prevent travel from passing over it, as he says, to prevent litigation, in which an accident might involve his town.

When the bridge was carried away by the flood and ice, a large number of the citizens of the town of Rutland petitioned that a tax, sufficient to yield about $1000, should be levied on the taxable property of their town to aid in rebuilding the bridge. And they must have known that such a tax could not have been legally levied to aid in the construction of a private bridge. And the highway commissioners of Rutland township recommended the board of supervisors to levy a tax of sixty cents on the one hundred dollars' worth of taxable property in their town, to be used in reconstructing the bridge. And they must have known they could only legally recommend the levy of such a tax to build or repair a public bridge, which their town was either in whole or in part liable to repair.

It is true, that the petition of the citizens and the recommendation of the highway commissioners were coupled with a statement that these several acts were not to be held to render the town liable to future repairs. If these commissioners, or their predecessors, had recognized this bridge as a public highway, and thus accepted it as such, then such a protest could not have any effect one way or the other; or, if by

recommending the levy of the tax, they intended to recognize the bridge as a town charge, the protest could not prevent the liability of the town. Nor would it have any effect on acts of recognition, if any were shown, by their successors. When officers perform official duties, the law attaches the legal effect to be given to such acts, and no protest of the officer can change the result flowing from the act.

These were all acts tending to prove an acceptance of the bridge, to be considered by the jury. And it was for them to say whether they all, together, or any one or more of them, proved an acceptance of the dedication. If there was an intention on the part of the highway commissioners to accept, and that was manifested either by declarations or acts, then Rutland township is liable to contribute to the expense of the rebuilding of this bridge.

It is objected that the court erred in admitting the plat of the State road, crossing Fox river at the place where the bridge was erected, in evidence. We do not perceive how the admission of this plat could, in the slightest degree, affect the rights of appellants. It was not questioned that a State road ran near to the bridge, and the plat may have been of use to the jury in learning the relative position of the ford and the bridge. As we can see no injury resulting, or likely to result from its admission, we can not reverse for that reason, even if it was improperly received as evidence.

It is also urged that the resolution of the board of supervisors, making an appropriation for the rebuilding the bridge, was improperly admitted in evidence. It is an elementary rule, that if evidence is admissible for any purpose, it should not be rejected. In this case, it was material for the jury to know who constructed the bridge erected in 1857, and from what source the funds were obtained. On the part of appellants, it was contended that the bridge was a private enterprise, whilst appellees contended that it was a public bridge, constructed and recognized as such. To show that it was so regarded by the board of supervisors representing the whole

county, the resolution was properly admitted. There was no error in the admission of this evidence.

It is again urged, that the court below erred in rejecting the evidence offered to prove that the bridge was not of public utility; that there were other bridges which accommodated the public in going to and returning from their places of business, and that the bridge accommodated private individuals. The question was, whether the proper officers had recognized the liability of the town; whether they had accepted the bridge as a dedication, and not whether it would be to the advantage of the town to do so, and appropriate the bridge to public use. This being the question, it did not matter whether it would be judicious to adopt it if the officers had not already accepted it. The evidence was properly rejected.

It is next urged, that the court below erred in giving instructions for appellees. It is claimed that their first instruction is too general. It is technically incorrect, as it does not confine the liability of the town to repair, to public bridges. And as a town is only charged with the repair of such, this instruction should have so informed the jury. The very question lying at the foundation of the right to recover was, whether it was a public bridge. Until that was established, there could be no liability.

The third of appellees' instructions was erroneous. It informs the jury that, if the highway commissioners in Rutland laid out and opened a public road to the end of the bridge, that fact would render the town liable for repairs. As this was originally a bridge built by individuals, the question should have been left to the jury whether they had donated it to the public, and the public had accepted it. The opening of a public road to the end of the bridge did not, as a legal conclusion, render the town liable for repairs. That was a circumstance tending to show an acceptance of the dedication. The fourth of appellees' instructions is liable to the same objection. The fifth instruction erroneously asserts that, although this bridge was built by private individuals, still, if the town

authorities permitted the public to travel over the bridge, and repaired the roads leading to the bridge, the towns thereby became liable for its repair. We are at a loss to perceive how the town officers could prevent the public from traveling over the bridge. If private property, they could not close the bridge without becoming trespassers. And the law imposed the duty of repairing all public roads in their towns. If this instruction is correct, then the commissioners had no option whether they would or not accept the dedication, but had the liability thrust upon them without their consent, and they were deprived of the right to determine whether the bridge was of such public necessity as to require its adoption as a public highway, for the repair of which the town should be liable. These facts, as we have seen, were for the consideration of the jury in finding on the question of an acceptance by the town officers, but they did not form legal conclusions or estoppels.

The instructions were not sufficiently limited as to the measure of damages. If Rutland is liable, it is only for one half of the cost of repair reasonably expended. Dayton could have no right to wastefully or recklessly expend money, and impose half of the burthen upon Rutland. Appellees had no right to recover half of the appropriation made by the county, but may participate in any donation made to towns to aid in repairing the bridge. But if any donation was made to the town of Dayton to relieve that town from a portion of the expense of constructing the bridge, then Rutland would not have a right to participate in such donation. The instructions were not sufficiently specific on this question.

It is next urged, that the court erred in refusing instructions asked by appellants. Whilst a portion of them assert correct principles as to a dedication and acceptance of the bridge, they use the word transfer instead of dedication. The term might be regarded by the jury as requiring a written transfer. In fact, the language rather implies a conveyance than a parol gift, and with that construction they would be

erroneous, as such a dedication may be effectually made by parol, or mere acts of acquiescence, and the like. With this correction, no objection is perceived to the third and fourth of appellants' instructions.

The sixth of appellants' instructions was unobjectionable, as the mere fact that the town had repaired its public roads, including that leading to the bridge, could not, as a legal proposition, create a liability to repair, but the court might well refuse to give it, inasmuch as there were other circumstances in connection with that from which an acceptance might be inferred, and consequently liability to repair. An instruction can not be said to be entirely fair which simply selects one of several facts tending to defeat liability, unless it concludes the case, and base an instruction on it alone, but it should be more general and comprehensive in its scope.

The seventh is not explicit as to the dedication, but required that the bridge should have been turned over to the town authorities. From this, the jury would probably infer that a formal surrender should have been made, when such is not the case. Merely permitting the public to use the bridge, without objection, for a length of time, may, if the surrounding circumstances justify it, amount to a complete dedication, without any formal donation, or formal offer to give it to the public. This, then, rendered this instruction vicious, and it was properly refused. The same objection applies to the eighth.

The tenth instruction asked by appellants was properly refused. It assumed, as a matter of law, that the petition and recommendation that a tax be levied to rebuild the bridge after its destruction in 1857, coupled with a statement that the town should not be liable for future repairs, did not render the town liable. That was a question for the jury. If the officers regarded the bridge a town charge, and recommended the levy of the tax because they so regarded it, and not as a mere gratuity to private individuals, then it was a recognition which, if not previously accepted, rendered the town liable.

Their intention in performing the act would govern. It was for the jury to find whether the condition was based on some promise that the town should not be required to repair, or other consideration.

The eleventh instruction is not correct in the last clause, which asserts that appellees are entitled to recover no more than one-half of the amount for which a competent and responsible bridge builder offered to construct it at the time. This refers to none of the circumstances surrounding the transaction. The plan of the work, the time when payments could be made, and the material used, would all contribute to make a material difference in the contract price. If the town of Dayton only had half of the money on hand, and the time when the balance should be paid depended upon when the other half could be obtained from Rutland, then all must see that the contractor would, of necessity, increase the price. Had the instruction been given, the jury could not have considered any of these circumstances, if they existed and appeared from the evidence. This instruction does not confine the proposition to the work as it was done, and the character of the payments to be made.

The twelfth of appellants' instructions was properly refused. The mere fact that the Greens, whether for the promotion of their own interest, the public good, or for other reasons, saw proper to indemnify the town of Dayton from payment of more than $1000, did not release the town of Rutland from liability, if it existed, for the payment of one-half of the cost of repairing the bridge. Nor is the thirteenth instruction correct. If the town of Dayton has paid, or become liable to pay, for the repairs, they have the right to recover one-half of the amount, if the sum is fair and reasonable.

It was also objected, that Fox river was, by an act of the legislature, declared to be a navigable stream, and this bridge is an obstruction, and is therefore unauthorized. Whether or not the charter, previously granted, authorized its construction, or whether or not its construction is in violation of the

right of the public to navigate the river, can not be raised collaterally in this proceeding. If it obstructs navigation, and is violative of the law declaring the stream navigable, it can be indicted and abated as a nuisance. When the question shall be thus directly presented, it will then be determined.

The judgment of the court below, for the errors indicated in this opinion, must be reversed, and the cause remanded.

*Judgment reversed.*

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## THE CHICAGO ARTESIAN WELL COMPANY *et al.*

*v.*

## FRANCIS E. COREY *et al.*

1. MECHANIC'S LIEN—*how acquired.* The law of lien enacted in 1845 applied only in cases of express contracts to furnish materials or labor. That of 1861 enlarges the provision so as to cover all contracts, express or implied.

2. LIEN—*proof—request.* Proof of labor or materials furnished within one year after request, express or implied, will sustain the lien.

3. SAME—*second purchaser.* A sale of the property after the lien is fixed, to a party cognizant of the encumbrance, gives him no rights as against the lien.

4. SAME—*diversion of materials.* The diversion to other uses, without collusion of the seller, of a portion of the materials purchased for use upon the premises, does not tend to defeat the lien respecting it.

5. NEW EVIDENCE. Upon a third trial, new evidence tending to set aside a former decree, must be distinct, positive and overwhelming.

6. COLLATERALS—*sale of by holder, when void.* One to whom securities are pledged for security of a debt, can not become the purchaser at his own sale.

7. Such sale, if illegal, does not cancel the securities, but the pledgee is remitted to his former rights respecting them.

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

Statement of the case.

This was a proceeding to enforce a mechanic's lien.

The original petition was filed April 6, 1867. It appears that A. F. Croskey held the legal title to the southeast quarter of southeast quarter of section 1, town 39 north, range 13 east, in the city of Chicago—George A. Shufeldt, being his partner in business, having an equitable interest, and the firm being owners of valuable improvements upon the land. The firm purchased lumber of Francis E. Corey & Co., composed of Corey and Amasa Dwight, and thereby became indebted about $2500. The original proceeding was against Croskey alone, but Shufeldt joined in the answer.

The Chicago Artesian Well Company came in as a defendant, alleging purchase of the property from Croskey and wife, March 10, 1867.

Munn & Badger also became defendants, setting up a mortgage for some $11,000, dating before the sale to the well company.

A trial was had, resulting in a decree favorable to the petitioners. The judgment was reversed and the case remanded by the Supreme Court on account of error in draft of decree. 48 Ill. R. 442.

In June, 1870, an amended petition was filed, followed by amended answers. Upon the hearing, the court dismissed the petition on the ground that the petitioners had not established their lien. This decree of dismissal was reversed, and the case again remanded at the September term, 1870. (57 Ill. 251.) A third trial was had, in which further and new testimony was taken tending to defeat the claim of the petitioners. It was also shown that A. C. & O. F. Badger, who held bonds secured by a $100,000 mortgage on the property, had caused them to be sold at auction, becoming themselves the purchasers, and claimed to hold them upon the sale, and to enforce a prior lien for a balance, under the proceedings consequent upon the petition.

Upon the hearing, the court sustained the lien and decreed the sale of the property for the payment of the amount proved,

after payment of the claim of Badger & Darling, for whom he held bonds in trust.

The Artesian Well Company then again appealed to this court.

Messrs. GOUDY & CHANDLER, and Mr. J. N. JEWETT, for the appellants.

Messrs. WAITE & CLARKE, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a petition for a lien by material-men, and has been before this court several times.

At the September term, 1870, it was held by this court, on the testimony then in the record, that a lien had been established by the petitioners. It now comes before this court with the testimony of Wm. T. B. Read superadded, and a bill of interpleader filed by A. C. & O. F. Badger.

By stipulation, the record and abstract filed at the last September term is to be taken and used as parts and portions of the record necessary for this appeal, so far as the facts of the case appear in that record.

The principal witnesses for the petitioners, as appears by the original record, were, Dwight, one of the petitioners, and Croskey and Shufeldt, two of the defendants, and several others; and from their testimony we decided, at the last term, a lien was established. It remains to inquire, does the testimony of Read conduce to a different result?

Upon a careful examination of his testimony, we do not think it weakens, in the slightest degree, the claim of the petitioners to a lien.

Read states he bought all of this lumber, when the proof is he bought none of it. The contract for the lumber was made with one of the petitioners, Dwight, and Croskey, for the company, and to be delivered on Read's orders. He is contradicted also in another point, that the price was agreed

upon. This he could not know, as he was not present at the time the contract was made. His "thinking" the price was "$14," is no evidence that the price of the lumber was $14 *per thousand,* and so agreed and understood by the contracting parties. His evidence does not appear well in the printed abstract, and as he was personally present before the Superior Court, and there examined and cross-examined, he could not have made a favorable impression upon that court. His evidence fails to overthrow that of the other witnesses, on whose testimony a lien was declared to have been established, at the last term. The great preponderance of the testimony is in favor of a lien under the act of 1861. This act requires only, in order to create a lien, so far as the agreement of the owner of the land and the mechanic or material-man is concerned, that labor or materials should be furnished at the request of the owners of the land, for erecting or repairing any building thereon, when no price is agreed upon, or no time is expressly fixed for the payment of such labor or materials, provided, that the work is done and materials furnished within one year from the commencement of the work, or the commencement of furnishing the materials. A contract arises by implication from these facts, the existence of which creates a lien on the land. To bring a case within this act, it is only necessary, by a material-man, to show that he, at the request of the owner of the land, furnished him with materials for making improvements on the land, and the material-man, afterwards, in compliance with this request, furnishes the materials, and they are used for the purpose indicated: then a lien is created, by the act of 1861, for the value of the materials, provided they are furnished within one year, and there need not be any other agreement, express or implied, in order to the creation of the lien.

We are satisfied, from a full review of the whole case, in the light of the additional testimony of Read, that petitioners have established a lien on these premises. The request of Croskey and company, to the petitioners, to furnish to Read the lumber, to be used on the artesian well premises, and being furnished

under this request, and used on the premises, are all the elements essential to the creation of a lien under the act cited. That this lumber was put into the buildings on the artesian well premises, is too clear to admit of doubt. The fact that a small portion of it was diverted to other uses, can not prejudice the claim of the petitioners, as they delivered the lumber for a specific purpose, on request, on the land of the defendants.

We perceive nothing in the testimony of Read to change the conclusion we reached at the last term. The whole ground was then carefully examined, and we see no reason why we should retrace our steps.

The fact that some of the lumber especially bought for buildings on these premises was diverted by the purchasers to other purposes, can not have the effect to destroy the lien, nor is there any satisfactory evidence that any considerable portion of it was so diverted. To claim an exemption from a lien on this account, the proof of the quantity diverted should be clear. The knowledge of the fact, if it existed, was with the defendants, and the onus was upon them to supply such proof.

Another point made by appellants is, that the note was cancelled. The note was filed in the cause, but the record does not show it was for cancellation. If it was cancelled, then there would be strong equitable grounds for allowing interest on the account, the justice of which had been admitted, and payment vexatiously delayed. Interest on the account would increase the amount of the decree.

The remaining point is, that the Badgers were not entitled to a lien, as provided by the decree.

It appears the Badgers held the bonds of this company, secured by a mortgage on the premises. They attempted to sell these bonds and become themselves the purchasers. This sale, if illegal, but remitted them to their original rights, and did not cancel the bonds. They exist in all their original vigor, and they had a right to set them up for the amount appearing on their face.

There may be a trifle too much allowed the Badgers—it is a mere trifle—and would have been corrected on motion to the court. We will not send the cause back on this account. Appellants saw, or could have seen, the draft of the decree before it was entered, and should then and there, in the Superior Court, sought a correction.

As to the point that these bonds should be surrendered to Shufeldt, it is a sufficient answer to say, his right to demand the bonds can not be asserted until he has paid the debt for which they were pledged. The court in which the bonds are filed can make such order in this respect as justice may require.

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

*Decree affirmed.*

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## JAMES W. MARTIN

*v.*

## S. CORNING JUDD.

1. REDEMPTION BY CREDITOR—*regularity of his judgment.* A debtor who has failed to redeem within twelve months may confess judgment in favor of another creditor upon a *bona fide* debt, for the purpose of enabling him to redeem, but the indebtedness must be clearly shown and the proceeding free from suspicion.

2. JURISDICTION—*attorney.* A court acquires jurisdiction of a party beyond reach of its process, on entry of appearance by attorney.

3. APPEARANCE—*when sufficient.* The authority of an attorney appearing in open court, will be presumed to be regular until the contrary is shown. But in vacation, authority to confess judgment must affirmatively appear; no presumption will be indulged as to his authority.

4. RATIFICATION. Ratification of act done is equivalent to precedent authority, and relates back to the date of the execution of the power.

5. SETTING ASIDE JUDGMENTS, VOID AND VOIDABLE—*at whose instance.* Collateral, as well as direct parties, may impeach a void judgment, as when confessed through fraud and collusion without indebtedness. But if only voidable, the rule seems to be different, and only the party himself can impeach it.

6. RIGHT TO REDEEM—*when lost.* A judgment creditor purchasing the land within the twelve months, takes his grantor's right of redemption, but loses his right to redeem as a creditor.

WRIT OF ERROR to the Circuit Court of Fulton county; the Hon. CHAUNCEY L. HIGBEE, Judge, presiding.

Messrs. MCCULLOCH & WINTERS, for the plaintiff in error.

Messrs. GOUDY & CHANDLER, and Mr. S. CORNING JUDD, in person, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was to set aside a redemption of the lands in controversy, and for an injunction to restrain the plaintiff in error from taking a deed under the sale subsequently made.

The land had previously been sold as the property of Andrew Hoagland, on an execution issued out of this court, on a judgment for costs, in the case of *Mansfield* v. *Hoagland et al.*, and at such sale the defendant in error became the purchaser.

The right to the relief claimed, is based on the ground that the judgment upon which the redemption was made was fraudulently obtained by the plaintiff in error, by collusion with other parties, in a court having no jurisdiction of the person of Andrew Hoagland by any service of process, and whose appearance was only entered by an unauthorized attorney, and in a case where there was, in fact, no indebtedness due from the judgment debtor to the redeeming creditor, the plaintiff in error, and therefore the judgment was absolutely void and the redemption a nullity, and because the deed, if the plaintiff in error should be permitted to obtain one under the sale

thereafter made, would be a cloud on the title of the defendant in error when it should be perfected under the original sale.

The defense set up to the case made by the bill, is:

*First*—That there was a *bona fide* indebtedness due from Andrew Hoagland, the judgment debtor, to the plaintiff in error, at the time the judgment was confessed.

*Second*—That McCulloch, the attorney who entered the appearance of the judgment debtor in the circuit court of Peoria county, was fully and legally authorized to do so by Joseph C. Hoagland, the attorney in fact of Andrew Hoagland, and the power under which the attorney in fact acted was broad enough to include the employment of the attorney for that purpose.

*Third*—That the act of McCulloch in confessing the judgment on his behalf, was subsequently ratified and confirmed in all things by Andrew Hoagland, by an instrument under seal, and hence, that the judgment was valid and the redemption legal.

The land in controversy had been, for a number of years, and was still, the subject of litigation in chancery and at common law, between Mansfield and Hoagland and others, in the various courts, at the time the defendant in error purchased it at the sheriff's sale, on the execution issued out of this court. During the period that these proceedings were being had, and ever since, Andrew Hoagland resided in the State of Ohio, but the business in relation to the land had been conducted in his behalf by Joseph C. Hoagland, his attorney in fact, who was a resident of this State. McCulloch, who is charged with complicity in obtaining the alleged fraudulent judgment, was the principal attorney of Andrew Hoagland in the protracted controversy in regard to this property. He was employed by Joseph C. Hoagland on behalf of his brother Andrew, and it was through him that his fees and other expenses attending the litigation were paid. The funds with which these expenses were paid, were procured from the plaintiff in error on the

credit of Andrew Hoagland. Of this, there can be no doubt; the evidence is all to that effect. The indebtedness thus created was still subsisting at the time the judgment was confessed—certainly to the amount of that judgment.

It appears that the land had been sold, and the twelve months allowed by statute for redemption had expired before the fact of the sale had become known to any of the parties acting on behalf of Andrew Hoagland, the land being situated in a different county from the one in which they resided. The fifteen months allowed in which a creditor might redeem, was also about to expire. Knowing of the indebtedness of Andrew Hoagland to the plaintiff in error, McCulloch advised that a judgment should at once be confessed so as to enable him to redeem the land, which was accordingly done. There was no time to consult with Andrew Hoagland, nor was it deemed necessary, for the reason it was believed that Joseph C. Hoagland was fully authorized and empowered to act in his stead. The debt was honestly due to the plaintiff in error, and the purpose in view was lawful. Had Andrew Hoagland, himself, been present, no one would doubt his right to appear in open court and confess a judgment expressly to enable the judgment creditor to redeem the land, if there was a *bona fide* indebtedness existing and due to such creditor. This would be his clear legal right, so that he could make the property pay as much of his indebtedness as possible. *Phillips* v. *Demoss*, 14 Ill. 410; *Karnes* v. *Lloyd*, 52 Ill. 113.

It would be alike lawful for the attorney to do the same thing in the name of the principal, if his authority in the premises was sufficient for that purpose.

There being a *bona fide* debt, in this instance, due to the plaintiff in error, and the object to be attained a statutory right, the transaction is relieved from any fraudulent intention. There was no purpose to wrong or defraud the defendant in error. The interest that he then had in the premises was the alternative right to have returned to him the amount of his bid at the sale, with the statutory rate of interest, in

case this redemption was regularly effected under the provisions of this statute; or, in case the land should not be so redeemed, he would be entitled to a deed in pursuance of his certificate of purchase.

In *Phillips* v. *Demoss*, it was said that "the statute holds out no inducements for a speculation at a sheriff's sale, beyond ten per cent for the use of the purchase money, and the purchaser can set up no equitable claim beyond that where the redemption is made according to the provisions of the statute."

There being no taint of fraud, in fact, in the transaction, the real question, and perhaps the only one that can arise that materially affects the merits of the case, is, whether the court had jurisdiction to render the judgment under which the redemption was effected.

The plaintiff in error employed James M. Rice, an attorney, to procure a judgment against Andrew Hoagland, and for this purpose the attorney filed, in the circuit court of Peoria county, a declaration in assumpsit. The declaration was filed in term time, and it does not appear that any process was ever issued in the cause. At the same term of court McCulloch appeared in open court and filed a cognovit, waiving service of process and confessing a judgment in the sum of $500 in favor of the plaintiff, and against the said Andrew Hoagland. The authority of McCulloch to appear for Andrew Hoagland, as his attorney, was derived solely from Joseph C. Hoagland, the attorney in fact, who had, from the beginning, and still had, the entire charge of his brother's business in relation to these lands, and the litigation in regard thereto. It was through him, and by him, that McCulloch was originally employed, and he was especially authorized to appear for Andrew Hoagland in the suit of the plaintiff in error against him. It was in pursuance of that employment that he appeared and confessed the judgment. It was under an execution issued on this judgment that the redemption was effected.

The evidence shows that McCulloch was an attorney at law practicing in that court, and his authority to appear as an attorney for the defendant in that suit, does not seem to have been doubted. It is a matter within the observation of every one at all familiar with the practice in the circuit courts, and in this court, that it is the constant practice, where there has been no service of process, for the attorney to enter the appearance of the defendant. His right to do so has never been questioned, and his authority in the premises will be presumed until the contrary is made to appear. *Ransom* v. *Jones*, 1 Scam. 291.

In this regard there is a broad distinction taken in the adjudged cases where the proceedings are had in open court, and where the judgment is confessed in vacation. In the latter case, the authority of the attorney must affirmatively appear. No presumptions will be indulged as to his authority. *Roundy* v. *Hunt*, 24 Ill. 598; *Rising* v. *Brainard*, 36 Ill. 79.

Had McCulloch, the attorney in this case, been authorized even verbally by the defendant, Hoagland, to appear in open court for him and consent that judgment should be rendered against him, it is not doubted that the appearance of the attorney would have conferred jurisdiction upon the court. He was, however, employed by the agent and attorney in fact of the defendant, with a view to enter the appearance of the defendant in a case then pending in court. In pursuance of his general employment, the attorney did appear in open court and entered the appearance of Andrew Hoagland in a cause then pending, which was sufficient, *prima facie*, at least, to confer jurisdiction on the court. He has not since objected that his attorney in fact transcended the power conferred on him in the employment of counsel. He has not heretofore, and does not now, complain that the attorney who appeared on his behalf did so without authority from him, but on the contrary, by an instrument under seal, has solemnly ratified and confirmed all that his attorney did in the premises; and

the reasonable rule is, to regard such ratification as equivalent to precedent authority, and as relating back to the date of the execution of the power. *Karnes* v. *Lloyd,* 52 Ill. 113; *Hauer's appeal case,* 5 W. & S. 473; *Ransom* v. *Jones,* 1 Scam. 291.

It may be doubted whether the defendant in error stands in a position to question the right of McCulloch to appear in open court as the attorney of Andrew Hoagland and confess a judgment in his name, whether he had any rightful authority or not. While the question is not free from difficulty, we are inclined to hold that the view that he does not occupy such a position, is better sustained on principle and authority. Upon the same principle, a party might dispute the right of an attorney to appear in that court and plead in the name of the defendant. We do not understand upon what principle a third party may interpose any such objection. It is a matter between the attorney and the client, in which a mere stranger may not intermeddle.

The bill proceeds on the theory that, where there has been no service of process on the defendant, and the appearance of the attorney is unauthorized, the judgment is absolutely void. But, in case the attorney, who enters the appearance of the defendant, is unauthorized, is the judgment void or only voidable? If such a judgment is void, it is not doubted that any one, injuriously affected by it, may equitably have it set aside in any proceeding, collateral or otherwise; but, if it is only voidable, the rule seems to be different, and only the party himself can impeach it. It is a plain principle of law, that where an act is only voidable, the party himself, if laboring under no disability, may ratify it, and it will be as binding as though it had been originally legal. No reason is perceived why a party may not, upon this same principle, ratify a judgment that, under certain circumstances, might be voidable. It is essential, to make the judgment even *prima facie* valid, that there should be a *bona fide* indebtedness existing between the parties, to give the court jurisdiction. If a judgment should

be collusively confessed in a case where no indebtedness whatever existed, it would be fraudulent, and any party whose interest might be affected, could properly attack it. *Phillips* v. *Demoss,* 14 Ill. 410; *Ransom* v. *Jones, supra; Denton* v. *Noyes,* 6 Johns. 296; *Hauer's Appeal,* 5 W. & S. 473; *Lewis* v. *Smith,* 2 Serg. & R. 142; *Fumerman* v. *Leonard,* 7 Allen, 54; *Field* v. *Gibbs,* 3 Peters' C. C. R. 155; *Tichout* v. *Cilley,* 3 Ver. 415; *St. Albans* v. *Bush,* 4 Ver. 58; *Pillsbury* v. *Dugan,* 9 Ohio, 117; *Brown* v. *Nichols,* 42 N. Y. 26; *Holbert* v. *Montgomery, Ex'rs,* 5 Dana, 11.

The only remaining point that we deem material to be considered, is that made by the amendment to the bill, which charges that the plaintiff in error was the grantee of Andrew Hoagland at the date of the redemption. If he was, in fact, the grantee, and the owner of the equity of redemption, it seems quite clear that he could only redeem the land from the former sale within the twelve months fixed by the statute. But we do not think that the charge is sustained by the evidence. The deed itself bears a subsequent date, and it is certainly better evidence than that produced from the failing and uncertain recollection of the witness, Andrew Hoagland. No other deed is produced, and it does not sufficiently appear that any other, in fact, ever existed.

In the view that we have taken, the bill presents no equitable grounds for relief, and the decree, for that reason, is reversed, the injunction dissolved, and the bill dismissed.

*Decree reversed.*

Justices BREESE, THORNTON and SHELDON, dissent.

Syllabus.

## K. HOBERT HILLS

*v.*

## THE CITY OF CHICAGO.

1. DELINQUENT TAXES—*who may make the sale.* Where the city collector applied to the court for an order for the sale of real estate for the payment of delinquent city taxes and assessments in the mode pointed out by the city charter, and an order was so made by the court, such order authorizes the collector, and no one else, to make the sale, precisely as though he had been so ordered in specific language.

2. CONSTITUTION—*prohibitory clauses—their effect.* Section 4 of Article IX of the constitution requires the legislature to provide, in all cases where a sale of real estate is necessary to collect taxes and special assessments for State, county, municipal or other purposes, that a return shall be made to some general officer of the county having authority to receive State and county taxes, "and there shall be no sale of the said property for any of said taxes or assessments, but by said officer, upon the order or judgment of some court of record:" *Held*, that this provision prohibited the court from rendering a judgment for the sale of real estate for such taxes on the application of any person but the general county officer named, and that no other but him could make the sale.

3. SAME—*interpretation.* In giving an interpretation to this clause, no aid can be derived by a comparison with other clauses of that instrument, as it stands alone, disconnected from other clauses.

4. In such case the cardinal rule is, that it must be so construed as to give effect to the intent of the people in adopting it. Where the words employed, when taken in the ordinary sense and their grammatical arrangement, embody a definite meaning which involves no conflict with other parts of the same instrument, then the meaning thus apparent on the face of the instrument is the only one that can be presumed to have been intended to be conveyed, and there is no room for construction.

5. It must be presumed that the people who adopted the constitution understood the force of the language used, and that language has been employed with sufficient precision to convey the intent, and unless examination demonstrates the presumption does not hold good in the particular case, nothing will remain but to enforce it.

6. The language employed in this section is plain and unambiguous, conveys a definite meaning, and involves no absurdity, conflict or inconsistency, when compared with other parts of the instrument. In such a case, the argument drawn *ab inconvenienti* can not apply to the interpretation, but to the policy of the prohibition itself.

7. When an act is prohibited by clear and unambiguous language of the constitution, the policy of such inhibition, or the inconvenience that may ensue from its enforcement, is a matter with which the court has no concern, its duty being to faithfully enforce it.

8. The first branch of the section enjoins upon the legislature the duty of providing that a return of unpaid taxes and assessments be made to some general officer of the county having power to receive State and county taxes, it being the object to promote public convenience and economy. Had the clause gone no further, it would have been incapable of enforcement by any other department of the government, until the legislature had adopted enactments to carry its provisions into effect. The last clause was designed to produce prompt action. Its effect began with the adoption of the constitution, and annulled all laws in conflict with its provisions. When such a constitutional provision is adopted it abrogates all laws conflicting therewith. Such may not be a rule of universal application, but it does apply when a particular proceeding authorized by a former statute is prohibited by the constitution.

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

Messrs. HITCHCOCK, DUPREE & EVARTS, for the appellant.

Mr. M. F. TULEY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

At the March term, 1871, of the Superior Court of Cook county, the collector of the city of Chicago, upon his report of special assessments, for municipal purposes, remaining unpaid, upon a certain special assessment warrant, made application to that court pursuant to the 12th section of chapter 9 of the city charter, for judgment against the several lots and parcels of land described in said warrant, according to the form of the statute in such case made and provided.

The appellant, as owner of a portion of the property described, appeared at the term stated, and, under the provisions of the 15th section of said chapter, filed objections to such judgment, of which the only material one is as follows: "This application by the city collector is in violation of the provisions of section 4, article 9 of the constitution of this State."

The court overruled the objections, entered judgment against each lot for the sum annexed to it, being the amount of the assessment and costs due and unpaid, and ordered such lots, or so much as should be sufficient to satisfy the amount of the assessment and costs unpaid thereon, to be sold as the law directs. From which judgment an appeal was taken to this court. The only question presented upon this appeal for decision is based upon the objection in the court below, above specifically set forth.

The judgment and order of sale appear to be in exact conformity with the form prescribed in section 16 of chapter 9, (Gary's Laws, 90). By section 17 of same chapter, it is made the duty of the clerk of such court, within twenty days after the order is granted, to make out, under the seal of said court, a copy of so much of the collector's report in such case as gives a description of the land or other property against which judgment shall have been rendered, and the amount of such judgment, together with the order of the court thereon, which shall constitute the process on which all lands, etc., shall be sold for the amount of any taxes, assessments, etc., so levied, assessed or charged upon them. This section proceeds: "The said city collector is hereby expressly authorized and empowered to make sale of such lands, lots, etc., upon ten days' notice," etc.

In the 18th section it is enacted that "the proceedings may be stopped at any time upon payment of said judgment to the collector." In the 20th, that "certificates of sale shall be made and subscribed by the collector," and that "the collector shall continue such sale from day to day, until all the lots, etc., contained *in his precept*, on which judgment remains unpaid, shall be sold or offered for sale." (Gary's Laws, 91.)

It is obvious, from the form of the order prescribed, and the subsequent provisions of the charter referred to, that, in legal effect, it is an order for such sale to be made by the city collector, and nobody else.

For all the purposes of the question we are now considering, it is to be regarded in precisely the same light as if it directed, in so many words, that the several lots, etc., be sold by the collector of the city of Chicago as the law directs.

If such be the legal effect of the order of sale, and if the 4th section of article 9 of the constitution must be interpreted as prohibiting such sale by the city collector because he is not a general officer of the county having authority to receive State and county taxes, then it must follow that the order which purports to authorize the city collector to do what he is thus prohibited from doing is itself prohibited, and the court had no power to make it; for it would be a legal solecism to say that although the fundamental law forbids the doing of a particular act, yet it is not erroneous for a court to order the same act to be done. The only question, therefore, which remains in this case is: Does the section of the constitution referred to contain the prohibition supposed? The section is as follows:

"The general assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments for State, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive State and county taxes, and *there shall be no sale of the said property for any of said taxes or assessments but by said officer,* upon the order or judgment of some court of record."

The duty devolved upon the court is that of giving a judicial interpretation to the language here quoted. No aid in its performance can be derived by a comparison of this with other parts of the same instrument; for it seems to stand by itself, wholly disconnected from other clauses; nor by recourse to the adjudicated cases cited, because they involved the construction and effect of unanalogous provisions. The process will require the application of a few general rules and careful attention to the words employed. The first and cardinal rule

is, that we must so construe it as to give effect to the intent of the people in adopting it. This rule nobody will question. But the second one we would invoke is that which will afford us the true test by which such intent is to be ascertained. As to that, there may be some difference of opinion; for we find the counsel for appellant adverting to the address prepared by a committee of the convention to the people which gave the same construction to the clause as is here contended for on behalf of appellants, while the counsel for appellee refers to the debates in the convention in support of his construction. Whether, in case of a clause of doubtful import, such reference to extrinsic matters might or might not be proper, we will not stop to inquire; for the doctrine is firmly established, that where the words employed, when taken in their ordinary, natural signification, and the order of their grammatical arrangement given them by the framers, embody a definite meaning which involves no conflict with other parts of the same instrument, then that meaning which is apparent upon the face of the instrument is the only one we are at liberty to say was intended to be conveyed, and there is no room for construction. "That which the words declare, is the meaning of the instrument; and neither courts nor legislatures have a right to add to or take away from that meaning." *Newell* v. *The People*, 7 N. Y. 97; *Den* v. *Reid*, 10 Pet. 524; *Spencer* v. *State*, 5 Ind. 76; ib. 569; Bronson, J., *People* v. *Purdy*, 2 Hill, 35.

The framers who prepared and the people who adopted the constitution must be presumed to have understood the force of the language used; "and it is to be presumed that language has been employed with sufficient precision to convey the intent; and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain but to enforce it;" Cooley's Con. Lim. 55. Or, as MARSHALL, C. J., said, in *Gibbons* v. *Ogden*, 9 Wheat. 188: "The framers of the constitution and the people who adopted

it must be understood to have employed words in their natural sense, and to have understood what they meant."

The language employed in the section we are considering is plain and unambiguous, conveys a definite meaning, and involves no absurdity, conflict or inconsistency, when compared with other parts of the instrument.

The counsel for appellee questions the right of the court to read the prohibitory clause according to the natural import of the words employed, and contends that it should read thus: "That when the general assembly shall have provided for a return to a general officer of the county as directed, then and from thence no sale shall be made but by such officer," etc.

His argument in favor of the court taking such liberty with the language used, is not based upon any ambiguity apparent upon the face of the instrument, but is drawn *ab inconvenienti*, and assails the policy of the prohibition.

When a particular act is inhibited by the clear and unambiguous language of the constitution, the policy of such inhibition, or the inconvenience that may ensue its enforcement, is a matter with which the court has no concern; its duty is simply to reverently recognize and faithfully enforce.

The first branch of the section in question enjoins upon the legislature the duty of providing that a return of all unpaid taxes and assessments be made to some general officer of the county having authority to receive state and county taxes. The object of this requirement was undoubtedly the promotion of public convenience and economy.

If the clause had gone no further, then, although the duty would have been imposed upon the legislature, still it would have been incapable of enforcement by any other department of the government, and the only guaranty for its performance would have been the presumptive regard of the legislative body for the mandates of the constitution and the responsibility of that body to its constituents. Upon this guaranty alone, the people, it seems, did not see fit to rely. But as an inducement to prompt action, the prohibition of the last clause

was added. Its effect began with the life of the constitution, and annulled all laws conferring power upon officers, other than the county officer described, to sell real estate for the non-payment of any taxes or special assessments.

If there had been prompt action by the legislative department, as was contemplated by the constitution, very little, if any, inconvenience, it is believed, would have resulted from the change in the revenue system sought to be effected. For the want of such action or the consequences which may follow, this court is, in no respect, responsible. Suppose the legislature should now pass a law, and instead of providing for a return to be made of unpaid city taxes or assessments to some general county officer, should provide, that they be returned to the city treasurer, not being such county officer. Would the act be valid? Most clearly not. It would be in conflict with the constitution, because an attempt to perpetuate a system which the constitution intended to destroy. If such an act would be unconstitutional, if passed *after* the adoption of the constitution, because of inconsistency with it, would not the same act be annulled by it, if in existence *at the time* of its adoption? This court has said that it would. *People* v. *Maynard*, 14 Ill. 419.

This test may not be one of universal application, but must be a correct one where a particular act or proceeding, authorized by a previous statute, is prohibited by the constitution.

This case is among the first cases, arising under the new constitution, in which we have been directly called upon to interpret or construe any of its provisions. And if we now set the pernicious example of frittering away, by subtle and artificial construction, one of its plain prohibitions, though not one of the greatest importance, of what value is the rest of it? With such license on the part of the court of last resort, of what avail, we might ask, is any constitution? If one provision may be thus evaded or abrogated, where is the security that others may not?

After a full and very careful consideration of the question involved, we are constrained to hold, that the portions of the city charter, authorizing a return of unpaid taxes and assessments to the city collector, and an order of sale of real estate to be made by him, were abrogated by the new constitution, and the court had no power to make such order of sale.

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

*Judgment reversed.*

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## SETH W. HARDIN

*v.*

## NIAL S. OSBORNE.

1. DEED—*how defective certificate of acknowledgment may be cured.* A certificate of acknowledgment entitled simply "county of New York," is insufficient, failing to show the State in which the act was done, but is cured by the certificate of the county clerk that the commissioner was duly commissioned for the city, county and State of New York, residing in the county, and duly authorized, etc.

2. CONVEYANCE BY AGENT—*its effect.* If one take a deed absolute to himself, but for the benefit of his client, and afterwards disregards his client's interest, and sells without objection of the client, his deed gives title, and can not be impeached by third parties.

3. COLOR OF TITLE—*second conveyance of the same interest.* A deed by an assignee in bankruptcy does not give color of title, when it appears that the bankrupt has himself already parted with his title in trust under a special assignment, even though the date of acknowledgment is subsequent to the decree in bankruptcy.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—*when deemed fraudulent.* While courts will sustain assignments preferring creditors, they are ever watchful to prevent conditions onerous, burdensome and discriminating, and which must result in giving the debtor control of a large part of the assigned property, and enable him to defeat the avowed purpose of the conveyance. Such conditions should always taint the instrument with fraud.

Syllabus. Statement of the case.

5. Thus, the reservation of a use or benefit to the grantor avoids the assignment.

6. Thus, where the deed of assignment excludes from its benefits all creditors residing at great distances, who do not signify their acceptance within a fixed time, which, under the circumstances, is unreasonably short, especially while relieving resident and preferred creditors from the necessity of any acceptance.

7. Thus, when unusual conditions and restrictions are imposed upon a trustee, delaying his action and dictating when and how he may sell, evidently intended to enable the debtor to control the execution of the trust.

8. ASSIGNEE—*excess of authority.* If the assignee is invested with power which the law would not give, and it is absolute and improper, the assignment must be held void.

9. SAME—*restrictions.* If the directions given and the restrictions imposed, are not in affirmance of the legal duties and obligations of the trustee, and do not promote the interests of creditors, but tend to their injury, the assignment can not be sustained. The trustee must be left free to act in accordance with the rules and principles which govern trustees in similar cases.

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

This was an action of ejectment, brought by Seth W. Hardin against Nial S. Osborne, for certain lands in Will county.

It appears that the lands in question were the property of William B. Egan, under purchases from the United States. They were sold by the sheriff December 23, 1837, under a judgment in favor of Eurotus P. Hastings, against Egan. December 1, 1840, the sheriff conveyed the same property to Bailey & Reynolds, of New York, as redeeming judgment creditors. May 1, 1841, Bailey & Reynolds make deed to Brower & Wyncoop, in trust for creditors. August 13, 1860, Brower & Wyncoop convey to Hardin.

On the other hand, it is known that Egan, on the first day of July, 1837, made a deed of the same and other lands to Josiah S. Breese, of Chicago, in trust for the payment of his debts, to the amount of about $10,000, owing to persons living in the city of Chicago, and in various States, the firm of

Bailey & Reynolds, of the city of New York, being among their creditors. The trust, so far as related to the Chicago creditors, was absolute, and provided for their payment in advance of all others. There was also a condition imposed upon foreign creditors, from which the preferred class was exempt—they were to be absolutely excluded from the benefit of the assignment unless formally accepting its provisions within thirty days after notice. Extraordinary and unusual powers were conferred, such as authorizing the trustee to sell at private sale within two years, at his discretion; to fix prices and terms; to sell or mortgage for payment of taxes and assessments; that, if the trustee could not sell without loss, etc., the whole to be sold at auction at the end of two years.

In absence of formal acceptance of the trust by Breese, it is shown that he afterwards made deeds to a portion of the same lands.

Upon the conclusion of the proceedings in bankruptcy, against Bailey & Reynolds, the same lands (or their interest in them) were sold to J. D. Brown for a nominal sum. It is further shown, that William Stuart, the attorney of Bailey & Reynolds, and of Brower & Wyncoop, January 13, 1845, purchased the lands at sheriff's sale for taxes, for the benefit of his clients, but afterwards held for himself.

Through various channels, the title went to John Forsythe, who went into possession about 1863–4, by placing the defendant upon the lands. The statement of points made on the trial will be found in the opinion of the court.

Mr. EDMUND S. HOLBROOK, for the appellant.

Mr. G. D. A. PARKS, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The objection to the title of appellant, is the alleged insufficiency of the acknowledgment to the deed from Bailey & Reynolds to Brower & Wynkoop.

The same acknowledgment was passed upon in *Hardin* v. *Kirk*, 49 Ill. 153, in which case the only reference to the certificate was, that it did not show in what State the acknowledgment was made. It is true, that the venue to the certificate of the commissioner is simply "County of New York," and from it we can not infer that it was made in the State of New York. But the certificate of magistracy is full and formal, and is entitled, "State of New York, city and county of New York, ss.," and is to the effect that the officer, at the time of taking the acknowledgment, was a commissioner of deeds for the city and county, residing therein, commissioned, sworn, and duly authorized to take acknowledgments, and that his signature was genuine.

This certificate of magistracy was not noticed by the court in the reported case in 49 Ill. It was either not before the court, or was entirely overlooked.

By force of the two certificates, we must presume that the acknowledgment was taken in the State of New York, and in the county of New York. There the commissioner resided, and the legal presumption is, that he acted in the place where he had jurisdiction. It would be an unreasonable and violent conclusion, that an officer attempted the discharge of his duty in some State other than the one in which he was authorized to act.

In addition, however, there was the certificate of the clerk of the Supreme Court of Chautauqua county, in the State of New York, that the deed had been executed and acknowledged in conformity to the laws of that State in existence at the time of its execution and acknowledgment. Under the provisions of the statute, this entitled the deed to be used as evidence, without further proof.

It was, therefore, error not to permit this deed to be introduced as evidence upon the trial.

As it was competent evidence, we need not discuss the error assigned, in excluding the parol proof of its contents.

The defendant, in the court below, relied upon a deed to one Stuart, as color of title, and also offered a deed from Egan to Breese, embracing the lands in controversy, for the purpose of showing an outstanding title, and, for the same purpose, introduced in evidence decrees in bankruptcy against Bailey & Reynolds, the grantors of the plaintiff; an order for the sale of the property of the bankrupts, including the lands in question, and a deed from the assignee to Brown, made in 1858.

According to the opinion, in the case of *Hardin* v. *Crate*, of the present term, *post*, p. 215, the deed to Stuart is effectual, as color of title, acquired in good faith, to hold 160 acres of the land described in the declaration, as there was payment of taxes, accompanied with possession, for the period required by the statute. The proof does not show the payment of taxes for seven years upon the 40 acres described.

The deed to Brown was properly rejected, as evidence of outstanding title. The decrees in bankruptcy, and the order to sell the property of the bankrupts, were subsequent to the deed made by them to Brower & Wynkoop. The bare fact that the acknowledgment to the latter deed was after the rendition of the decrees, is not sufficient to defeat the title.

The deed of the bankrupts, made prior to the declaration of bankruptcy, vested the legal title in the grantees, at the time of its delivery. In the absence of proof to the contrary, the presumption of law is, that it was delivered upon the day of its date, and the subsequent date of the certificate of acknowledgment can not overcome the presumption. *Deininger* v. *McConnel*, 41 Ill. 227; *Jayne* v. *Gregg*, 42 Ill. 413; *Darst* v. *Bates*, 51 Ill. 439.

The deed from Egan to Breese presents a more difficult and important question for solution. It is in the form of a deed of trust, conveying to the trustee a large amount of lands, for the purpose, as is alleged in the deed, of securing and paying the moneys due to certain enumerated creditors. It is dated the first day of July, 1837, and the only action under it, until 1857, was a sale and conveyance of a small portion of the

lands, by the trustee, in the years 1837 and 1838. In 1857, the trustee, in consideration of one dollar, conveyed all the remaining lands, which had not been conveyed to other parties in good faith, to Scammon.

Remote grantors of the plaintiff, who are mentioned amongst the enumerated creditors, obtained judgments against the assignor, in the same month and year in which the deed was executed, but, as is admitted, subsequent to the record of the same. These parties resided in New York and Detroit, in 1837.

The total amount of debts mentioned in the deed is a fraction over $10,000, and the number of acres of land, beside some lots in Chicago, is 5000. So far as is shown, only 1200 acres of land were sold and conveyed, by the trustee, during a period of twenty years, and prior to the year 1857, when all the lands undisposed of were quitclaimed to Scammon for $1.

The deed does not purport to embrace all the property of the debtor. No personal property is mentioned, and we can not even infer that all the real estate of the assignor was conveyed to the trustee. Neither is it, in terms, or by any fair intendment from the language used, a deed for the benefit of all creditors.

These statements comprise all which need be made to afford a comprehension of the view which we have been compelled to take of this deed. It directed, in most explicit language, the exclusion of the non-resident creditors from any participation in the trust fund, unless it was accepted by them, in writing, within thirty days after actual notice of its execution. This exclusion did not apply to the creditors in Chicago. As to them, the deed was absolute.

Was the time reasonable for acceptance, and the distinction between the creditors necessary, just or right?

Prior to the clause providing for the exclusion, the creditors were classified in the deed. The classes were fifteen in number, and the judgment creditors, through whom the plaintiff claims title, were in the tenth and twelfth classes. Their debts

were postponed, and the Chicago creditors were preferred, in the order of payment, with the exception of two, whose debts only amounted to $470, while the total amount of the debts of the judgment creditors, according to the deed, was $3300, and the debts of the excluded creditors, who might not accept within thirty days, were $5300, more than one half of the entire indebtedness secured.

In the exercise of this preference, the debtor had done what the law permitted.

While, however, courts will sustain assignments preferring creditors, they are ever watchful to prevent conditions onerous, burdensome and unjustly discriminating, and which must result in giving the debtor the control of a large part of the assigned property, and enable him to defeat the avowed purpose of the conveyance. Such conditions should always taint the instrument with fraud.

It is also a settled principle, that the reservation of a use, or benefit, to the grantor, voids the assignment. The distinction is exceedingly nice and difficult of apprehension, between a use or benefit reserved, and a condition or limitation imposed, which, in its necessary operation, must result in benefit to the assignor, and relieve the assigned property of more than one-half the indebtedness.

The exclusion of the foreign creditors could not possibly have been of any benefit to the home creditors. The trust fund must, at all events, be exhausted, if necessary, for the payment of the debts of the latter. They were equally secure with or without the clause of exclusion. What, then, was the object of the provision? Why should there be an unfair and odious distinction between resident and non-resident creditors, in addition to the preference already made?

After mature thought, our conclusion is, that the intent was to defraud the non-resident creditors. If they accepted within thirty days, they were postponed to the preferred creditors. If they did not accept, they were denied any benefit of the fund. What is the result, if the deed be held valid? The

assignor will receive any surplus, through the hands of a friendly trustee of his own selection, which may be, after the payment of the preferred creditors. After the satisfaction of creditors, he has a right to any surplus, but when the deed operates to the benefit of the grantor, and the injury of creditors, it should be held void.

Certain creditors were preferred. This was right, and if the acceptance had been made to apply to all creditors, the objection we take would not be so glaring. It would then not be so much like an attempt to extort from a class of creditors, but would more nearly resemble an unconditional surrender of property for the benefit of all, with special preferences.

Was the time for acceptance reasonable? As to reasonable time, there is, and can be, no absolute rule. It must be determined by the circumstances of the case, the quantity of the estate, the number of creditors, and the distance between the parties. As the object of the limitation is to afford to creditors an opportunity to accept or reject the terms offered, the time must not be so short as to prevent a thorough examination.

The utmost good faith must be observed, and the time must not be so short as not to afford ample opportunity for inquiry. *Ashurst* v. *Martin*, 9 Porter (Ala.), 566.

In *Fox* v. *Adams*, 5 Greenleaf, 245, the assignment was made for the benefit of creditors who should become parties within seventy days. The court held that the shortness of time created a presumption of fraud, and constituted a sufficient objection to the validity of the assignment.

In this case, there was scarcely sufficient time for examination, consultation with counsel, and deliberation, within the time in which the acceptance must be signed, or the exclusion follow.

The proof is that, in 1837, with the best conveyance and most expeditious travel, it would take from ten days to a fortnight to effect communication between Chicago and New

York. The creditors upon whom the exclusion was to operate, resided in Michigan, Missouri and New York. No allowance is made for miscarriage by mail, or failure of communication from unavoidable causes; and under the most favorable circumstances, the creditors might have ten to fifteen days for determination, after actual notice. In so important a matter to creditors, distant one thousand miles, an adequate opportunity was not afforded for an investigation into the title, the incumbrances upon, and the value of the property, and the fairness of the transaction.

The fact urged by the counsel for appellee, that the creditors in New York had an attorney resident in Chicago, is not entitled to weight. An ordinary attorney had no right to make the required acceptance. Special written authority would have been necessary to enable a third party to effectuate it.

An honest man, with an honest intent, would never have conceived the idea evolved in this deed. It is irreconcilable with the laudable purpose of making a surrender of all the property of a debtor for the benefit of all his creditors.

Our conclusion is, that the deed was intended to coerce an acceptance. The debtor knew the difficulty, the almost impossibility, of compliance, and must have designed the clause, of malice and fraud, to hinder, delay and defraud his creditors.

Under the circumstances, the time for acceptance was not reasonable, and the requirement, with exclusion as the penalty for non-acceptance, was coercive, unjust and fraudulent.

Another unusual provision in the deed was, that the trustee should sell the real estate to pay the debts mentioned, "at the most favorable opportunity which should occur after its execution," "*of which event he was to be the sole judge,*" and at all events within the period of two years from the date, at private sale, for a fair and reasonable price, having reference to the value of the lands and the improvements, and if the property could not be sold at private sale, within two years, without

great loss, then, at the expiration of that period, it should be sold absolutely at public auction.

Here are limitations imposed upon the trustee in the discharge of his duties, and obstacles interposed to a sale of the property, which must have been intended to have the effect to hinder and delay creditors, within the purview of the statute.

Stipulations in deeds of assignment, that a trust shall be executed within a specified time, have been sustained, but the time must be reasonable under the circumstances. So, too, discretion may be given to the assignee. It must not, however, be unlimited, but subject to the control of a court of equity.

The principle which pervades this branch of the law requires an unconditional surrender of the property of the debtor, and its immediate application in favor of creditors. Unusual provisions in deeds are looked upon with suspicion; and restrictions, which have the effect unnecessarily to delay creditors, indicate an intent to defraud. If fraud lurk in any of the clauses, however speciously concealed, when discovered, the instrument must be pronounced invalid. *McIntire* v. *Benson*, 20 Ill. 500; *Sackett* v. *Mansfield*, 26 Ill. 21; *Curtis et al.* v. *Leavitt*, 15 N. Y. 10; *Brigham* v. *Tillinghast*, 13 N. Y. 214.

If the assignee is invested with power which the law would not give, and it is absolute and improper, the assignment must be held void. If the directions given, and the restrictions imposed, are not in affirmance of the legal duties and obligations of the trustee, and do not promote the interests of creditors, but tend to their injury, the assignment can not be sustained. The trustee must be left free, to act in accordance with the rules and principles which govern trustees in similar cases. *Dunham* v. *Waterman*, 17 N. Y. 9; *Jessup* v. *Hulse*, 21 N. Y. 168.

Under this deed the trustee could not sell at private sale, unless he obtained a fair and reasonable price, with special reference to the value of the lands and their improvements.

He alone determined the value which might restrict a sale. He could not sell at private sale if great loss might ensue. He, therefore, was the judge of the probable sacrifice, the fear of which should forbid the sale. He could not sell at private sale, unless the time and circumstances were suitable. He decided upon the "favorable opportunity," without control. Of this he was the *sole judge*. The power to sell privately was so trammelled that the debtor, in effect, directed a delay for two years.

The plain import of the language is, that the assignee might postpone any sale for two years. He was made the sole judge of the fit and convenient time, during two years, for a private sale. For that period the creditors might be delayed, without any power to force action through the courts. The power conferred upon the trustee is wholly incompatible with any rights in the creditors. The former could not be the sole judge, if his judgment could be directed or restrained.

We think the obvious intent, and the necessary effect, of this clause, were to hinder, delay and defraud creditors.

The hindrance and delay of creditors make the assignment fraudulent and void in law. The postponement of the sale and payment for an unreasonable time, will also avoid it.

One expressed object of the conveyance in this case was, to prevent a sacrifice of the property by a suspension of the sale for two years. If "great loss" ensued, the plain direction to the trustee was, not to sell.

Under such circumstances, one year's suspension of proceedings was held to be fraudulent. *Ward* v. *Trotter*, 3 Monroe, 1.

In *Green* v. *Trammell*, 3 Md. 11, the deed was held to be fraudulent and void as to creditors, where they were required to covenant for an extension of the payment of their claims for six to twenty-four months.

In *Mitchell* v. *Beal*, 8 Yerger, 134, the postponement of the sale of the property for three years rendered the deed fraudulent.

In *Sheever's Assignees* v. *Lautzerheiser*, 6 Watts, 543, the deed of assignment gave more than one year for the payment of the proceeds of the sale of the goods, and it was held invalid.

In *Hart* v. *Crane*, 7 Paige, 37, the chancellor ruled that the assignee was bound to sell the property, either at private or public sale, without delay, and that the sale could not be deferred for the purpose of obtaining higher prices, without the consent of the creditors.

The directions to the assignee, in the clause under consideration, make the deed fraudulent in law.

One other point remains to be considered.

As the section of the statute relied upon requires, to sustain color of title in good faith, the payment of taxes for seven successive years, upon vacant and unoccupied land, it is urged that Hardin's possession defeated the rights acquired under the color of title, by a change of the land from vacant to occupied land.

We can not regard the bare entering upon the land, breaking one or two furrows, and a proclamation of his rights by appellant, as anything more than a symbolical possession. He abandoned the land immediately, paid no taxes, and was absent for years.

There was no manifestation of the intention to appropriate the land to actual use. *Brooks* v. *Bruyn*, 18 Ill. 539; same case, 24 Ill. 372; *Truesdale* v. *Ford*, 37 Ill. 210.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

Mr. JUSTICE BREESE took no part in the decision of this cause.

## IRA A. W. BUCK

*v.*

## ELLEN BUCK.

1. SUMMONS—*service.* There is no substantial departure from the statute when the service of process is required to be served by *delivering* a copy *to* the defendant, and by the return it appeared a copy of the summons was *left with* the defendant.

2. PRACTICE—*at law—in equity—contempt.* In a court of law, the defendant may clear himself of a contempt by his answer, and be discharged, but in equity, the defendant's answer to interrogatories may be contradicted and disproved by the adverse party.

3. ATTACHMENT—*contempt.* The attachment for this kind of contempt —disobedience to an order to pay money—is rather a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court.

4. SAME—*evidence.* In such a proceeding, the adverse party may avail himself of the evidence of defendant as in a civil case.

5. SAME—*interrogatories—replication.* The rules of chancery practice do not require a replication to an answer to interrogatories filed in a proceeding for contempt.

6. MINOR CHILD—*support and education.* Where a party had adopted a child, and was subsequently divorced, and the decree required him to support and educate the child, and he had previously placed the child in a boarding school to be taught, and his divorced wife, who had the custody of the child, afterwards placed the child in the same school, and although he gave notice that he would not pay the expense, as it failed to appear that he had provided other means of education, or that there were common schools accessible, he was held liable to pay the expense incurred in keeping the child at the boarding school.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

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

Messrs. WHEATON, SMITH & MCDOLE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding against the appellant, by attachment for contempt, in not complying with a decree of the circuit

court of Kane county, in a suit for a divorce, ordering him to support and educate an adopted child of the parties.

The first point made is, that the court erred in ordering the attachment, for the reason that there was no jurisdiction of the person of the defendant in the suit wherein the decree was rendered, as there was no sufficient service of the summons.

The return of service was, by *leaving* a copy of the summons *with* the defendant.

The service required by the statute, is by *delivering* a copy *to* the defendant. It is supposed, that here was an essential difference. We fail to perceive it. We regard the two forms of expression as equivalent, and that the return shows the required service by delivering a copy of the summons to the defendant.

In the court below, interrogatories had been filed, to which defendant had filed his answer. The court ruled, that notwithstanding the answer, the defendant must purge himself of the contempt in open court, whereupon the defendant was sworn, and testified.

This ruling of the court is assigned as error.

A difference obtains between the practice, in this respect, in courts of law and in courts of equity. In the former, if the defendant clears himself by his answer, he will be discharged, and the complaint totally dismissed; whereas, in the courts of equity, after the party has answered the interrogatories, his answer may be contradicted and disproved by the adverse party. The attachment for this species of contempt, the disobedience of an order to pay money, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. 4 Black. Com. 288; *Crook* v. *The People*, 16 Ill. 535.

It is a singular mode of trial, admitted in this particular instance of contempt, where ordinary rules governing criminal trials do not apply; and we see no sufficient objection in this

case to the adverse party having resort to the testimony of the defendant, as might be done in a civil case. No replication to the answer was necessary, as claimed. The practice of the courts of chancery recognizes no such thing as a replication to an answer to interrogatories filed in such a proceeding as this.

We hold there was no error in this ruling of the court.

It is objected, that the sum of $251, which the court ordered the defendant to pay, as money which had been expended in the support and education of the child, was exorbitant and unjust, and especially so the two items of $81.50 and $75, for tuition at a boarding school at Rockford. It is said, the child was within the reach of free schools in Aurora, and no allowance in such case should be made for those items, under the decision in *Plaster* v. *Plaster*, 47 Ill. 290. There is an absence of proof in the record, that the child was within reach of any free school.

It appears, that she had previously been placed at this boarding school by the defendant himself, about September 1, 1866; that he paid for her support and education there, until July 1, 1867, and the items in question were for tuition there, from that time to February, 1868; that when the child returned to the school in the fall of 1867, after a vacation, defendant informed the principal of the school he would not pay the child's bills. No sufficient reason appears for this step. Defendant never expressed any willingness, or took any steps, to provide for the child's education elsewhere; that her education at this school was suitable and proper, in view of her own needs, and the circumstances of the defendant, is evidenced by his own act in placing her there to be educated. The education was needful for the child, and defendant was required, by the decree in the divorce suit, to furnish it to her. In his neglect to do so, he was rightly adjudged to pay the expenditures incurred therefor, which must be held, in his own estimation, to have been necessary and proper. The same neglect appears, to furnish support for the child.

After an examination of the answer of the defendant, and the proofs in the case, we are satisfied with the finding of the court as to the sum due.

The order of the court below is affirmed.

*Decree affirmed.*

Justices WALKER and THORNTON dissent.

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## GILES SCOTT

*v.*

## JAMES D. MILLIKEN *et al.*

1. DECREE *upon constructive service—opening the same.* Where a mortgagor is a non-resident, and served by publication, and within the three years allowed by the statute applies to the court for leave to answer, and is permitted to do so, he occupies the same position to the case as though he had been personally served and was defending in the first instance. The decree originally rendered on his default, in nowise affects his rights on the trial, on his answer.

2. No reason is perceived why a party, applying under the statute and being permitted to answer by the court, may not be allowed to demur, if the bill is substantially defective, but not for mere technical defects.

3. SALE—*of interest in mortgaged premises pendente lite.* Where a party thus let in to defend, after answer filed sells his equity of redemption, the suit may still progress in the name of such defendant; or, if application be made for the purpose, the court probably might permit the grantee to become a party defendant.

4. STRICT FORECLOSURE—*purchasers from complainant.* Where a mortgagee files a bill to foreclose, makes publication against a non-resident mortgagor, and obtains a decree of strict foreclosure on a default and then sells the property, and the purchasers make lasting and valuable improvements, it is correct practice for the mortgagor, who afterwards obtains leave to answer, to file a cross bill, and make such purchasers defendants and parties to the suit.

5. In such a case, equity requires that the land should be valued, and if not equal to the mortgage debt, then the foreclosure may be strict, unless a redemption shall be made. If, on the other hand, the land, apart from the improvements, is found to be of greater value than the debt, the mort-

gagor should be allowed to redeem as in the other case, but if not redeemed, a sale should be decreed, and from the proceeds should be paid the costs; the debt due on the mortgage notes, and taxes paid by complainants before selling to the purchasers, should be paid to them; to the mortgagor the excess of the value of the land unimproved over the amount of the costs, debt and taxes; to the purchaser from the mortgagor the value of the improvements independently of the land, which value should be ascertained by the court.

APPEAL from the Circuit Court of Cook county; the Hon. WM. W. FARWELL, Judge, presiding.

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

Messrs. DUNHAM & BONFIELD, and SLEEPER & WHITON, for the appellees.

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

On the 19th day of May, 1857, Alexander Smith sold certain lots in Chicago to Clark and Thomas, taking back a mortgage to secure the unpaid purchase money. Smith subsequently assigned the notes then unpaid, to James Henry Smith, Platt A. Smith and Anna Smith, and they filed their bill in chancery for a strict foreclosure. A decree was pronounced on the 26th of January, 1864. It being subsequently ascertained that Clark and Thomas had conveyed to Joel I. Scott, and he to Giles Scott, before the bill was filed, a second bill was brought, making Giles Scott a party. He was served by publication only, and not answering, was defaulted, and a decree of strict foreclosure was again pronounced, requiring payment to be made in ninety days. The payment was not made, and the complainants subsequently sold the lots to different parties, one of whom was James D. Milliken, who bought three of the lots, and afterwards sold an interest in them to George N. Milliken. This second decree was made June 1, 1867, and in December, 1869, Scott filed his petition for leave to answer, under the section of the chancery act allowing defendants, not personally served, to appear and

answer within three years from the rendition of the decree. He was permitted to answer, and he also filed a cross bill making the two Millikens parties, as they were not parties to the original bill. On the final hearing, the court pronounced a decree authorizing Scott to redeem on payment of the unpaid purchase money secured by the mortgage, the taxes and interest, and the improvements made by the Millikens since their purchase. In the event no redemption should be made, the property was to be sold, and the debt, taxes, and value of the improvements, were to be first paid, after the costs.

Both parties have assigned errors upon this record. We do not deem it necessary to discuss every point raised in the argument. It is sufficient to dispose of those questions which are decisive of the case.

Counsel disagree as to the position which Scott occupies. We consider he has the same right to redeem that he would have had if he had been personally served with process, and had appeared and defended before the decree was rendered. He lost no rights by that decree. The statute leaves no room for doubt. It provides that, after paying such costs as the court deems reasonable, the party petitioning to be heard may "answer the complainant's bill, and thereupon such proceedings shall be had as if the defendants had appeared in due season and no decree had been made." This language is explicit. In this case, the court did not permit the defendant to demur, but required him to answer. The statute provides that the defendant may answer. This does not, necessarily, exclude the right to demur. It may be well enough to hold, that a demurrer, based upon merely technical grounds, will not be entertained, but if the bill is so substantially defective as not to show any ground for relief, we see no reason why the defendant should not be permitted to raise that question by demurrer. In this case, the defendant has not been prejudiced by striking his demurrer from the files. The complainants have a right to foreclose their mortgage. The defendant has a right to redeem, and the court, by requiring him to answer

and permitting him to file a cross bill bringing in the Millikens, took the most effectual mode of disposing of the controversy upon its merits.

It is urged by complainants that Scott, after he appeared and presented his petition to be heard, and after leave was given and he had filed his demurrer, but before answering or filing his cross bill, conveyed to one Weston his equity of redemption, and therefore should not have been permitted to take any further steps in the suit. The authorities cited in support of this untenable position, have no application to a case like this. Scott has been brought into court as a defendant for the purpose of extinguishing his equity of redemption. Pending the suit he conveys this equity. Counsel certainly will not contend that the rights of complainants, or their position before the court, were affected in any respect whatever by Scott's conveyance. Weston, taking as a purchaser *pendente lite*, would be bound by the decree without being made a party. Perhaps the court would have permitted him to be made a party if he had presented a petition for that purpose, but it was his right to protect his interests by continuing the defense in the name of Scott, and it was a matter of total indifference to the complainants which course might be pursued. As to the cross bill, that was also properly filed in Scott's name, because it was a mere incident to the defense, and proper for the purpose of bringing the Millikens before the court. Although the suit might have progressed without them, yet, as they had purchased from the original complainants, and had made valuable improvements, it was better for them and for all parties that they should be brought before the court, and that all the equities should be adjusted in this suit. They can not complain because an opportunity was given to them to assert their rights.

The real question in this case, and the only one which presents any difficulty, relates to the improvements made by the Millikens after their purchase from the Smiths. The court below decreed that Scott might redeem by paying, within

ninety days, the amount of the mortgage debt, and also the value of the improvements, which were estimated at $12,000. The decree further provides that, in default of redemption, the premises shall be sold, and the proceeds of sale, after payment of costs, be applied first to the extinguishment of the debt and the payment of the improvements. The Millikens, owning both the debt and the improvements, would, under this decree, be paid in full, before Scott, as owner of the equity of redemption, would receive anything.

It is contended by appellant, that the Millikens are not entitled to payment for their improvements, under the rules which regulate the allowance of compensation for improvements made by a mortgagee in possession. This case, however, is peculiar, and in our opinion a broader equity should be applied to it than that which governs in the ordinary case of mortgagor and mortgagee. When the Millikens bought, and proceeded to erect their houses, there had been a decree of strict foreclosure by which the absolute title had apparently passed into the complainants. Still they must be held to know the law, and held, also, to notice of the fact that Scott was not personally served, and might come within three years and set aside the decree. On the other hand, Scott had owned the equity of redemption more than seven years when this bill to foreclose was filed, and about nine years when he filed his petition for leave to answer. The notes secured by the mortgage had been due nearly five years before the bill was filed. Scott had paid no taxes since he bought, the proof showing that the complainants had paid them from 1858 to 1867, and then the Millikens began to pay. A fair inference from these facts is, that Scott had considered the lots not worth the incumbrance, and had practically abandoned them until he found these houses erected upon them, and then he determined to assert his rights as holder of the equity of redemption. If, on the other hand, he regarded himself as owning a valuable interest in this property, he must be charged with notice of the fact that the Millikens were in possession and erecting valuable

improvements, and it was an act of bad faith on his part to allow them thus to expend their money without notice of his claim, and come forward to assert it as soon as such expenditure was complete. The claim on his part to take their improvements made under such circumstances, without compensation, is a claim to which a court of chancery can hardly listen with patience, violative, as it is, of every sense of justice.

Still, it must not be forgotten that Scott was the owner of the land, subject only to the mortgage, and that position he still retains. If he has no equitable claim on the Millikens' improvements, on the other hand they have no claim, either legal or equitable, upon his title to the land, apart from the lien of the mortgage. Remembering this, it is not difficult to arrive at an equitable basis of adjustment. The court should ascertain, by proof, the value of the lots, independently of the improvements. If this value does not exceed the amount due upon the notes held by complainants when they filed their bill, then a decree should be pronounced by which Scott should be permitted to redeem in ninety days by paying the debt, improvements, taxes and costs. To this point, the decree actually rendered was correct. If, however, the value of the land, unimproved, does not equal the amount of the debt, no decree of sale should be made; that would be useless, and make unnecessary costs. If Scott should not elect to redeem within the time appointed, he should then stand foreclosed.

If, on the other hand, the land, unimproved, shall be found to exceed the debt in value, the court should still, as in the other case, give to Scott the right of redemption, but instead of decreeing a strict foreclosure in case he fails to redeem, should decree a sale, and that, out of the proceeds, shall be paid, first, the costs; second, the debt due on the notes, and taxes paid by the complainants before selling to the Millikens, which sum should be paid to the Millikens as the present holders of the debt; third, to Scott, the excess of the value of the unimproved land over the amount of the debt and taxes; fourth, to the Millikens, the value of the improvements,

independently of the land, which value should be ascertained by the court; fifth, the residue, if any, to Scott.

By such a decree, we think justice will be done to all parties. The decree is reversed and the cause remanded.

*Decree reversed.*

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## AUGUST FISHER

*v.*

## CHRISTOPHER DEERING.

1. LEASE—*assignment.* At the ancient common law, a lease, like any other agreement or *chose in action*, was not assignable so as to give the assignee an action against the tenant; but, by the 32 Hen. 8, chapter 34, section 1, the assignee of the reversion became invested with the rents, and where the tenant attorned to him, he might maintain an action of debt to recover subsequently accruing rents.

2. Although the assignment of the reversion created a privity of estate between the assignee and the tenant, still it required an attornment to create such a privity of contract even under the 32 Hen. 8, as would authorize the assignee to sue for and recover the rent in his own name.

3. The 4 and 5 of Anne, chapter 16, was adopted by the British Parliament to dispense with the necessity of an attornment, to enable the assignee to sue for and recover the rent from the tenant. But this statute is not in force in this State.

4. COMMON LAW—*British statutes—how far in force.* Our general assembly has adopted the common law, and all British statutes, with a few exceptions, in aid of the common law, so far as they are applicable to our condition, passed prior to the fourth year of James the First, as the rule of decision, until altered or repealed. The 32 Hen. 8, chapter 34, section 1, was adopted prior to that time, and is applicable to our condition, and is in force. And the legislature, in adopting it, will be presumed to have intended to adopt the judicial construction that had been placed on that statute.

5. LANDLORD—*tenant—grantee of the premises.* Where a landlord had leased premises, and before the expiration of the term sold and conveyed to a third person, and the tenant had paid one or more installments of the rent to the grantee: *Held*, that such payment amounted to an attornment,

and was such a recognition of the grantee, as his landlord, as authorized the latter to sue for and recover the rent by an action of debt.

6. FORMER DECISION. The case of *Chapman* v. *McGrew*, 20 Ill. 101, considered and overruled.

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

Mr. CONSIDER H. WILLETT, for the appellant.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears, from an examination of the authorities, that at the ancient common law a lease was not assignable so as to invest the assignee with the legal title to the rent. Such instruments were, in that respect, on a footing with other agreements and *choses in action*. But the 32 Hen. 8, chapter 34, section 1, declared that the assignee of the reversion should become invested with the rents. But notwithstanding this enactment, the courts held that the assignee of the reversion could not sue for and recover the rent unless the tenant should attorn, when the holder of the reversion might recover subsequently accruing rent in an action of debt. *Marle* v. *Fake*, 3 Salk. 118; *Robins* v. *Cox*, 1 Levinz, 22; *Ards* v. *Walkins*, 2 Croke's Eliz. 637; Knowles' Case, 1 Dyer, 5 b. 5 Barn. & Cress. 512, and the note.

In *Williams* v. *Hayward*, 1 Ellis & Ellis, 1040, after reviewing the old decisions on this question, it was, in substance, held that, under the 32 Hen. 8, an assignee of the rent, without the reversion, could recover when there was an attornment, and that such an assignee could, under the 4 of Anne, recover without an attornment.

The courts seem to have proceeded upon the ground that there could be no privity of contract unless the tenant should attorn to the assignee of the reversion; that, whilst the assignment of the reversion created a privity of estate between the

assignee and the tenant, privity of contract could only arise by an agreement between them. Some confusion seems to have got into the books from calling the purchaser of the reversion an assignee of the lease, by its passing by the conveyance as appurtenant to the estate. But where the tenant attorned to the assignee of the reversion the assignment became complete, and then there existed both privity of estate and of contract between the assignee and the tenant, and by reason of the privity of contract the assignee might sue in debt, and recover subsequently accruing, but not rent in arrear at the time he acquired the reversion.

To give the assignee of the reversion a more complete remedy, the 4 and 5 Anne, chapter 16, section 9, was adopted, dispensing with the necessity of an attornment which the courts had held to be necessary under the 32 Hen. 8, to create a privity of contract. But this latter act has never been in force in this State, and hence the decisions of the British courts, made under it, are not applicable. In many States of the Union this latter act has been adopted, and the decisions of their courts conform, of course, to its provisions. But we having adopted the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply defects of the common law, prior to the fourth year of James the First, except certain enumerated statutes, and which are of a general nature and not local to that kingdom, they are declared to be the rule of decision, and shall be considered of full force until repealed by legislative authority. Gross' Comp. 1869, 416. It then follows that the 32 Hen. 8, chapter 34, section 1, is in force in this State, as it is applicable to our condition, and is unrepealed. And we must hold, that the construction given to that act by the British courts was intended also to be adopted.

The facts in this case show such a privity of contract as brings it fully within the rule announced in the above cases. Appellee paid to appellant several installments of rent falling

due under the lease after it was assigned to him. By paying the rent, the lessee fully recognized the appellant as his landlord, and created the necessary privity of contract to maintain the action.

The case of *Chapman* v. *McGrew*, 20 Ill. 101, announces a contrary doctrine. In that case this question was presented, and notwithstanding the lessee had fully recognized the assignee of the lease as his landlord, it was held that the lessor of the premises might maintain an action to recover the rent. In that case, the fact that the lessee had attorned to the assignee, was given no weight, and the fact that such privity was thereby created as authorized the assignee of the lease to sue for, and recover the rent, was overlooked. In that, the decision was wrong. The right of action could not be in both the lessor and his assignee, and the privity thus created gave it to the latter.

The subsequent case of *Dixon* v. *Buell*, 21 Ill. 203, only holds that such an assignee, whether he holds the legal or equitable title to the lease, may have a claim for rent growing out of the lease, probated and allowed against the estate of the lessee. That case has no bearing on the case at bar.

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

*Judgment reversed.*

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JAMES WELCH

*v.*

PETER KARSTENS.

1. JUSTICE OF THE PEACE—*recovery of interest in excess of the amount endorsed on the summons.* In a suit upon an account before a justice of the peace, the plaintiff recovered a judgment for the full amount endorsed on the summons. The defendant appealed to the circuit court, where the

plaintiff recovered a judgment for the full amount of his claim with the addition of interest thereon and ten per cent damages for the delay in taking the appeal: *Held*, the fact that the judgment exceeded the amount endorsed on the summons by the amount allowed for interest and damages did not vitiate it.

2. The justice trying the cause had a right, under sec. 28 of chap. 59 R. S. 1845, which provides that if the judgment is rendered upon any note or bond or for a balance upon a settled account, the justice shall allow interest from the time when the same became due and include the same in the judgment, to allow interest from the time when the account was demanded and payment promised.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. H. B. STEVENS and Mr. THOMAS SHIRLEY, for the appellant.

Messrs. BENNETT & SHERBURNE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a suit before a justice of the peace, and no defense made. The plaintiff recovered a judgment for the full amount endorsed on the summons. The defendant appealed to the circuit court. A trial was there had, and a judgment rendered against the defendant for the amount of plaintiff's claim, with the addition of interest thereon, and ten per cent damages.

Appellant complains that the amount so found exceeds the amount endorsed on the summons, and vitiates the judgment. This objection has no force.

By the act of 1845, R. S. 319, sec. 28, the justice trying the cause had a right to allow interest from the time the account was demanded and payment promised. This account had been admitted months before the trial.

In *Dowling* v. *Stewart*, 3 Scam. 195, it was held, an increase in the recovery beyond the amount claimed on the summons, occasioned by the accrual of interest, would not be erroneous. By the practice act of 1845, R. S. 421, sec. 58, it is provided,

in cases of appeals to the circuit court from judgments of justices of the peace, the appellee shall be entitled to judgment not exceeding ten per cent damages upon the amount of the judgment, if the court shall be satisfied the appeal was prosecuted for delay. That the court decided this appeal was taken for delay, there can be no doubt, as the evidence shows defendant had, several times, admitted the justice of the account, and promised to pay it.

No defense was made on the merits, but a captious objection raised that the handwriting of the justice who issued the summons was not so legible as it should have been, whereby the name of the plaintiff was incorrectly written. There was no plea of misnomer before the justice, or in the circuit court.

We perceive no error in the record, and affirm the judgment.

*Judgment affirmed.*

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## JOSEPH MAY

*v.*

## THE PEOPLE OF THE STATE OF ILLINOIS.

1. REASONABLE DOUBT—*what amounts to.* A reasonable doubt, beyond which the jury should be satisfied in a criminal case before finding the accused guilty, is one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause.

2. EVIDENCE—*of its sufficiency.* In a criminal prosecution where a question arose as to the time when the warrant for the arrest of the accused was issued, the testimony of a police officer in respect thereto given months after the event, the witness undertaking to state the time of issuing the warrant without its being produced and without having recently ascertained the time by any reference to the record of the proceedings, was regarded as of too uncertain a character to be relied upon to establish the guilt of the prisoner.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

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

Mr. WASHINGTON BUSHNELL, Attorney General, and Mr. CHARLES H. REED, State's Attorney, for the people.

Per CURIAM: This was an indictment for receiving stolen goods, knowing them to have been stolen. In order to a conviction, it was necessary for the prosecution to satisfy the jury beyond a reasonable doubt that the accused knew the goods had been stolen at the time he received them. A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause. *Miller* v. *The People*, 39 Ill. 457.

The goods were stolen on the 15th of May, 1870. The evidence of DeYoung, who was in the employ of the accused at the time the latter received the goods in pawn, gives a full account of the time and manner of receiving them, and if his statement is true, it repels any presumption of guilty knowledge.

The only evidence to countervail the effect of DeYoung's testimony consists in the statements of a policeman as to the time of issuing a warrant, and a remark made by the accused that he brought the clock with him from State street, and had had it some time. It appears that the accused had two clocks about which inquiries had been made—one a bronze clock and the other marble. The former was the one in question. DeYoung testifies that it was the marble clock that the accused said he brought from State street. But the policeman applies the remark to the bronze clock, in which he might easily have been mistaken. The effect of the evidence of the officer as to this account of where accused got the clock, must have been the principal evidence upon which the jury relied, and yet it

rested upon such a foundation as would, in the graver transactions of life, cause a reasonable and prudent man to hesitate and pause.

The only other circumstance to overthrow DeYoung's evidence is the statement of the policeman as to when the warrant was issued. He was testifying months after the event, and yet he undertakes to state the time of issuing the warrant, without its being produced, or the witness having recently ascertained the time by any reference to the record of the proceedings. To impose upon a man the disgrace of a conviction, and deprive him of his liberty, upon evidence of so unreliable a character, does not well comport with the safeguards which the law throws about the accused in criminal prosecutions.

We think the evidence of guilty knowledge not satisfactory, and that the court below should have granted a new trial.

For the refusal so to do, the judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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## ELI S. PRESCOTT

*v.*

## THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*notice—certificate of publication—collateral proceeding.* In a collateral proceeding, the record of the proceedings to widen a road can not be attacked for a defective certificate of the publication of the notice in failing to state the last day of its insertion. The city may have obtained a release, or the parties affected by that proceeding may have estopped themselves from raising the question by voluntary payment. If it were allowed, the city would be compelled, in every case, to prove perfect title to its streets before a special assessment could be levied for their improvement.

2. CONSTITUTION—*title of law—more than one subject.* A law entitled "An act to amend the charter of the city of Chicago, to create a board of

park commissioners, and to authorize the levy of a tax in West Chicago, and for other purposes," is not repugnant to the constitution because it contains many provisions prescribing the manner in which the subject matter of the bill, as stated in the title, shall be carried into effect. All of the provisions contained in the law are well expressed and embraced in the words, "an act to amend the charter of the city of Chicago."

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

Mr. JOHN BORDEN, for the appellant.

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an application made at the March term, 1871, of the Superior Court, by the city collector of the city of Chicago, for judgment against delinquent lands, upon a special assessment warrant for grading a roadway 36 feet wide in Southwestern Avenue, or Ogden Avenue, from its intersection with West Twelfth street to its intersection with the south line of section 23, township 39 north, range 13 east of the third principal meridian, and from its intersection with the south line of said section 23 due west to the present western city limits, as the same has been widened and extended by the order of the common council passed July 26, 1869, and constructing a road bed in said described roadway, of sand, broken stone, gravel, etc.

To the application for judgment, objections were filed. Upon the hearing, the objectors introduced a certified copy of the proceedings in the matter of widening Southwestern Plank Road, in evidence, and some oral testimony, all of which is preserved by bill of exceptions, and it is claimed that the proceedings to widen were void. The record of these proceedings contains defective certificates of printer. They fail to state the date of the last paper containing the notice, and this

is the only defect in the proceedings of any substantial character which we are able to discover. We are disinclined to recognize the propriety of allowing those former proceedings to be attacked in such collateral way, because we can not say, from the mere production of the record, that the parties who were affected by them may not have estopped themselves by voluntary payment and acquiescence, or that the city may not have obtained the proper releases. The principle of allowing the title of the city to be drawn in question in such collateral way, would extend to every case of the improvement of a street, and require the city to show a good title to the street, as a condition precedent to making a special assessment for such improvement.

Another reason for reversal urged is, that the assessment in question is void, because the proposed improvement extends beyond the city limits.

It is, however, conceded by appellant's counsel that, if the West Side Park Act, approved February 27, 1869, is constitutional, then the improvement does not extend beyond the city limits. But he insists that the act is void under section 23, article 3, of constitution of 1848, prohibiting the passage of any private or local law embracing more than one subject, which must be expressed in the title. The title of the act in question is, "An act to amend the charter of the city of Chicago, to create a board of park commissioners, and to authorize a tax in the town of West Chicago, and for other purposes."

We can not spare the time to set forth the several provisions of this act, but, from an examination of them, are of opinion that the reasons assigned by counsel for holding it to embrace subjects not expressed in its title, are wholly groundless.

The principal object of the act is to amend the charter of the city of Chicago, and in so doing, to extend the city limits, to establish and provide for the improvement and regulation of public parks situate in the west division of Chicago. All of these purposes are well expressed by the title, in these

words: "An act to amend the charter of the city of Chicago."

There is nothing in the evidence showing or tending to show that the assessment was not made fairly, upon correct principles.

The collector had no authority to apply for the judgment, and for this reason it must be reversed and the cause remanded.

*Judgment reversed.**

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## THE HOME MUTUAL FIRE INSURANCE COMPANY

*v.*

## ALBERT G. GARFIELD.

1. PLEA *waives a demurrer to the declaration.* Where a defendant demurs to the declaration and the demurrer is overruled, and he then pleads to the action, he waives the grounds of demurrer, and can not raise the legal questions presented by the demurrer. If he desired to do so, he should have abided by his demurrer.

2. INSURANCE—*policy—condition—notice—waiver.* Where an insurance policy contained a condition that if the interest in the real estate be less than a fee, the nature of the title must be stated, or the policy should be void, in answer to the question, what is the title, and is it incumbered by mortgage, etc.; it was answered, a fee simple. There was a mortgage on the property to secure a loan of $10,000 to the person to whom the loss was, by the terms of the policy, made payable; but that fact was known to the agent and the vice president when the policy was issued, and the

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* EDWARD ROBERTS *v.* THE CITY OF CHICAGO.

PER CURIAM: This case arises out of the same proceedings and is the same as *Prescott* v. *The City of Chicago*, and is disposed of in the same way.

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

*Judgment reversed.*

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MARSHALL P. AYRES *v.* THE CITY OF CHICAGO.

PER CURIAM: This case is in all respects the same as that of *Prescott et al.* v. *The City of Chicago*, and must be decided in the same way. Judgment reversed and cause remanded.

*Judgment reversed.*

agent of the company wrote the application: *Held*, that under such circumstances it would be a fraud to permit the company to escape liability on that ground. The assured had a fee simple title subject to an incumbrance, of which the officers were fully informed. There was not a concealment of the title. This case distinguished from the *Illinois Mutual Insurance Co.* v. *Marseilles Manufacturing Co.*, 1 Gilm. 236.

3. SAME—*re-building by the company.* Where the charter of an insurance company provided that settlement should be made, and a payment of the loss within three months, unless they, within that time, determined to re-build, and were authorized to do so in a convenient time, "provided they do not lay out and expend in such buildings or repairs more than the sum insured on the premises," and a loss occurs, and notice is served on the assured that the company had elected to re-build, but they failed to do so: *Held*, that by giving the notice, the contract was not changed to a contract to re-build, but the company, failing to re-build within a reasonable time, became liable to pay the amount of the insurance, with interest and a fair rental value of the ground while the owner is thus deprived of its use.

4. In such a case, it is error for the court to instruct the jury that the company was bound to re-build, "cost what it may," as they are restrained by their charter as to the amount that may be so expended.

APPEAL from the Superior Court of Cook county.

Messrs. SLEEPER & WHITON, for the appellant.

Mr. A. N. WATERMAN, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This is an action of covenant upon a policy of insurance, brought by the insured against the company. After the destruction of the property by fire, a notice to re-build was given, according to a clause contained in the policy.

The objections to the form of the action and the right of the plaintiff to sue, can not be availed of here. These were raised by demurrer in the court below, as the declaration sets forth at length the policy and the notice to re-build. This having been overruled, special pleas were filed. The appellant should have abided by his demurrer if he desired to present the questions raised by it to this court. *Russell* v. *Whiteside*, 4 Scam. 8; *American Express Co.* v. *Pinckney*, 29 Ill. 406.

Appellant is a mutual insurance company, and insured the property of appellee to the amount of $5000. The application and policy contain these words: "Loss, if any, payable to Wm. C. Reynolds, trustee, or order, as his interest may appear." By the policy, the company promised to pay the sum insured "within three months next after the property shall be burnt, destroyed or demolished by fire, and notice thereof given by the act during the time this policy shall remain in force, unless the directors shall, within said three months, determine to re-build or replace the property destroyed." In condition VII, annexed to the policy, and a part of it, it is declared that, "If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void."

Section 14 of the charter is as follows: "The directors shall settle and pay all losses within three months after they shall have been notified as aforesaid, unless they shall judge it proper within that time to re-build the house or houses destroyed or repair the damages sustained, which they are empowered to do in a convenient time, *provided they do not lay out and expend in such buildings or repairs more than the sum insured on the premises*," etc.

It further appears, that in reply to the question, "What is the title, and whether incumbered by mortgage or otherwise, and to what amount," the answer was, "Fee simple." The proof shows that, at the date of the policy, Reynolds held an incumbrance on the property to the amount of $10,000.

It is insisted that the fraudulent concealment of the title rendered the policy void. Campbell, an agent of the company, testified, substantially, that Reynolds called in the office and said he had been making a loan to Garfield; that Garfield had a policy but it was not satisfactory, and that he desired one in the Home Mutual, and requested him to make a survey of the building. He made the survey, and then consulted with the vice president, and wrote the application in the office of the company. Upon cross-examination, he said:

"The matter was all talked over between Reynolds and the vice president." From both the policy and outside information, the officers of the company had full knowledge of the loan and incumbrance. They knew that Reynolds wanted the insurance effected for the better security of the money he had loaned. They knew, from the policy itself, that there was an incumbrance. Proof of a fee simple estate, accompanied with these explanatory circumstances, would be a compliance with the seventh condition, attached to the policy. To permit the company to have the benefit of this stringent provision, with the evidence before us, would be to countenance the perpetration of a gross fraud.

The proof was, that the assured party, at the time of the insurance, had a fee simple title, subject to an incumbrance. This was mentioned in the policy. The company had notice of it, and should have made further inquiry or rejected the application. There was not a concealment of the true character of the title, and consequently no fraud practised. This is not like the case of the *Illinois Mutual Insurance Co.* v. *Marseilles Manufacturing Co.*, 1 Gilm. 236. In that case, the court said: "Neither of the policies, or the applications which are parts of the policies, express that the title of the defendants in error to the land was less than an estate in fee simple, or that the same was incumbered," and therefore they were properly declared void. In this case, the disclosure was sufficient when the policy informed the company that Reynolds had a lien upon the property.

In determining the meaning and effect of the answer as to the title to the property, we should consider the application and policy together. In this view, the answer to the question as to title and incumbrance was, "Fee simple, subject to the lien of Reynolds." We do not, therefore, think that the policy was void.

It is claimed that the suit was not instituted in proper time, under the charter of the company. We have examined the

stipulation of the parties, and do not think this defense can now be made.

All other questions raised may be resolved into one: What is the liability of the appellant? As authorized by the policy, a notice to re-build was given, and is as follows:

"ALBERT G. GARFIELD, ESQ., *Chicago*:

"Dear Sir: In conformity with the provisions of policy No. 5881 of the Home Mutual Fire Insurance Company of Illinois, you are hereby notified that the company elects to re-build the four story frame building formerly situated on the southwest corner of Franklin and Tyler streets, in the city of Chicago, and occupied as a tinware manufactory, being the same premises insured under the above described policy of insurance, and destroyed by fire on or about the 21st day of February, 1868.

"Every other right existing under the same policy of insurance is hereby expressly reserved. You are hereby requested to furnish, at the earliest practicable moment, plans and specifications of the construction of the building in accordance with the customs of insurance in such cases of loss adjustments.

Truly, yours,

April 24, 1868. J. K. MURPHY,

*Secretary.*"

It is assumed that this notice changed the policy—changed the entire character of the contract—and that, thereby, the company agreed to replace the property destroyed, without any reference to the amount of the cost.

It is urged that the policy is in the nature of an alternative contract, and the company, in giving the notice and making its election, made it an absolute contract to re-build, and having failed to re-build, became liable for all damages for breach of such contract. The policy is not in the alternative, to pay a sum of money or to re-build the house. The language is, "to pay the sum insured unless the directors shall determine to re-build." It is equivalent to saying, I will pay a sum

certain if I fail to re-build. The company merely reserved the right to replace the property, to avoid the payment of the money. Its liability was for the money, to be discharged by the performance of some other act. This conduct on the part of the company in giving notice, should be looked upon with disfavor, unless good faith is manifested in all its subsequent proceedings. Upon the notice to re-build, it should proceed immediately with the work.

It was error to instruct the jury that "the company was bound to re-build the building destroyed, *cost what it may.*" Section 14 must be construed as a limitation upon the company in the expenditure of money; hence, the instruction announced an erroneous measure of damages.

This section must be interpreted with some regard to the language used, and the object in its adoption. It restricted the extent of liability, and the notice could not render the company liable as assumed in the instruction. The effect of giving the notice was not to change the contract so as to make it a mere contract to re-build.

What, then, was the effect of the notice? It hindered the assured in the enforcement of the policy; it gave the company the right to take possession of the ground for the purpose of building. If prompt measures are not adopted to re-build, what is the remedy of the assured, and what is the measure of damages? If the company neglected, within a reasonable time after notice, to carry out its evident intention, the assured might disregard it and sue upon the policy, and, with proper averments in the declaration, recover the amount of the policy and interest, and the rental value of the ground during the time of the delay thus caused by the act of the company. The right to the latter, under the circumstances stated, would naturally result from the act of the company.

For the error in giving the instruction, the judgment is reversed and cause remanded.

*Judgment reversed.*

## THERON S. NORTON

*v.*

## FREDERICK TUTTLE *et al.*

1. POWER OF ATTORNEY—*dismissal of suit.* Where a party gives to another a power of attorney, which recites that the maker is indebted to the attorney, authorizing him to file a bill to set aside a conveyance made by the guardian of the maker of the power, and to compel the guardian to account, and, out of the proceeds realized from the suit, the attorney should be paid: *Held*, that after such a suit is commenced in the name of the person giving the power, he may dismiss the suit notwithstanding the opposition of the attorney.

2. EQUITABLE ASSIGNMENT. The bare right to file a bill in equity growing out of the perpetration of a fraud on a party, is not assignable, being contrary to public policy and savoring of the character of maintenance. Neither is the right of action for a tort assignable. The assignor must have a substantial right, and not a mere naked right, to overset a legal instrument, or to maintain a suit. The assignment, under such circumstances presented by this case, must be regarded as void and against public policy.

3. SAME—*power of attorney.* Where a claim of this character is not assignable, the giving of a power of attorney by the holder of the mere naked right to his creditor, authorizing suit to be brought and prosecuted in his name, the claim not being assignable, confers no rights on the attorney in fact, and therefore nothing upon which to found a claim of an irrevocable power to prosecute the suit. The position of the attorney is less favorable than if he were assignee.

4. EQUITABLE JURISDICTION. As to the question of jurisdiction of a court of equity, the case of *Whiting* v. *Roberts*, 22 Ill. 381, considered and distinguished.

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

Mr. J. H. KNOWLTON and Mr. S. W. FULLER, for the appellant.

Messrs. GOODRICH & SMITH, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an appeal from an order of the circuit court of Cook county, dismissing a bill in chancery on motion of the complainant in the bill, the appellant.

It is insisted that the action of the circuit court in dismissing the bill was erroneous, because of the interest which one William F. Camp had acquired in the subject matter of the litigation, under a power of attorney executed to him by the appellant, Norton, on the 27th of May, 1869, and Camp takes the appeal in the name of the complainant.

The power of attorney recited that the appellant was one of the lawful heirs of Theron Norton, who deceased on or about the 24th day of April, 1844, and of Minerva M. Norton, who died on or about the 16th day of October, 1859, and that his interests in the estates of the decedents were wrongfully withheld from him by Frederick Tuttle, who claimed the ownership of the same under a certain conveyance made on the 25th of June, 1860, which was obtained through misrepresentation and the exercise of undue influence over the appellant by Tuttle, and that the appellant was desirous of securing an accounting of the guardianship by said Tuttle of the estate and of the management of said interests, and the complete recovery and possession of said interests.

It was also recited in the power of attorney that, "the appellant was justly indebted to William F. Camp for money obtained from him by the appellant upon certain promissory notes, upon some of which the appellant was holden as indorser thereof, and upon the other of said notes he was holden and bound as the maker of the same, and for the purpose of securing the payment of the money and interest thereon at the rate of ten per cent per annum until the money and interest should be fully paid, and for the purpose also of securing said William F. Camp for his time, trouble and all expenses which he had incurred and which he might thereafter incur in and about the matters and business intrusted to him by said power

of attorney, including attorney's fees and counsel fees and charges, and for the other purposes mentioned therein;" and therefore the power of attorney further proceeded to authorize Camp, as the attorney of the appellant, to institute every and all necessary proceedings to secure an accounting and for the recovery of all and every interest which he had had or might now have in the estate of Theron and Minerva M. Norton, and when so accounted for and recovered, to take possession of the same, and to execute contracts, leases and all necessary writings pertaining thereto, collect all rents, etc.

Through the procurement of Camp, the bill was prepared, and was filed January 25th, 1870.

The bill alleges the appointment of Tuttle as guardian of the complainant and his sister Minerva M.; that Tuttle, while such guardian, under an order of sale by the county court of his ward's lands, fraudulently made sale of, and acquired for himself a deed to, one certain lot of land of his wards; that, by fraud and undue influence, he obtained from his said wards conveyances of two certain other lots of land.

The bill also alleges that Tuttle never accounted with the complainant or said Minerva M. concerning his guardianship, or for any of the moneys received by him as proceeds of their estate; that he claims to hold two of said lots by virtue of the conveyances to him, and has received a large sum in rents and profits. The death of the said Minerva M. is alleged, and that complainant is one of her heirs. The bill prays for an account, and that the alleged fraudulent conveyances be set aside, and the lots be reconveyed to complainant.

Tuttle left this country for Europe, in July, 1869, and was absent over a year, and, upon his return, was served with a summons in this suit on the 11th day of August, 1870.

On the 27th day of January, 1870, two days after the bill was filed, Norton filed in the cause a written stipulation, signed by him, consenting that the suit be discontinued.

Without entering into the particulars of the several affidavits and documents filed in support of the motion to dismiss,

we deem it sufficient to say that the complainant not only did all in his power to dismiss his own bill, but he placed upon record a detailed statement showing that he had no case upon the merits.

Two days after the suit was commenced, he filed a stipulation in writing, signed by himself, consenting to its dismissal. On the 22d of August following, he made an affidavit stating his reasons for filing the stipulation, and insisted upon the dismissal of the suit pursuant to his stipulation. Again, on the 9th of September he made another affidavit, explaining how the suit came to be commenced, and stating in detail facts and circumstances, showing that he had no claim against Tuttle, and that the suit never ought to have been commenced.

And finally, on the 23d of December thereafter, in a still further affidavit, he again repeated that he desired and asked that his suit be dismissed.

These repeated affidavits and declarations would seem to have been thought necessary, by the efforts of Camp, to proceed with the prosecution of the case, despite of Norton's wishes, and to meet matters set up in affidavits on behalf of Camp.

We deem it unnecessary to consider the questions, whether there was any actual indebtedness on the part of Norton to Camp, or whether the power of attorney was executed by Norton under such circumstances as not to be binding upon him, for, in the view we take, conceding the existence of the indebtedness, and the valid execution of the power of attorney, we can not admit the right of Camp to carry on the prosecution of this suit against the will of Norton.

The claim of such right is rested on the ground that the alleged liability on the part of Tuttle to Norton, amounted to a legal or equitable estate, in which Camp had acquired an interest by virtue of the power of attorney, and which he had a right to have investigated for the purpose of securing out of the proceeds of the litigation the payment of any indebtedness from Norton to him, and which the power of attorney was made to secure.

There are authorities of the highest respectability, that such a claim as is set forth in this bill is not assignable in equity. Story, in his Equity Jurisprudence, vol. 2, sec. 1040 g, says: "So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor, will be held void, as contrary to public policy, and as savoring of the character of maintenance. So, a mere right of action for a tort is not, for the like reason, assignable. Indeed, it has been laid down as a general rule, that where an equitable interest is assigned, in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to overset a legal instrument, or to maintain a suit." Spence, in his treatise on Equitable Jurisdiction, vol. 2, 868, speaking upon the same subject, lays down the rule in the following language: "A right which can only produce property by means of a successful litigation, is not a subject which, generally speaking, the court will recognize as property for the purposes now under consideration," (capability of assignment); and further on: "But a right to avoid the effect of a legal instrument on equitable grounds—for instance, to set aside a release obtained by fraud, though there may be the strongest grounds for presuming that the litigation will be successful—is not such a possibility, or such a chose in action, as can be assigned, even in the view of the court of chancery; it is only by litigation that the right can be constituted, and the property acquired."

In *Prosser* v. *Edmunds*, 1 Younge & Coll. 481, one of the cases cited by both Story and Spence, in support of the doctrine they lay down, Lord ABINGER examined the subject at large, wherein he said: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon

general principles, and by analogy to such acts, a court of equity will discourage the practice." * * * * "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity."

Within the principle of the authorities cited, we must regard the subject matter of the controversy in this suit as not assignable, and that any attempted assignment of it should be held void, as contrary to good policy.

If not assignable, then Camp could acquire no interest in it by way of security for any indebtedness of Norton to him, and there would be nothing upon which he could found the claim of an irrevocable power of attorney, entitling him to take from Norton the control of the suit, and to persist in its prosecution in the name of the latter against his will, and in the face of his sworn statement placed upon the record, that he has no claim whatever against Tuttle.

The position of Camp is less favorable than if he were an assignee of the subject of the suit.

Nothing has been assigned to him, but he has merely a power of attorney to prosecute this litigation, and, out of the fruits of it, to reimburse himself for his expenses, and repay an indebtedness to him, as recited in the power, with no mention of its amount.

The litigation, if pursued, promises to be involved, vexatious and prolonged. Norton insists that it is groundless, regrets that it was instituted, and desires to drop it. But Camp, a stranger, claims the right, by virtue of this power of attorney, to intermeddle in the suit, and compel its prosecution in the name of the complainant, contrary to his will, against his step father, Tuttle, the bill containing various aspersions upon the character of the latter, and the natural result of which litigation must be to embroil this family and disturb its peace. It is desirable that parties should have the full liberty of amicably adjusting their suits in court, and the interference with it, as

set up in this case, seems opposed to the best interests of society.

If Camp supposes that he has any equitable interest in the subject matter of the suit, he can file his own bill, and litigate in his own name, and if he deems Norton a necessary party, make him a party defendant.

We must hold that the fact of the execution of this power of attorney did not divest Norton of the control of the suit, and that he might, notwithstanding the power of attorney, dismiss his own suit.

We do not regard the view here entertained as conflicting with the decision in *Whitney* v. *Roberts*, 22 Ill. 381, upon the authority of which case the counsel for Camp relies. There, a grantor, from whom a deed of land had been procured by fraud, made a subsequent conveyance of the land to another, and the subsequent grantee was allowed to maintain a bill in his own name, to set aside the prior deed which had been fraudulently obtained by the first grantee. There was a conveyance of land, the prior fraudulent deed was void, and it was the common case of the owner of land filing a bill in his own name, to remove a cloud from his title.

Here is no conveyance of any thing—but only a power of attorney; the suit respects not only the fraudulent disposition and obtention of lands of the ward, but it involves the accounting on the part of a guardian of the management of his wards' estate, and it is the claim of an attorney in fact to take from the principal the control of his own suit, and carry it on in the name of the latter, despite his will to the contrary.

The cases are wholly distinguishable.

We do not perceive how the court below could have done otherwise than to dismiss the bill, and its order of dismissal is affirmed.

*Decree affirmed.*

## CHICAGO & IOWA RAILROAD COMPANY

*v.*

## WILLIAM DUGGAN.

PRACTICE—*of giving evidence in chief after the opposite party has closed.* Where the court below so far disregarded the rule that the party holding the affirmative of an issue must be confined, after the opposite party has closed his evidence in defense, to merely rebutting testimony, as to permit the former, under such circumstances, to introduce new witnesses, but it appeared that no injury could have resulted to the latter thereby, he not being surprised by testimony as to new facts, the additional evidence being but cumulative, this court refused to interfere with the discretion of the inferior court in that regard.

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

This was an appeal from the report and award of commissioners, appointed by the circuit court of Kane county to fix the compensation to William Duggan for land taken for the right of way through his farm, of the Chicago & Iowa Railroad Company, and to assess the damages resulting to him by the construction and operation of the road.

Duggan took the appeal from the decision of the commissioners, and the cause was taken by change of venue to the circuit court of Kendall county. Upon a trial by jury, the compensation due Duggan was fixed at $107.80, and his damages assessed at $150, and a judgment was rendered accordingly. From this judgment the railroad company appeals.

Mr. CHARLES WHEATON, for the appellant.

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

Per CURIAM: Although the rule is, that the plaintiff must be confined, after the defendant has closed, to merely rebutting testimony, we can not interfere with the discretion of the court below in this matter, unless we can plainly see that injustice

has been done. In this case, it is not probable any injury accrued to the plaintiff because the rule was so far disregarded as to permit new witnesses to be sworn as to the extent of the damages. The defendant was not surprised by testimony as to new facts, the only objection being that the evidence was cumulative.

The instructions were correct, and the verdict is not unsustained by the evidence.

*Judgment affirmed.*

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## GEORGE C. BESTOR *et al.*

*v.*

## JAMES H. WATHEN *et al.*

1. CONTRACT—*in respect to the location of a railroad.* Two persons owning a tract of land on the line of a railroad, contracted with the president of another road then being constructed, and a firm of individuals who had contracted to build that road, to lay the land off into town lots, and, after selling lots to the amount of $4800, to convey to the president of the road and to the construction company an undivided half of the remaining lots. The president and the individuals composing the construction company were to pay no money, but agreed to "aid, assist and contribute to the building up of a town on said land:" *Held,* that if this contract was made to secure the location of the road at a place where it would not be of the greatest benefit to the stockholders of the road, then it was in the nature of a bribe, and can not be enforced; or, if the place where the parties agreed the road should be located, which was afterwards done, was the route best calculated to promote the interest of the stockholders and the public, and the officers of the company were professing to hesitate between it and another line to procure the agreement, that was a fraud, and the contract can not be enforced in equity.

2. When the legislature grants a company a charter for the purpose of constructing a railway, the grant is made because it is supposed the road will bring certain benefits to the public; and when subscriptions are made to build such a road, it is with the understanding that the officers entrusted with its construction will so locate the line and establish its depots as to

bring the highest pecuniary profit to the stockholders, compatible with a proper regard to the public convenience. These alone are the considerations which should control the action of the president and directors of the road, and so far as they permit their official action to be swayed by their private interest, they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public.

3. EQUITY. A court of equity will not enforce a contract resting upon the delinquency of such officers, or tending to produce it.

4. CONTRACT. If such a contract was entered into when the line adopted was only equally as good as another, then neither the company nor the public were injured, yet the company made their power instrumental of private emolument in a manner which a court of equity will not sanction. Public policy forbids the sanction of such contracts.

5. CROSS BILL—*to remove a cloud on title.* Where, in such a case, the defendants file a bill to have the contract set aside as a cloud on their title, it is error in the court to grant the relief. Having entered into a contract, the effect or the tendency of which was to induce the other parties to commit a breach of duty, they are not entitled to the relief sought.

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

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

Mr. JOHN BURNS, for the defendants in error.

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

In February, 1849, the legislature chartered a company with authority to build a railroad from Oquawka, on the Mississippi river, to Peoria, and in 1852 the charter was so amended as to authorize the extension of the road from Peoria eastward to the State line. In 1855 a contract was made between the railway corporation, of the one part, and the firm of Cruger, Secor & Co., of the other part, by which the latter undertook the construction and equipment of the road. On the 5th of April, 1856, while engaged upon this work, the members of the firm, together with Bestor, the president of the railroad company, Sweat, one of its directors, and Smith, its construction agent, entered into a contract with Wathen

and Gibson, the defendants in error, by which the latter, owning one hundred and sixty acres of land situated where the road then in process of construction was expected to cross the Illinois Central, agreed to sell to the first named parties an undivided half of said land upon the following terms: No money was to be paid by the purchasers, but the land was to be laid out into town lots and sold. The first proceeds of the sale to the amount of $4800 were to be retained wholly by Wathen and Gibson, the owners, and when this sum was received from sales, they were to convey to the other parties an undivided half of the residue of said land. The only consideration for this agreement was, that the so-called purchasers should "aid, assist and contribute to the building up of a town on said land." Wathen and Gibson laid out the land into lots and proceeded to sell, and the town of El Paso was built on this and an adjoining tract. In December, 1863, the plaintiffs in error filed their bill against Wathen and Gibson, asking for an account of sales, and for a conveyance of an undivided half of the lots unsold. The cause came on to a hearing, and the circuit court dismissed the bill.

It is insisted for defendants in error, that complainants have done nothing to aid in building a town on said land, and have therefore no claim upon a court of chancery for a decree of specific performance. The record sustains this view, except so far as the adoption of a line for the new road that would cross the Illinois Central at this point, and the erection of a depot here, may be considered as within the purview of the contract. To that extent the plaintiffs in error did contribute to the building of the town. We have, indeed, no doubt that this was the chief aid which they were expected to furnish, and the question is thus presented, whether a contract of this character is one which a court of equity can be called upon specifically to enforce.

On this question there is slight room for doubt.

When the people, through the legislature, grants to a company the right of eminent domain for the purpose of constructing

a railway, the grant is made because it is supposed the road will bring certain benefits to the public. When the company is incorporated and subscriptions are made to the stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders, compatible with a proper regard to the public convenience. These, and these alone, are the considerations which should control the action of the president and directors of the road, and so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust towards the stockholders, and of a breach of duty to the public at large.

A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it. Such is the character of the contract before us. If we enforce it, we lend the sanction of the court to a class of contracts the inevitable tendency of which is to make the officers of these powerful corporations pervert their trusts to their private gain at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now, if this was the best line for crossing the Illinois Central, considered with reference to the interests of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure for themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants and using a false pretext in order to acquire defendants' property

without consideration. If, on the other hand, this line was not the best, but was adopted because of this contract, the case is still stronger against complainants. If such was the fact, they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts because of the great temptation they would offer to official faithlessness and corruption.

The impropriety of such contracts is illustrated even by the argument of counsel for plaintiffs in error. In order to show that they did aid to build the town, it is claimed that, for more than a year, free transportation was given to all persons wishing to go to El Paso with a view of purchasing or settling there, and that a discrimination in the rates of freight was made in favor of El Paso to induce the growth of business there. It surely needs no argument to show that all this was a wrong, both to the stockholders and to the public at large, and we can not but regard it as furnishing, of itself, a most sufficient reason why the courts should regard such contracts as intrinsically vicious, and therefore not to be enforced.

The defendants in the court below filed a cross bill, asking the court to cancel this contract as a cloud upon their title, and this was done. In the view we have taken of the case, the contract should be regarded as so far against public policy that neither party is entitled to the aid of the court. The defendants have entered into a contract, the effect, or at least the tendency of which, was to induce the complainants to commit a breach of duty. The refusal to enforce the contract practically puts an end to it, yet the court should not have

granted affirmative relief on the cross bill. To this extent the decree is modified. Both bills are dismissed, and the costs of this court equally divided.

*Decree modified.*

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## DURFEE CHASE

*v.*

## EDWARD A. FROST.

EXECUTION *from the county court of LaSalle county—within what time it may issue.* A writ of execution can not issue for the first time on a judgment rendered in the county court of La Salle county after the expiration of a year and a day from the rendition of the judgment.

APPEAL from the county court of La Salle county; the Hon. C. H. GILMAN, Judge, presiding.

Mr. A. T. CAMERON and Messrs. DICKEY, BOYLE & RICHOLSON, for the appellant.

Messrs. BRUSH & BUTLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the 11th day of August, 1866, a judgment by confession was rendered, in favor of appellee, in the county court of La Salle, and against appellant, for the sum of $244.32 and costs of suit. No execution was issued until the 3d of January, 1871. The first execution was then issued and delivered to the sheriff of La Salle county, who seized personal property of appellant to satisfy the same. At the January term of the same year he applied to the court to have the execution quashed, upon the ground that no execution had been issued within a year from the last day of the term at which the judgment was rendered.

On a hearing, the court overruled the motion, and the record is brought to this court by appeal, and the decision of the court assigned for error.

The second section of the act which confers jurisdiction on the county court, is this:

"The writs and process of said county courts shall be issued and executed in the same manner as the writs and process of the circuit courts of this State, and the rules, proceedings and practice, not herein otherwise provided for, shall conform, as near as may be, to the rules, proceedings and practice of the said circuit courts; and all fines, orders, judgments and decrees of said county courts shall be and remain a lien upon the lands, tenements and real estate of the person against whom the same may be obtained for the period of seven years from the last day of the term in which the same shall be entered; but no final order, judgment or decree shall be entered in vacation, except judgments by confession, which may be entered at any time upon filing the proper papers with the clerks of said courts, and shall have the same force and effect from the time of entry, as if entered in term time." (Scates' Comp. 659.)

The first clause of this section declares that, writs and process of the county court shall be issued and executed in the same manner as writs and process of circuit courts of this State. It only remains, therefore, to ascertain in what manner writs are issued from and executed by the circuit courts, and what rules, proceedings and practice obtain in such courts, to determine whether the court erred in overruling the motion.

In the case of *The People* v. *Peck*, 3 Scam. 119, it was held that an execution can not issue when more than a year and a day has elapsed since the rendition of the judgment. That case was a *mandamus* to compel the clerk to issue an execution, but the court say that, as no execution was issued within a year and a day, that fact of itself would have justified the clerk in refusing to issue. So far as we are aware, the rules,

proceedings and practice of the circuit courts have conformed to that decision, and it has been accepted and acted upon by the profession until the present case, without being questioned. That is the manner in which writs are issued from the circuit courts of the State, and inasmuch as no greater power is conferred on this county court than is possessed by the circuit courts, it must, in this respect, conform to the same practice. The writ issued without authority, and should have been quashed.

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

*Judgment reversed.*

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## PERRY FRAZER *et al.*

*v.*

## GEORGE S. SMITH *et al.*

1. ALLEGATIONS AND PROOFS—*variance.* To constitute a variance there must be a substantial departure from the issue, in the evidence adduced, and it must be in some material matter which, in point of law, is essential to the charge or claim.

2. In an action to recover damages for the breach of a contract, the declaration alleged the contract to have been made on the 20th day of February, 1868, to repair and put in good order a still apparatus and column for the manufacture of alcohol, to be performed within and during the period of six weeks from and after that day, with breach that the defendant did not perform within that time, averring damage by reason of loss of use of the machinery. The proof showed that the contract was made on the 1st day of March, 1868, and that the defendant was to complete the same in thirty days: *Held*, there was no substantial variance between the allegation and proof. The time of making the contract was not of the essence.

3. MEASURE OF DAMAGES, *in such case.* In cases of such character, the measure of damages is not prospective gains unless there should be shown outstanding contracts to be performed by the machinery to be furnished. In this case, the averment in the declaration was, that the plaintiff was deprived of the use of the still for two months, during which time he might

and would have manufactured large quantities of alcohol, from which he would have derived great gains. This was regarded as prospective, and too remote to be an element of damages.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

This was an action of assumpsit, brought by George Smith and others against Perry Frazer and others, to recover for damages resulting to the plaintiffs by reason of the failure on the part of the defendants to comply with the terms of their contract to repair and put in good order for the plaintiffs certain machinery. A trial in the circuit court resulted in a verdict and judgment for the plaintiffs. The defendants appeal.

Messrs. MCCULLOCH & RICE, for the appellants.

Mr. C. A. ROBERTS and Mr. N. W. GREEN, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Several points are made on this record, the most important of which will be noticed. The first is, a variance between the contract set out in the declaration, and the one proved.

The contract is alleged in the declaration to have been made on the 20th day of February, 1868, to repair and put in good order a still apparatus and column for manufacturing alcohol, to be done and performed within and during the period of six weeks from and after that day.

The proof by the plaintiff Maus, one of the contracting parties, is, that they made the contract on the first day of March, 1868, with defendants, who were to complete the same in thirty days.

There is *prima facie* a variance, but it is not a substantial one. The averment that the contract was to be performed within and during a period of six weeks from the 20th day of February, 1868, is, for all practical purposes, the same as a contract made on the first day of March, and to be performed

in thirty days from that day. It is certain a recovery on the contract, as described, would be a bar to any future recovery for the same cause. The time of making the contract is not of the essence. As this court said, in *Wheeler* v. *Read et al.* 36 Ill. 85, a variance is understood to be a substantial departure from the issue in the evidence adduced, and must be in some matter which, in point of law, is essential to the charge or claim, and the reason is, that the defendant may not be subject to another action for the same cause set out with more certainty and precision in another suit. It is not to be questioned that the defendants could protect themselves under this judgment and recovery, should the same claim come again in controversy.

It is also argued that the verdict was contrary to the evidence. This is a character of objection which seldom prevails where the evidence was conflicting, as it was in this case, unless the finding is against the clear preponderance of the evidence. We can not say such is the case if the rule of damages laid down by the court was correct, and to that we come, and it is the principal point in the case.

This court has decided, in cases kindred to this, that the measure of damages is not prospective gains, unless there should be shown outstanding contracts to be performed by the machinery to be furnished. There is no averment in the declaration of such, the only averment being that the plaintiffs were deprived of the use of the still for two months, during which time they might and would have manufactured large quantities of alcohol, from which they would have derived great gains. This is all prospective, and too remote to be an element of damages.

In this view, the defendants' ninth instruction should have been given. Refusing to give it was error, and for the error the judgment must be reversed, and the cause remanded.

*Judgment reversed.*

## YOUNG & ROWLEY

*v.*

## AUGUST SCHORLING.

NEW TRIAL—*sufficiency of the evidence.* The evidence in this case is regarded as sufficient to sustain the finding of the court below.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. WILLIAM H. HOLDEN, for the appellants.

Mr. GRANT GOODRICH, for the appellee.

Per CURIAM: Appellants seek to recover for commissions, upon the assumption that they were employed to sell the farm of appellee.

There is no question of law presented in the record, and the only assignment of error is, that the finding is against the evidence.

As is usual, when the parties are witnesses, the evidence is contradictory. By consent, a jury was waived, and the cause was submitted to the court. Proof was heard as to the authority to sell, and as to the performance by the parties. The witnesses were present in court, and the weight and credibility of their testimony was considered and determined.

There is sufficient evidence to sustain the finding, and there is not such a preponderance in favor of either party as to authorize us to grant a new trial.

From a careful examination, we are satisfied that the judgment should not be disturbed.

It is therefore affirmed.

*Judgment affirmed.*

Syllabus. Statement of the case.

## STEPHEN B. WILLIAMS

*v.*

## THE CHICAGO COAL COMPANY.

1. EVIDENCE—*matters of privilege.* In an action against a former agent of the plaintiff, to recover for money received by the agent and not paid over, the defendant sought to recoup the damages he had sustained by reason of having been discharged from his employment without proper cause, and before the expiration of the time fixed in the agreement of the parties, and, in testifying in his own behalf, the defendant, in order to reduce the amount of his earnings in other employment, after his discharge, set up a loss claimed to have been sustained by him through one of his customers: *Held*, the witness was not privileged from disclosing, upon cross-examination, the name of such customer.

2. INSTRUCTIONS—*questions for the jury.* Where, in such a case, damages were claimed, in recoupment in a suit against the discharged agent, for a breach of the contract, and a deduction claimed for one month's salary, and that he had allowed a sum of money in settling a claim for the company, it is error for the court to instruct the jury as to how they should find and the amount of their verdict. These were questions for the jury, and not the court.

3. INTEREST. In such a case, where the agent had retained money belonging to the company, and notified them of the fact, whether the company shall recover interest is a question for the jury, under proper instructions, and it is error for the court to compute and direct the jury to allow it.

4. BREACH OF CONTRACT—*damages.* Where a person is employed as the agent of another, and is wrongfully discharged from the employment, he is entitled to recover compensatory damages, but the damages may be mitigated, if the agent, after he is discharged, gets or can get employment in business of the same general character, to the extent of his compensation thus received, if less than his wages under the contract, and if equal thereto, then only nominal damages. If he engages in business of a different character, requiring harder labor and more capital, the damages should not be reduced the full amount of his earnings in such business.

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

This was an action for money had and received, brought by appellee against appellant, in the Superior Court of Chicago.

Pleas—the general issue, and a special plea setting up as matter of recoupment in the nature of a set off, in substance, that the money sought to be recovered in the suit was for money received by appellant while acting as agent and employee of the appellee under a special contract, whereby appellee agreed to employ him for the period of five years from the 14th of May, 1866, at a salary of $2500 per year, and commissions on all coal sold in Chicago by either party, in excess of 10,000 tons, of ten cents a ton for the first year and five cents a ton for the remaining four years, appellant to be the sole agent in Chicago, to be furnished with yard, office, fixtures, and all help necessary to conduct the business; that appellant was discharged on the 23d of September, 1868, without any fault on his part and without his consent, whereby he had lost his salary and commissions and sustained a large amount of damages, to wit: $10,000, which were due at the commencement of this suit, and of which he offered to set off so much as was sufficient to equal any damages sustained by appellee.

To this plea the usual replication of general traverse was filed and issue joined.

A trial was had before the court and a jury; a verdict returned in favor of appellee for $2604 damages. Appellant moved for a new trial, which was overruled and judgment given upon the verdict. Exception was taken, and the case brought to this court by appeal.

Upon the trial, the counsel for the appellee relied almost exclusively upon a correspondence by letters between the secretary of the coal company and appellant, to establish its cause of action. The first in the series is written by Rockwell, the secretary, from La Salle, Ill., dated September 26, 1868, to appellant at Chicago, requesting the latter to send him, as soon as possible, a statement of appellant's account with the writer to the 23d inst., together with a list of the debts due by the Chicago Coal Company lately under appellant's charge, and a statement of all money due to the company in connection with the same business.

To this appellant replied by letter of the date of September 28, 1868, by which it appears that he enclosed an account current since the last account was rendered. But this account was not introduced in evidence.

On the 4th of October, 1868, Rockwell, from La Salle, addressed appellant by letter again, in which he acknowledged the receipt of appellant's of the 28th of September, with the statement of the accounts, and asks for information under the following heads: "I notice that S. B. Williams stands credited with $4122.77. What does that mean? Under what head is your own salary included, and what is the amount to yourself, to clerks and other employees?"

Appellant replied by letter of the 5th of October, 1868, and says: "The credit to my account arises in this way: My salary was credited up to September 1st, 1868; in making final settlement of the books, I credit myself as follows: debiting expense account for the same, for salary from September 1st, 1868, to May 1st, 1871, two years and five months, at $2500 per annum, as per contract, $6666.67; also for commissions on coal to be sold, amount of which can not now be ascertained; this leaves the balance now due me from the company, so far as can be determined at this time, of $4122.71, the amount referred to in your letter, said amount to be increased by commissions on coal to be sold, as per my contract with your company."

Upon the receipt of this letter, Rockwell, by letter of date October 7, 1868, again addressed appellant, as follows: "I have yours of the 5th inst., and notice your explanation of the item of $4122.77, concerning which I inquired in my letter dated 4th inst. You state that you have credited yourself with salary to May 1st, 1871, $6666.67. The amount to your credit, as shown by the trial balance, is $4122.77. Balance, $2543.90. What are the items which constitute this balance of $2543.90, and where are they?"

This inquiry was answered by appellant's letter of the 10th of the same month, in which he says: "In reply to your

inquiries as to what constitutes the amount of $2543.90 referred to in your letter, I would say it is principally cash retained by me on account of my claim against the Chicago Coal Company, the balance of which claim I desire to have paid at your earliest convenience."

Here the correspondence dropped, and these letters constitute all of the evidence, except some indefinite statements of Rockwell, as to a conversation between him and appellant, introduced on behalf of appellee.

Appellant introduced in evidence the agreement between him and appellee, set out in his special plea, and a letter from Rockwell, dated September 19, 1868, notifying appellant that his connection with the company would cease on the 23d inst.

Appellant testified that, at the time he was discharged he retained $2543.90 in his hands, which sum had been reduced by deducting his salary for September, amounting to $208.33, which, with $100 he had to pay on a wharfage account, reduced the amount to $2235.57, on account of his claim; that when he was discharged he notified the company that he had retained this sum, and why he did so. He also testified that, from the 1st of October, 1868, to May 1st, 1871, he had made in other business the sum of $3282.69. On cross-examination, he testified that he had made a much larger sum, but by losses sustained in the commission business, amounting to $2000 or $3000, his earnings and receipts had been reduced to the amount stated. Upon being questioned as to the name of the person through whom this loss was sustained, he declined to give the name of the party, whereupon the court decided that he must answer and give the name, be committed for a contempt, or withdraw the matter of the loss from the consideration of the jury. Appellant elected to withdraw the matter of the losses, and the evidence closed, whereupon the presiding judge said: "There is nothing left now to discuss, is there? I think I am prepared to tell the jury what the verdict ought to be," and instructed the jury as follows: "Under the evidence the plaintiff is entitled to recover $2604." To which

appellant's counsel excepted. The jury retired and returned into court the following verdict: "We, the jury, find that the plaintiff is entitled to recover $2604, including interest."

Mr. GEORGE L. WATERMAN and Mr. E. A. SMALL, for the appellant.

Messrs. MOORE & CAULFIELD, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The first question presented for consideration is, whether appellant, having claimed, as witness for himself, to reduce the amount of his earnings in other employment, by losses alleged to have been sustained by him, as a commission merchant, through one of his customers, was privileged from disclosing, upon cross-examination, the name of such customer. No authorities have been referred to by counsel tending to recognize the privilege in such case. We are aware of none, and regard the negative of the proposition as being too clear, upon principle, to merit discussion.

The only other question in the case arises upon the action of the court at the close of the testimony. It is claimed by appellant's counsel that, as the case then stood, there were questions of fact involved, constituting necessary elements of the verdict, but that the court withdrew all such questions from the consideration of the jury, and peremptorily directed what verdict they should find.

The record shows that, at the close of the testimony, the court said: "There is nothing left to discuss, is there? I think I am prepared to tell the jury what the verdict ought to be." Thereupon the court instructed the jury as follows: "Under the evidence, the plaintiff is entitled to recover $2604." To which appellant's counsel excepted. The jury returned the following verdict: "We the jury find that the plaintiff is entitled to recover $2604, including interest." The counsel for appellant moved to set aside the verdict and to grant a new trial, which was overruled and exception taken.

There was a special plea, setting up matters arising out of the same subject matter and transaction of the claim of the plaintiff below, in recoupment. Such matters grew out of a breach of contract on the part of the appellee to employ him at a certain salary, and commissions upon coal to be sold by him, for the period of five years, and wrongfully discharging him before the lapse of that time.

At the close of the testimony, the state of the case was substantially this: Appellant was discharged on the 23d of September, 1868, without cause, when his time would not expire until the 1st of May, 1871. But it appeared from his own testimony that, as early as the first week of October following his discharge, he got employment, or into business, from which he realized more than he was to receive from appellee, if we lay out of the question the uncertain amount which might be realized as commissions upon coal which he might sell in excess of a specific amount, as to which the evidence shows little, if any, data; that he continued to receive such compensation or profits in his other employment, as that, at the expiration of the time for which he was employed by appellee, he would probably have received as much, if not more, than his salary would have amounted to, if he had continued under the contract with appellee. If he had received as much in other employment, of the same character, then, of course, the damages sustained by his wrongful discharge might be but nominal. But he claimed to reduce the result of his earnings and income below what his salary from appellee would amount to by showing losses to which he had been subject; but upon the question arising concerning the privilege above referred to, he, rather than disclose the name of the customer through whom the loss was sustained, elected to withdraw all evidence of such loss. It is probable that, upon this being done, the court regarded the defense by way of recoupment foreclosed, by appellant's admission of the amount received by him in other business, and that no question of fact remained to be passed upon.

Would such a result necessarily follow?

Where a party is employed for a specified time, and at a stated salary, in a business of one character, and he is wrongfully discharged, does it follow that, if he goes into another kind of employment, or, by the use of his capital and skill both combined, he makes as much as he would have received under the employment from which he was discharged, he has, therefore, necessarily sustained no damages?

The principle upon which damages are allowed in cases like this, is that purely of compensation. New employment does not constitute a defense, but the amount earned is to be taken into consideration in determining how much the party discharged has lost; or, perhaps, as a better expression, in mitigation of damages. The law will not permit him to so conduct himself as to aggravate the damages. He must not lie idle when it is practicable to get work of the same general character.

But when other employment has been obtained, and earnings received, or business entered into and profits made, and the question arises as to how much damages such party has sustained by reason of the wrongful discharge, some questions of fact must necessarily be involved, viz: Was the new employment of the same general character, or was the labor more severe, or the responsibility greater or less? Was the new business such as required the use of capital, while that from which he was discharged did not? If a young man should enter into a contract with a merchant, to act as his clerk for a specified time, at a stated salary, and be wrongfully discharged, and if the only employment he could get would be to work as brakeman on railroad trains, would it be claimed that because he received as much wages as brakeman as he was to receive as clerk, such facts would constitute a defense to the merchant? Would they, as matter of law, operate as mitigation of damages, to such as were nominal, merely? Clearly not; simply because the question of fact should be

passed upon whether the labor was not different in character and more severe in the performance.

The matter set up in the special plea is in the nature of a cross action. Suppose, instead, appellant had brought his action upon the contract, alleging the same breach. Proof upon the trial, of the execution of the contract, readiness to perform on the part of appellant, and the wrongful discharge, would constitute a cause of action which would entitle him to some damages. But suppose the same evidence were introduced as to subsequent employment, and the receipt of compensation, which, nominally, amounted to as much and even more than the stipulated salary, would it be competent for the court to take the case from the jury and instruct them peremptorily to find for the defendant? Manifestly it would not; and yet that is precisely what was done, in effect, in this case.

The appellant testified, and is uncontradicted, that, at the time he was discharged, he retained, and so reported to appellee, the sum of $2543.90, which had been reduced by deducting the September salary of $208.33; that he was obliged to allow Mr. Hart $100 in the settlement of a wharfage account, which, with the September salary, reduced the amount received by him to $2235.57.

It does not appear that appellee had ever questioned the allowance of the salary for September, or of the $100 paid on the wharfage account. If it was questionable whether these items should have been allowed, the matter should have been submitted to the jury. Against appellant's evidence on the trial was his letter of October 10, 1868, to Rockwell, in answer to one of the latter. Rockwell says in his letter:

"You state that you have credited yourself with salary to May 1st, 1871, - - - - - - - - $6666.67
The amount to your credit as shown by the trial balance, is - - - - - - - - - 4122.77

Balance, - - - - - - $2543.90

What are the items that constitute this balance of $2543.90 and where are they?"

In his reply to these inquiries, appellant said:

"In reply to your inquiries as to what constitutes the amount of $2543.90 referred to in your letter, I would say it is principally cash retained by me on account of my claim against the Chicago Coal Company," etc.

Unless this admission amounts to an absolute estoppel, which it clearly does not, the appellant had the right to claim before the jury that this amount should be reduced by the items above referred to in his testimony, and the question should have been submitted to the jury.

Then again, the question of interest was for the jury, and not for the court. The suit was for money received to the use of another, it is true; but appellant testified, and, in that, was uncontradicted, that he immediately notified the company of the fact, and his reason for so doing. In such case, the statute gives interest when such money is "retained without the owner's knowledge." And the only other case where the statute gives interest in the absence of a written contract or judgment is, "on money withheld by an unreasonable and vexatious delay of payment." Whether the interest be claimed upon one ground or the other, the question must be submitted to the jury.

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

*Judgment reversed.*

Syllabus. Statement of the case.

## JOHN A. LEGGAT *et al.*
*v.*
## SANDS' ALE BREWING COMPANY.

1. WARRANTY. No particular form of words is necessary to make a warranty. The word warrant need not be used, but there must be some language to indicate the intention.

2. SAME—*liability for deterioration.* One who orders and purchases an article well known to him, for transportation and resale upon a venture, for his profit, can not, without express warranty, compel the vendor to cover loss by deterioration, resulting from unusual distance, time, and mode of transit. If ale sold and shipped at Chicago be of the quality ordered, the vendor is not held to a warranty that it will bear shipment, or be merchantable on arriving in Montana.

3. PLEADING—*custom.* A plea, that vendors of ale have a custom or usage of crediting purchasers with ale found unfit for use, is not supported by proof of loss in quality, after shipment to a distant territory upon a new venture, exposed to delays and subject to every variety of carriage.

4. CUSTOM. A custom must be general and uniform. It must be certain, reasonable, and sufficiently ancient, to afford the presumption that it is generally known.

5. PLEA—*failure of consideration*, must be specially pleaded. Where property is the consideration of a note, there can be no failure, except there be a warranty or fraud.

6. SET-OFF—*recoupment.* No warranty being established, evidence in support of set-off, or for purpose of recoupment, is not admissible under the general issue.

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

This was an action of assumpsit, brought by Sands' Ale Brewing Company, to recover an unpaid balance upon a note for $2136, given by John A. Leggat and Alexander J. Leggat, upon a purchase of one hundred and fifty barrels of Sands' stock ale and two dozen brass faucets, of Sands' Ale Brewing Company, for shipment to Montana, to be there sold by Leggats in the course of their business.

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

The defendants pleaded the general issue and several special pleas, averring warranty on the part of the vendors in their promise to ship to Montana said one hundred and fifty barrels of ale, to be there offered and sold as a merchantable beverage, but that on arriving by the usual modes of transportation, it was found sour and unfit for use, whereby the consideration, except $200, failed, constituting breach of warranty. The defendants also pleaded set-off, and claimed for their charges and damages resulting from the breach alleged.

The plaintiff below replied, in substance, that the ale delivered was of the quality contracted for, and that they did not warrant said ale to be of the quality and fit for the purposes alleged in said plea, in manner and form as alleged.

The proof showed that the purchasers well knew the quality of Sands' ale; that in ordering, they said, "Please select the ale as flat as possible, as it will be sixty days in transit;" and that they considered the transaction a venture, promising large profits. The shippers wrote, "The quality of the ale is our very choicest summer stock;" and, "We sent the very best and oldest summer stock we had in our cellar—ale which was made in December last, and which you will hear a good report of should it reach its destination."

Verdict for balance due; motion for new trial overruled; exceptions taken; judgment entered, and appeal.

Mr. GEORGE L. PADDOCK and Mr. GEORGE O. IDE, for the appellants.

Messrs. HOYNE, HORTON & HOYNE, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Two questions arise in this case for our consideration:

*First*—Whether the proof, offered by appellants, was competent under the special plea of partial failure of consideration?

*Second*—Whether it was competent under the plea of the general issue?

Appellants purchased of appellees, by letter, a quantity of ale, and directed its shipment from Chicago to Montana, for which the note, sued on, was executed.

The only averment in the special plea necessary to be noticed, is to the effect that the ale was warranted to be reasonably fit for transportation to Montana, and there to be used and sold as a merchantable beverage.

The only construction to be given to this plea is, that the ale was suitable for such purposes at the time of the purchase.

No particular form of words is necessary to make a warranty. The word warrant need not be used, but there must be some language used to indicate the intention of the party, to oblige himself that the article shall be of the quality stated in the plea.

The warranty as set up in the plea was, that the ale, at the time of the sale, was not only suitable to be transported to Montana, but that it should be merchantable upon its arrival there.

Appellants remark in one of their letters, "Please select the ale as flat as possible, as it will be sixty days in transit." It was shipped on the last of April.

It would be most unreasonable that any man, under such circumstances, would make such a warranty.

The letters offered in evidence to sustain the plea, wholly fail to do so.

The first two letters between the parties merely amount to a proposal to purchase, and an agreement to sell.

The next letter from appellants was an order of one hundred and fifty barrels of stock ale, to be as "flat as possible." Appellees replied in three successive letters, stating the shipments, and remarking in the last one, "The quality of the ale is our very choicest summer stock."

The last letter of appellants enclosed the note sued on, and they ask, "Did you not make an error in charging the ale at $14? We were figuring it at $13.24."

To this, appellees sent a reply, acknowledging the receipt of the note, and stated: "We did not make any mistake regarding the price of the ale sent you. We sent the very best and oldest summer stock we had in our cellar—ale which was made in December last, and which you will hear a good report of should it reach its destination."

The order was for a particular ascertained quality of ale, to be as flat as possible. The oldest summer stock was sent.

There is not an expression in the correspondence, on the part of appellees, which can be construed into a warranty or representation that the ale would bear shipment to Montana; that it was suitable to be transported there; that it would be merchantable after the long transit to which it was to be subjected.

The language relied upon by counsel for appellants is contained in the last letter of appellees, already quoted: "We sent the very best and oldest summer stock," etc., "which you will hear a good report of should it reach its destination."

It is contended that this was a warranty of the quality of the ale. Concede that it was, and yet it does not support the plea. This language, as well as all the language of the correspondence, has reference solely to the quality of the ale in Chicago, and not in Montana.

The warranty in the plea is not sustained by the letters offered. On the contrary, they show that the transportation of the ale to Montana was a mere venture, which appellants were willing to risk, with the hope of realizing enormous profits, and without any thought or expectation of indemnity from a warranty.

Appellants next offered to prove, that good, merchantable Sands' ale, shipped from Chicago to Montana, would have arrived at the latter place in good condition, and that the ale in controversy was sour and spoiled, and worthless as a beverage when it reached its destination, and that it was the custom of the ale trade to credit the vendee with ale which was found unfit for use.

This proof did not tend to establish the warranty, and was therefore inadmissible in support of the special pleas, for they contain no averment that the quality of the ale was warranted at the time of shipment, or that it was unfit for use when shipped.

But counsel insist that the evidence offered was proper under the second special plea, which they seem to regard as also a plea of partial failure of consideration, and urge that it avers that the ale was unmerchantable when shipped. If this construction of the plea be correct, still it avers a warranty, by express reference to the first special plea, of the same character as the latter plea, and the facts proposed to be submitted would not constitute even the semblance of proof of such warranty.

This second plea is rather anomalous, and we have grave doubts as to its character. It avers an express warranty of the ale; a breach which occasioned a loss of all but $200 worth; a reliance on the warranty; the advancement of money towards the purchase, in addition to the note; the payment of freight and charges upon the ale; the liability, undertaking and promise of appellees to refund the freight and charges, and payment made; and then concludes with the usual averments of indebtedness, and a willingness to set-off, as in a plea of set-off.

We think that the replication to this plea, in the court below, properly recognized it as a plea of set-off. In support of it as such, the proof was properly excluded. It neither showed liability nor promise on the part of appellees to refund the payment advanced, or the freight paid.

The evidence offered as to the usage of brewers, was properly refused.

No ale had been shipped from Chicago to Montana during the season of the sale, or the previous season. Appellants, in their letters, termed the shipment a venture, and remarked that the ale would be sixty days in transit; would readily sell in Montana at twenty-five cents a glass, in gold; and, "should

the venture prove a success, we hope, next spring, to give you an order for at least five hundred barrels."

It is most unreasonable to make any application of this usage, to ale shipped to this distant territory, exposed to delays, and subject to every variety of carriage.

A custom must be general and uniform. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known.

This was not a general custom which existed by the common law; it was a particular custom, and was inadmissible under the pleadings.

A particular custom must be stated in the declaration, and the rules, as to stating customs, are the same in pleas as in declarations, only greater strictness is required in pleas. 1 Saund. Pl. and Ev. 884–5–6.

The proposed evidence could not be admitted under the general issue for the purpose of recoupment.

The effect would be virtually to repeal the statute which permits the filing of the pleas of failure and partial failure of consideration.

Such defense would also be in conflict with former decisions of this court.

Leaving out of consideration the special pleas between which, and the proof, there is an irreconcilable variance, the only plea was *non-assumpsit*. Under it, a party is not permitted to prove a failure, or partial failure, of the consideration of the note sued on. Such defense must be presented by special plea. *Keith* v. *Mafit*, 38 Ill. 304.

Where property constitutes the consideration of a note, there can be no failure of the consideration, unless there is a warranty of the soundness or quality of the property, or a knowingly false representation made in regard it. In this case there is neither, and there was sufficient consideration for the note. *Owings* v. *Thompson*, 3 Scam. 502; *Myers* v. *Turner*, 17 Ill. 179; *Richards* v. *Betzer*, 53 Ill. 466.

The judgment must be affirmed.

*Judgment affirmed.*

## ISAAC N. BASSETT

*v.*

## HARVEY LOCKARD.

1. JUDICIAL SALE—*failure of title.* Where, in a partition suit, the land was found not susceptible of division and was sold by the master, and the proceeds partitioned, and the purchaser at that sale paid the money and received a deed from the master, but afterwards the administrator of the ancestor of those who sought the partition filed his petition for the sale of the land for payment of the debts, and under an order of the court one-half the land was sold for that purpose, on a bill filed by the purchaser at the master's sale: *Held*, that he was not entitled to relief.

2. It was held that, at a judicial sale, there is no warranty of title, and the maxim *caveat emptor* applies. The purchaser runs all risks of title at such a sale. If the land descended to those seeking partition, burthened with a lien of the ancestor's debts, he, at the master's sale, purchased subject to have his title defeated by a sale for the payment of those debts.

3. SUBROGATION. In such a case there can be no subrogation, as there was no claim that could be subrogated. The lien of the creditors was discharged by the sale by the administrator, and the purchaser thereby acquired the title to the land and nothing more. There was no remaining right held by the creditors. He did not pay the money to satisfy or purchase the debts, but to buy the title to the land, which he acquired, and nothing more. He acquired no right of the creditors which may have once existed. He purchased at the master's sale land that was burthened with, and subject to, a lien that was capable of defeating his title, and he may have abated from the price the amount of the debts against the estate, but whether he did or not, he purchased without warranty or fraud.

WRIT OF ERROR to the Circuit Court of Mercer county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. ISAAC N. BASSETT, *pro se.*

Messrs. PEPPER & WILSON, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a supplemental bill, filed in a proceeding for partition by one of five tenants in common, setting forth, among other things, that the complainant, on the 10th day of April,

1870, purchased a certain tract of land in Mercer county, at a sale thereof by the master in chancery, under a decree therefor, it having been found not susceptible of partition, for the sum of $1600; that after said sale, on the 2d day of July, 1870, one-half of the premises was sold at an administrator's sale for payment of the debts of Robert Lockard, deceased, under a decree of the county court, made at the May term, 1870, and bought in by the complainant for the sum of $818; that Lockard in his life time being considerably in debt, for the purpose of defrauding his creditors, made a voluntary conveyance of the premises to his five minor sons, being the four defendants, and one other, whose interest the complainant had purchased.

The bill prayed that the complainant be allowed a credit for the amount he had paid at the administrator's sale, upon the notes which he gave on the purchase at the master's sale, or that the master be ordered to pay him that amount.

A demurrer was sustained to the bill, and it was dismissed.

We do not perceive any ground upon which the complainant can be afforded the relief sought, for the failure of title as to one-half of the land purchased at the master's sale. It was a purchase at a judicial sale, and the general rule is, that there is no warranty at such a sale, but the rule of *caveat emptor* applies; and the goodness of the title must be at the purchaser's own risk.

Such rule was recognized and acted upon by this court in the case of *McManus* v. *Keith et al.* 49 Ill. 389, where an application had been made by a purchaser to enjoin the collection of certain promissory notes given by him upon the purchase of real estate at a like sale, upon the ground of a want of title to the land sold, and the application was held by the court to have been rightly refused.

The chief distinguishing feature between that case and the present is, that there the purchaser was a stranger to the proceeding, instead of a party plaintiff, as here. But it is not perceived why that circumstance should vary the application

of the rule. The defect of title here was not in any land which had been set off to the plaintiff in severalty, as his share on partition, in which case, on failure of title, he might have had resort to his co-tenants, but it was as to land of the tenants in common which had been sold at public sale and struck off to the plaintiff as a purchaser, as it would have been to any other purchaser.

It is said that, if the administrator had not taken the proceeding he did for the sale of this real estate, the creditors could have proceeded directly against the heirs to recover the debts due from their ancestor, and could have recovered from them the value of the land descended; but as the administrator did proceed and make the sale of the land to satisfy the claims of the creditors, the plaintiff, it is claimed, by bidding and paying on the sale the amount necessary to discharge the claims, became entitled to be subrogated to the rights of the creditors.

Admitting that the two proceedings indicated were open to be pursued, either one of them, for obtaining satisfaction of the creditors' claims, the administrator resorted to and sold the land in satisfaction of them, and there was no remaining right of creditors; the plaintiff, by the purchase, acquired title to the land, nothing more. He acquired no alternative right of the creditors, which might once have existed on their part, to proceed directly against the heirs for the recovery of their debts.

The most that can be said is, that the land came to the heirs chargeable with the debts of their ancestor. It was a qualified estate.

This estate the plaintiff purchased at the partition sale as it was. The title was subject to be defeated for the payment of such debts, and was so defeated, as it might have been by any other lien or incumbrance. It may be, the complainant considered and estimated the disadvantage of the burden upon the land, of the charge for the ancestor's debts, and bid and paid a price reduced to the extent of it. This he should

have done in the exercise of a proper precaution, but whether he did so, or the charge was a latent and unsuspected one, he purchased with the burden of this charge resting upon the land, without warranty or fraud, and he exhibits no sufficient ground for relief on account of failure of title by reason of such charge. *Owings* v. *Thompson et al.* 3 Scam. 502.

We see no error in sustaining the demurrer to the bill, and the decree must be affirmed.

*Decree affirmed.*

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## SANGAMO INSURANCE COMPANY

*v.*

## JEDEDIAH MCKEEN *et al.*

INSTRUCTIONS which are embraced in others already given may be properly refused.

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

Messrs. HARPER & CASSELL, Messrs. WORTHINGTON & PUTERBAUGH and Mr. S. D. PUTERBAUGH, for the appellant.

Messrs. BURNS & BARNES, for the appellees.

PER CURIAM: This was *assumpsit* upon a policy of insurance not under seal, issued by appellant to appellees, insuring them in the sum of $2000 upon grain in a warehouse which was burned.

There was a plea of the general issue, and a stipulation to admit the defense of fraud under that plea, the case tried by a jury and verdict rendered in favor of appellees, upon which the court, after overruling a motion for new trial, gave judgment against appellant.

Two grounds are relied upon for the reversal of the judgment: 1st, that the verdict is against the evidence; 2d, the court refused proper instructions asked on behalf of appellant.

Neither ground is tenable. The main question litigated upon the trial was that of fraud. The evidence is very voluminous and conflicting. We find no such weight and preponderance in favor of appellant as brings the case within the established rules of this court in respect to interfering with the verdict of a jury.

The instructions asked and refused had all been embraced in other instructions given for appellant by the court. Their repetition could subserve no proper purpose, and they were consequently properly refused. No error appearing in this record, the judgment of the court below is affirmed.

*Judgment affirmed.*

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## JOSEPH VAN METER *et al.*

*v.*

## THE PEOPLE OF THE STATE OF ILLINOIS.

1. RIOT—*persons of the same name—judgment uncertain.* Where two persons of the same christian and sir names are indicted, and they are not distinguished the one from the other, and one is found guilty, without designating which, and a new trial was granted as to one of them and overruled as to the other: *Held*, that the record of the conviction is so confused as to be incomprehensible.

2. CONTINUANCE—*affidavit—admitting its truth.* On a trial for a riot, the defendant filed an affidavit for a continuance, which contained sufficient grounds for allowing the motion, but the State's attorney offered to admit that the witnesses, if present, would swear to the facts contained in the affidavit, whereupon the court overruled the motion and required the parties to proceed to trial on such admission: *Held*, the court erred, as the act of 1869 is but an amendment of the practice act, and does not apply to criminal trials; but that the court might properly, in such a case, permit the prosecuting attorney to admit the absolute truth of the affidavit, without the right to contradict its truth, and require the defendant to go to trial,

but in doing so it would not be under the practice act, but because the court could see that the defendant would not be prejudiced.

3. ACCESSORIES—*in misdemeanors.* Our statute, in reference to accessories before the fact, applies to misdemeanors, although it uses the word "crimes." A misdemeanor is a crime, although not of the gravest character. In misdemeanors, all accessories before the fact are principals at common law as well as under our statute, and as such are punishable.

WRIT OF ERROR to the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. TURNER, BRAWLEY & TURNER, for the plaintiffs in error.

Mr. D. W. JACKSON, State's Attorney, for the defendants in error.

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

This was an indictment for riot, against Thomas J. Van Meter and two other persons, both of whom were indicted under the name of Joseph Van Meter. We infer from the evidence that the two Josephs were father and son. They are not distinguished from each other in the indictment. The record shows a verdict of guilty against Joseph Van Meter and Thomas J. Van Meter, without indicating which of the two Josephs is found guilty and which acquitted. It further shows a motion for a new trial, and the motion sustained as to Joseph Van Meter, and also overruled as to Joseph Van Meter and Thomas J. Van Meter. There has probably been a clerical error in making up the record, but, as it is submitted to us, it is quite incomprehensible.

A motion for a continuance was made, and the court, after holding the affidavit sufficient, overruled the motion upon the offer of the State's attorney to admit that the absent witness would, if present, swear to the facts set forth in the affidavit. The affidavit, if true, showed there was no riot, but merely a fight between Bryant and one of the defendants, in which none

of the other defendants took any part whatever. It showed good ground for a continuance, and the court should not have overruled the motion in consequence of the offer made by the prosecuting attorney. The act of 1867 (Session Laws of 1867, page 157), under which this admission was made, is simply an amendment of the practice act, and does not apply to the trial of criminal cases. The original act in regard to the admission of affidavits was not designed to apply to criminal proceedings, as decided by this court in *Willis* v. *The People*, 1 Scam. 402. We see, however, no objection to such a practice, in the discretion of the circuit judge, even in criminal cases, but it must be the old practice of admitting the statements of the affidavit to be absolutely true, and not the rule established by the law of 1867 for civil cases, permitting the affidavit to be contradicted. This would take from the accused what might be of the greatest importance, if his affidavit may be contradicted: the right to have his witnesses seen and heard by the jury.

If the court refuses a continuance because the prosecuting attorney offers to admit the truth of the affidavit, and not to contradict it, it must do so, not by virtue of the practice act, but because, independently of that act, it can see the accused would not be prejudiced by the refusal of a continuance on such terms.

As the case must be re-tried, it is proper to dispose of another point made by counsel for plaintiff in error. It is urged that our statute in regard to accessories before the fact does not apply to misdemeanors, because the word "crime" only is used in this section of the act. But this reason is not a valid one. The word "crime" comprehends misdemeanors. Every misdemeanor is a crime, though not one of the gravest character. Blackstone says, properly speaking, they are synonymous terms, though in common usage the word "crimes" is made to denote offences of a deeper dye. Book 4, page 5. At the common law there were no accessories in misdemeanors, because, says Blackstone, 4th Book, 36, "The law does

not descend to distinguish the different shades of guilt in petty misdemeanors."

In misdemeanors, all accessories are principals at common law, and that is the provision of our statute in regard to accessories before the fact in all crimes, whatever be their grade. Both at the common law and under our statute, one who has been accessory before the fact to the perpetration of a misdemeanor, is punishable as a principal. There was, therefore, no error in the instructions.

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

*Judgment reversed.*

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## ANDREW RYAN

*v.*

## THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

1. RAILROADS—*liability of a railroad company for injuries received by an employee, through the negligence of a co-employee.* In an action against a railroad company to recover for injuries to the plaintiff, occasioned by the alleged negligence of the defendants, it appeared the plaintiff was employed by the company as a common laborer at their carpenter shop, and, after his day's work was done, in going from the shop to his home, while crossing the defendants' track, was struck by one of their engines: *Held*, the employment of those in charge of the engine, and the plaintiff as a laborer in the carpenter shop, was so dissimilar and separate the one from the other that the plaintiff should not be held responsible for the negligence of the former. The doctrine that an action will not lie by a servant against a railroad company for an injury sustained through the default of a fellow servant, did not apply. In such a case, the company should be held responsible for gross negligence of the servant who caused the injury.

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

Messrs. FULLER & SMITH, for the appellant.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellant, in the Superior Court of Chicago, against appellees, to recover for injuries received by being struck by one of the engines of the company. Appellant was employed by the company as a common laborer at their carpenter shop in Chicago. And on the 22d day of February, 1868, after the six o'clock whistle had sounded to release the hands from labor, appellant started for his home. He, in going there, crossed appellees' railway tracks, and in doing so, was struck by one of their engines and severely injured. Appellant testifies that on approaching the track, he looked along it in both directions, and no engine was in sight, and the engine which struck him came upon him from the opposite side of the tank house on a curve on the main track; that no bell was ringing or whistle sounding, and the engine ran at an unusual rate of speed.

On the other side, witnesses swore that the bell was ringing, the engine was moving at a rate of speed not exceeding five miles an hour, and that the track was straight, and the engine could be seen at least two hundred feet in the direction from which it came. Each party prepared and asked instructions, which the court refused to give, but, on his own motion, gave this:

"If the plaintiff was in the service of defendants, and his route to and from his work was over the tracks of the defendants' railway, then the law is established in this State that he took upon himself the risk of being hurt by passing engines on such tracks, and the defendants are not liable to him for any injury that he received from such an engine, whether it was run negligently or not, and the verdict should be for the defendants."

The giving of which is assigned for error.

This instruction took from the jury all question of negligence, and only left to their consideration the fact whether or not he was in the employment of the railroad company.

In *Chicago & Alton Railroad Co.* v. *Keefe*, 47 Ill. 110, we said, "That the duties of an employee of a railway company may be so entirely distinct from all occupation upon its trains as to leave him at liberty to pursue the same legal remedies for injuries received while a passenger, may very probably be true. If, for example, a bookkeeper in a railway office should be injured, while traveling as a passenger, through the carelessness of the engineer, the reasons upon which the rule above referred to are founded, might well be held to have no application. But the employment of the person injured can not be considered distinct, in any sense, leading to this result, *if of a character* to make him a part of the force employed upon the train. If his duties attach him to the train as a part of its personal equipment, then his branch of service is not independent, in any such sense, as to exempt him from the general rule in regard to co-employees, in case he should be injured through the carelessness of the engineeer. * * * * * * In the case before us, the plaintiff was a part of the working force of a construction train, and had been for some weeks passing with it to and fro, and, although his duties were distinct from those of the engineer, yet they were fellow-servants of the company, and both engaged *in the same general duty*, to wit: the operating a construction train, though each worked in his own department."

In the case of *The Chicago & Northwestern Railroad Co.* v. *Swett*, 45 Ill. 197, we held that the doctrine that an action would not lie by a servant against a railroad company for an injury sustained through the default of another servant, applies only to cases where the injury complained of occurs without the fault of the company, either in the act which caused the injury or the employment of the person who caused it. Again, in the case of *The Schooner Norway* v. *Jensen*, 52 Ill. 373, it was held that a master is responsible to his servant

for an injury received from defects in the structure or machinery about which his services are rendered, which the master knew or should have known. And the *Illinois Central Railroad Co.* v. *Welch*, 52 Ill. 183, announces the same rule. In this last case it was said that a person engaging in such a service assumes the ordinary perils of railroad life, and the special dangers peculiar to the condition of the road, so far as he is aware of their existence, and his exposure to them would be his voluntary act.

In the case of *Illinois Central Railroad Co.* v. *Jewell*, 46 Ill. 99, it was said, where the engine driver was a reckless and wild runner, which was known to the company, that the company were liable for injuries resulting therefrom to a fellow-servant. From these decisions it will be seen that the rule that a servant can not recover against a railroad company, for injuries, has its exceptions. And those exceptions depend upon the negligence of the master in furnishing insufficient structures or machinery with which the servant is required to perform his duties, or in employing incompetent servants with whom the servant is associated in the discharge of his duties. Or where a servant is employed in a different department of the general service from that of those whose negligence produced the injury, as was said in the case of *The Chicago & Alton Railroad Co.* v. *Keefe, supra.* And the same principle is announced in the case of *Lalor* v. *Chicago, Burlington & Quincy Railroad Co.* 52 Ill. 401. Thus, it is seen, the rule is not inflexible and without exception.

No employee of the road could have been farther removed from those who produced the injury, than appellant. He was in nowise connected with those who had control of the engine. He was engaged in a different department of the business of the company; as wholly disconnected with the business of operating the engines and trains as was any mechanic or laborer in the city. It is true he was employed and paid by the same company, but otherwise a stranger to the engineers' department. The reason of the rule, when it is applicable, is,

that each servant engaged in the same department of business, for the safety of all, shall be interested in securing a faithful and prudent discharge of duty by his fellow-servants, or that they shall report to the master any delinquencies of those engaged with them in the performance of duty. But the reason does not, nor can it, apply where one servant is employed in a separate and disconnected branch of the business from that of another servant. A person employed in the carpenter shop can not be required to know of the negligence of those entrusted with running trains or handling engines on the road. And hence the reason of the rule fails.

The employment of the engine driver, and appellant as a laborer in the carpenter shop, is so dissimilar and separate from each other, that appellant should not be held responsible for the negligence of the former. In such a case, the company should be held liable for gross negligence of the servant who causes the injury. But the instruction in this case took that question entirely from the jury, and should not have been given. It entirely ignored the exception to the rule.

There was evidence which was conflicting on the question of gross negligence, and it was the province of the jury, and not of the court, to pass upon it and say which position should be regarded.

For this error, the judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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## Chicago & Northwestern Railway Co.

*v.*

## Delos A. Montfort *et al.*

1. Carriers—*liability beyond their own lines.* Where goods are delivered to a railroad company for carriage, marked to a particular place, and beyond the terminus of their line of road, the company receiving the

goods are bound to carry them to the place of destination. To that extent is their undertaking at the common law, but they may, by express agreement, limit their liability to their own route and to its terminus.

2. Where, in such case, the shipper takes a receipt for the goods, from the company receiving them, containing conditions restricting their liability to their own line of road, if he accepts it with a full knowledge of such conditions and intending to assent to them, it becomes his contract as fully as if he had signed it.

3. But whether the shipper accepted the receipt with a knowledge of such restriction, and with the intention to assent to it, is a question of fact to be determined by the jury.

Appeal from the Circuit Court of Cook county; the Hon. John G. Rogers, Judge, presiding.

Mr. George Willard and Mr. B. C. Cook, for the appellants.

Mr. A. T. Ewing, for the appellees.

Mr. Justice Breese delivered the opinion of the Court:

This was an action originally brought before a justice of the peace, against appellants as common carriers, for the loss of goods delivered to their care, to be carried from Chicago "as per bill of lading, to be issued by W. W. Chandler, agent."

The bill of lading issued by Chandler, is as follows:

Chicago & Northwestern Railway Company,

No. 425. Chicago Station, May 11, 1870.

Received from Tourtelot Bros. the following described packages in apparent good order, (contents and value unknown,) consigned to C. J. Montfort & Co. of St. Paul, State of Minnesota, marked and numbered as per margin, to be transported over the lines of this railway to the company's freight station at LaCrosse, and delivered in good order to the consignee or owner at said station, or to such company or carriers (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said goods or packages, it being distinctly

understood that the responsibility of this company as a common carrier shall cease at the station where delivered to such person or carrier; but it guarantees that the rate of freight for transportation of said packages from the place of shipment to St. Paul, shall not exceed $1 per cwt., and charges advanced by this company.

Upon the following conditions:

These conditions need not be noticed, except the following:

"The responsibility of this company, as carriers, to terminate on the delivery of the freight as per this bill of lading, to the company whose line may be considered a part of the route to the place of destination of said goods or packages."

A recovery was had by the plaintiff, and an appeal taken to the circuit court, where, upon trial had, the plaintiff obtained judgment, to reverse which the defendant appeals to this court.

The only questions made by appellants were, was it competent for the railroad company to limit their liability as common carriers, to their own line of road, by special agreement; and, second, does the fact that the goods in question were marked C. J. Montfort, St. Paul, Minnesota, *via.* LaCrosse, prove that the railroad company contracted to be responsible for the goods beyond the limits of their own line, notwithstanding the stipulations of the bill of lading.

These questions have been answered by this court, the first by the case of the *Illinois Central Railroad Co.* v. *Morrison,* 19 Ill. 136, where it was held that railroad companies were common carriers, and as such, have a right to restrict their liability by such contract as may be specially agreed upon, they remaining liable for gross neglect or wilful misfeasance.

The second is answered by the case of the *Illinois Central Railroad Co.* v. *Frankenburgh et al.* 54 ib. 88, wherein it was held, where railroad companies receive goods to convey, marked to a particular place, they are bound, *prima facie,* under an implied agreement from the mark or direction, to carry

to, and deliver at that place, although it be a place beyond their own lines of carriage. This was held to be the rule at common law. It was further held that the carrier might, by special contract with the shipper, limit his liability to such damage or loss as might arise on his own line of carriage; that it was permitted them to relieve themselves from this common law liability by special contract.

That case further holds, if a shipper takes a receipt for his goods containing conditions restricting the liability of the carrier, in such way as is competent for the carrier to do, with a full knowledge on the part of the shipper of such conditions, and intending to assent to the restrictions contained in them, it becomes his contract as fully as if he had signed it. But the question is for the jury, did the shipper accept the receipt with a knowledge of the restrictions and conditions, and with the intention to assent to them? To the same effect is the ruling in *Adams Express Co.* v. *Haynes*, 42 ib. 89.

The doctrine of this court is, when goods are delivered, marked to a particular place, and beyond the terminus of the line of the railroad company receiving the goods, the receiving company are bound to carry the goods to the place of destination; that, to this extent, is their undertaking at the common law, but that, by express agreement, they may limit their liability to their own route and to its terminus.

Whether this receipt, signed by W. W. Chandler, agent, was accepted by the shipper, with a knowledge of the restrictions and conditions contained in it, and with the intention to assent to them, was a question of fact for the jury, who could have found, under the testimony, no other way than they did find if they believed the witness Tourtelot, one of the consignors, who testified that, a day or two after their drayman delivered the goods to the defendants, he went to the defendants' office and called for a duplicate of the receipt, which he called a bill of lading. The clerk gave him the bill of lading in evidence, and he sent it to the plaintiffs at St. Paul. He did not read

the bill of lading, or any part of it. He supposed he was getting a copy of the receipt; he never consented to any of the conditions or limitations contained in the bill of lading.

The proof, therefore, fails to show there was any contract touching the common law liability of the carriers.

It is insisted, however, by appellants, that by an act of congress, approved March 3, 1855, a carrier, by ships or vessels, is not liable for loss resulting from fires happening to, or on board such ship or vessel, unless such fire is the result of the design or neglect of the carrier.

The distinguished counsel who makes this point should have known the act in question has no application whatever to vessels used in rivers or inland navigation. Such is the express provision of the act. 9 U. S. Statutes at Large, 636, section 7.

The judgment is affirmed.

*Judgment affirmed.*

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## JOHN SCHAEFFER

*v.*

## THE PEOPLE OF THE STATE OF ILLINOIS.

1. DELINQUENT TAX—*lien.* Where personal property of a person is assessed in the town in which he resides, and his lands lie in and are assessed in another town, and the personal tax is not paid, a lien for that tax does not attach to the land in another town in the hands of a purchaser after the assessment and before the delinquency of the personal tax. In such a case the land is not delinquent.

2. The 14th section of the Revenue Law of 1853 declares that personal property shall be liable for taxes levied on real estate, and the latter shall be liable for taxes levied on personal property, but the land does not become liable for the personal tax unless it can not be collected from personal property, and that must be shown before judgment can be rendered against the real estate.

3. The 49th section of the same act makes personal property liable for tax on real property, but does not render real estate liable for the personal tax.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

Mr. C. A. ROBERTS and Mr. N. W. GREEN, for the plaintiff in error.

Mr. JOHN B. COHRS, for the defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This proceeding was commenced at the June term, 1870, of the county court of Tazewell county, by the treasurer of that county, on behalf of the people, to recover a judgment against delinquent lands and town lots on which taxes for the year 1869 remained due and unpaid; and among others, it was sought to obtain a judgment against certain lands then owned by the plaintiff in error, for the taxes assessed on the personal property of Henry Wilkey, for the year 1869, who was the former owner of the land, and who, at the date the taxes were so assessed on his personal property, resided in a different township from the one in which the lands were situated.

From the stipulation in the record, it appears that the cause was tried in the circuit court on an agreed state of facts, as follows:

"In this case it is agreed that a personal property tax of $75.87 was duly assessed by the assessor of Pekin township, Tazewell county, Illinois, for the year 1869, for State, county, town, school and dog tax, upon personal property of Henry Wilkey, situated in said township, and that the tax thereon not being paid, the same was duly returned as delinquent and unpaid, and that on the 1st day of December, A. D. 1869, said Wilkey was the owner of the north half of the southeast quarter of section 5, town 23 north, range 5 west of the third principal meridian, and the north half south half of the southeast quarter of the same section, in said Tazewell county, Illinois; and, at that date, said Wilkey conveyed the said premises to Lewis Bequeath, who, on the 17th day of January, conveyed

to C. G. Whitney, who, on the same day, conveyed to defendant in this case; and that all taxes upon said lands for the year 1869, assessed against said lands, were duly paid, as also all taxes for that year assessed against any of defendant's property; and the question presented for the determination of the court is, whether, under the 'statute,' there is a lien upon said land for the unpaid personal tax of the said Wilkey in another township than that in which said land is situated."

The proceeding to obtain judgment against lands and town lots for the taxes due thereon is a proceeding purely *in rem*. The judgment is not rendered against the owner by name, but against the property itself.

It is indispensable, to confer jurisdiction on the county court to enable that court to render any judgment, that the lands should be delinquent, that is, that the taxes assessed thereon under the revenue laws of the State, must remain due and unpaid. Such was not the case in regard to the lands against which judgment was sought. It is admitted that all the taxes for State, county and other purposes, assessed on the lands of the plaintiff in error for the year 1869, had been fully paid. In no legitimate sense, then, could the lands be said to be delinquent, certainly not in the sense in which that term is used in the statute. The land itself owed no tax to the State, county, or to any municipality whatever. By delinquent lands, it is understood to mean lands against which taxes have been assessed under the provisions of the laws, and which remain unpaid. It is only against such lands that the county court is authorized and empowered to render judgment.

It is insisted, however, that the 14th section of the act of 1853 creates a lien on real property for the tax assessed on the personal property of the owner. In that section it is provided that, "personal property shall be liable for taxes levied on real property, and real property shall be liable for taxes levied on personal property, but the tax charged on personal property shall not be charged against real property, except in

case of removals, or where said tax can not be made out of the personal property."

It does not appear, from anything in the record, that Wilkey, on whose personal property the tax sought to be charged against the lands of the plaintiff in error was assessed, had removed from the county, or that the collector was unable to make the amount of the tax out of his personal property. Even if the construction contended for should be given to that section of the statute, the state of facts does not appear where it would be lawful to charge the land with the tax levied on personal property.

We do not think the statute will bear the construction sought to be given to it. By no fair construction of that section does it create any lien on the real property for the tax levied on the personal property of the owner, that can prevail against the rights of a subsequent purchaser. It is manifest that it was the intention of the legislature only to provide that, on the happening of a certain contingency, the real property should be "liable" for the tax levied on the personal property of the owner. Such is the only reasonable construction that can be given to that provision of the statute.

By the 49th section of the act of 1853, it is expressly provided that, "the assessment shall be a lien on the personal property of all persons owing taxes," but there is no express provision of law creating a lien on real property for the tax assessed on the personal property of the owner, and we are of opinion that no such lien is created by the 14th section of the act of 1853, as can be enforced against a subsequent purchaser without notice.

Whether the tax could properly have been charged on the lands, if Wilkey had continued to be the owner, it is not necessary for us to express an opinion.

In this view of the law, it was error in the circuit court to affirm the judgment of the county court, for which reason its judgment is reversed and the cause remanded.

*Judgment reversed.*

Mr. JUSTICE WALKER: I am unable to concur in the conclusion announced in this opinion. I think, under the revenue law, the personal tax was a lien on the real estate, and it was delinquent for that tax. I think the return of the collector should be held evidence that the owner had removed, or that the personal tax could not otherwise be collected.

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## EZRA O. HUNT

*v.*

## THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*interest of a member of the board of public works.* Where two members of the board of public works, one of whom owned property affected, made the assessment for widening a street: *Held*, that the latter was disqualified to act by reason of his interest, and the assessment and the ordinance based upon it were void.

2. PUBLIC OFFICERS—*disqualified to act by interest.* Where public officers are clothed with important powers, subject to but few effectual restraints, so that the rights of private property are almost at their mercy, it must be held that the acts of such officers must be free from the motives of special pecuniary interest, and courts should open the way to a proper investigation of the sources of such improper motives; to do otherwise would be to encourage a prostitution of their powers to their own private ends, by a judicial shield, which should be applied to the protection of the oppressed.

3. EVIDENCE. In such a case, it is error for the court, on an application for a judgment for the assessment, to refuse to permit the defendant to show that one of the two commissioners making the assessment had a pecuniary interest in making it.

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

Mr. WILLIAM H. HOLDEN, for the appellant.

Mr. M. F. TULEY, corporation counsel, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an application by the collector of the city of Chicago, at the March term, 1871, of the Superior Court, for judgment upon a special assessment warrant, to make up the amount which the city failed to collect of an original assessment for opening West Jackson street 66 feet wide, east from Leavitt street to Hoyne.

Numerous objections were filed to the rendition of the judgment.

Upon the hearing in the court below, appellant's counsel proved by one of the commissioners of the board of public works, McArthur, who was called as a witness, that he, McArthur, owned property situate upon one of the corners of Leavitt and Jackson streets; thereupon, the counsel for the city objected to any further evidence on the subject. The objection was sustained by the court and exception taken.

It will be observed that Leavitt street is the starting point of the improvement in question. It appears from the record that the report and application by the commissioners to the council for the new assessment in question, accompanied, as the statute directs, with an ordinance prepared, by which the assessment was to be ordered by the council, was made by only two commissioners, one of whom was McArthur.

Such a report, made by at least two commissioners, was indispensable to a valid ordinance.

By section 37 of chapter 7 of the charter (Gary's Laws, 76,) it is declared that: "If, in any case, the commissioners of the board of public works, or either of them, are specially interested in any special assessment about to be levied, the commissioners or commissioner so interested shall be disqualified from serving in that particular case."

If McArthur was disqualified by reason of a special interest in the proposed assessment, then the report should have been regarded as made by one commissioner alone, and the ordinance based upon it held void.

Where public officers, like these commissioners, are practically clothed with the continuous power of eminent domain, the exercise of which constitutes their almost daily business, and is subject to but few effectual restraints of abuse, so that the rights of private property are quite at their mercy, it is not claiming too much on behalf of private individuals affected by their acts, to insist that, in the exercise of that power in particular cases, the action of such officers shall, at least, be free from the motives of a special pecuniary interest, and courts can not better subserve the interests of a pure administration of public affairs, and the higher ends of government, than by readily and freely opening the way to a proper investigation of the sources of such improper motives. To do otherwise, to summarily foreclose all inquiry by a ruling peremptorily forbidding it, can but tend to impair public confidence in the administration of justice, and encourage a prostitution of the position and powers of such officers holding a high public trust, to their own private ends, by the use of that judicial shield, which should be interposed for the protection of the oppressed, and not of the oppressor.

The officer was himself upon the stand, so that there could be no surprise, and the evidence was admissible under the general objection that the city was not legally entitled to judgment.

The ruling of the court peremptorily forbidding the prosecution of the inquiry was erroneous, and its judgment must be reversed, and the cause remanded.

*Judgment reversed.*

## HARVEY G. COURSEY

*v.*

## MARY S. COURSEY.

1. INSTRUCTIONS—*divorce—cruelty—drunkenness.* On an application of a wife for a divorce, on the ground of extreme and repeated cruelty, it is not error to instruct the jury that they may consider evidence of the drunkenness of the husband in connection with evidence of personal violence, or threats by the husband. Such evidence tends to explain the nature and character of the violence and threats.

2. It is not error to instruct the jury, in such a case, if the defendant was guilty of extreme and repeated cruelty for a less time than two years, that they should find for the complainant on that issue. The statute only requires acts of extreme and repeated cruelty, but does not require their continuance for two years.

3. ANSWER—*to bill for divorce—sworn to.* The divorce statute does not require an answer to a bill for a divorce to be sworn to, but provides that it need not, and is different from the general chancery practice in that respect. The statute having dispensed with such oath, the defendant acquires no advantage by swearing to his answer in such a case. Such a sworn answer has no more effect than the bill, and is not evidence.

4. DIVORCE. Divorces will not be granted merely for indulgence in passion, for abusive language and threats of violence where the safety of the person is not in peril, or the words are not likely to be followed by acts producing serious injury. There must be evidence of a reasonable apprehension of bodily hurt, and such as prevents the party from performing marital duties.

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

Messrs. WILLIAMS, CLARK & CALKINS, for the appellant.

Messrs. CRAIG & HARVEY, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

A reversal of the decree rendered in this case, is urged upon two grounds:

*First*—That there were erroneous instructions given in behalf of appellee.

*Second*—That the charge of extreme and repeated cruelty which was found by the jury to be true, was not sustained by the evidence.

The instructions complained of, were:

*First*—"That if the jury find, from the evidence, that the defendant had been guilty of drunkenness, they might consider that fact in connection with any evidence of personal violence or threats on the part of defendant towards the complainant, in determining whether defendant had been guilty of extreme and repeated cruelty, and whether complainant had reasonable apprehension of bodily hurt, or danger to life or limb."

*Second*—"That if the jury find, from the evidence, that defendant has been guilty of extreme and repeated cruelty for the space of two years next before the commencement of this suit, or for a less time, then they will find for complainant on that issue."

The proof is conclusive that appellant had frequently been drunk subsequent to his marriage. He acknowledged that he had, at times, been a "little intoxicated." Other witnesses testified that they had seen him drunk. The wife stated that, within two years, he drank twelve barrels of wine which he made, besides thirty-five gallons of wine and several gallons of whisky which he purchased. This wine must have been very weak, indeed, not to have affected him seriously when imbibed in such quantities.

It has been said with much truth, as well as beauty, that "wine heightens indifference into love, love into jealousy, and jealousy into madness. It often turns the good-natured man into an idiot, and the choleric into an assassin. It gives bitterness to resentment, makes vanity insupportable, and displays every little spot of the soul in its utmost deformity."

When we reflect upon the passion and crime and unmanly violence so often the result of intoxication from the use of spirituous liquors, it was eminently proper that the jury should

consider the drunkenness of appellant in connection with his threats and acts of personal injury, in determining the character of the latter. A sober man would scarcely dare to strike a woman; while one, under the debasing influence of liquor, might be guilty of any enormity.

The instruction was right.

As to the other instruction, to which objection is made, we must acknowledge our utter incapacity to perceive any error in it. It is in the language of the statute, and states the law plainly and correctly. It is said in argument, "that it utterly ignores the requirement of the statute; that the cruelty must be repeated, as well as extreme." On the contrary, it explicitly informed the jury that the cruelty must be extreme and repeated.

If counsel suppose that the instruction is wrong because it limits the repetition of the cruelty to a time less than two years, they are under very grave misapprehension. The words, "for the space of two years," immediately succeeding the word "drunkenness," in the statute, do not qualify, restrain or extend the word "cruelty." The law makers were not guilty of the absurdity of intending that the cruelty should be repeated for two continuous years; that five or ten blows are not enough; but they must be continued, with short intervals, for two years, before the party thus insulted and abused can obtain a decree for a divorce. *Harman* v. *Harman*, 16 Ill. 85.

An instruction was asked and given for appellant, that if his acts of cruelty were occasioned by the misconduct of the wife, they would constitute no cause of divorce. The instruction as to cruelty was thus fully explained, if it was in the least objectionable.

Should the verdict of the jury be disturbed?

Before any review of the evidence, it may be proper to advert to the fact that the answer was sworn to, and the oath was not waived in the bill.

Counsel thereupon assume that the answer must be overcome by two witnesses, or by one witness and strong corroborating circumstances.

This involves a construction of the statute. In the chapter entitled "Chancery," it is provided that the complainant may waive the necessity of the answer, under oath, and then it shall have no other force as evidence than the bill; but unless this is done, every answer must be verified by oath or affirmation. To dispense with the oath, the waiver must be made in the bill.

In the chapter entitled "Divorces," it is provided that the like practice and proceedings shall be had in applications for a divorce, as are usually had in other cases in chancery, except that the answer of the defendant need not be under oath.

In the one case, the party must waive the oath; in the other, the law expressly waives it.

In making this discrimination, the legislature must have intended that the answer under oath, to a bill for divorce, was waived by operation of law. Any other construction would render the provision in the divorce act entirely inoperative of itself. The right to waive the oath existed without it.

We therefore hold that the answer, sworn to in this case, had no more force as evidence, than the bill.

The evidence justified the verdict.

Appellee testified that appellant once struck her, and she fell on the floor; that he violently pressed a bucket against her breast, and each time hurt her badly; that he made threats of injury; once seized his gun, and used profane language; raised a mallet to strike her, and forcibly put her out of the house three several times. At one time he kept her out in the snow with only her night clothes, to brave the cold and storm for two hours.

Appellant denied these acts, but acknowledged that he had misused his wife in his fits of drunkenness.

In justice to him, we would remark that a large number of witnesses testified to his general good conduct, and favorably to his sobriety.

Courts will never interfere and dissolve the marriage relation merely for indulgence in passion, for abusive language and threats of violence, where the safety of the person is not in peril, or the words are not likely to result in acts of serious injury.

In the leading case upon the subject of cruelty, *Evans* v. *Evans*, 1 Hagg. C. R. 35, it is said that there must be proof given of a *reasonable* apprehension of bodily hurt. The same rule is announced in *Harman* v. *Harman*, *supra*.

The acts of bodily violence proven, amount to that cruelty against which the law ought to relieve. The husband's conduct and ill-treatment of his wife rendered her unsafe, and she could not perform her marital duties.

She may have been indiscreet, but there is no proof that her misconduct provoked his excesses, or pushed his patience to extremity.

The jury had the witnesses before them, and have passed upon the weight of the evidence.

The decree must be affirmed.

*Decree affirmed.*

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## Michigan Central Railroad Co.

*v.*

## William N. Phillips *et al.*

1. Sale of chattels—*delivery—payment.* Where chattels are sold, and no time of payment is fixed by the contract, payment is a condition precedent, implied by law, and the title would not vest until payment, unless waived by the vendor.

2. Same—*waiver of payment.* The vendor, in such a case, may waive payment, and if he does, the title to the property sold will vest in the vendee.

3. Same—*bona fide purchaser.* But even where there has been no waiver by the seller, still, if he delivers the property to the purchaser, and

thus vests him with *indicia* of ownership, and he sells or pledges it to a *bona fide* purchaser without notice, the latter acquires rights which will be protected. Where the property is thus placed in the hands of the purchaser, as to third persons who become *bona fide* purchasers, it does not matter as to the intent with which it was delivered.

4. Such a case as the present is unlike one where something remains to identify or separate the property, or ascertain its weight, etc., as nothing remained here, not even a delivery, but to pay for the property, to complete the sale, and fully vest the title as between the contracting parties. Where one of two innocent parties must suffer loss by the fraud of another, the person who enables the commission of the fraud must suffer the loss.

5. FRAUD—*void and voidable contract.* Fraud in the purchase of property does not render the sale void, but it is voidable at the option of the party defrauded And where a person purchases and acquires the possession of property by fraudulent means, and sells it to a *bona fide* purchaser without notice, the latter acquires title thereto before the sale is avoided and the property is reclaimed.

6. PLEDGE—*delivered as collateral security.* Where a person purchases a lot of highwines and is to pay for them on delivery, and they are delivered late in the afternoon, the seller saying he will leave them until the next morning when he will call and get his pay, and the purchaser ships them to New York and draws drafts on a bank and attaches the shipping receipts to the drafts as collateral security for the payment of the money, and the drafts are presented to a bank and they are cashed: *Held*, the bank, having no notice that the highwines had not been paid for, acquired a valid and binding lien on the property as a pledge for the payment of the money; and that it would be protected against the vendor's claim for the purchase money.

7. BILL OF LADING—*its transfer—delivery.* The transfer of a bill of lading by the shipper, on a sale or pledge of the property shipped, is a symbolical delivery of the property, and this, too, without any indorsement on the bill. The shipper, when he is the owner of the property shipped, does not lose his title by inserting the name of a consignee when he ships the property. The title still remains in him unaffected. In such a case, the consignee becomes the factor or commission merchant of the shipper.

8. SAME. In such a case the same rule applies to the shipper who is not the owner, but has been put in possession of the property under such circumstances as to sell and pass the title to an innocent purchaser. Such a pledge and transfer of the bill of lading, transfers a legal and not a merely equitable title in the pledge.

9. BAILEE—*notice of adverse title to the pledge.* Where it appeared that it was usual, on the sale of highwines among dealers and rectifiers, to accompany the transfer with what are called coupons, but not with bankers who advanced money on drafts on bills of lading of highwines shipped, to have the coupons accompany the bills of lading: *Held*, that in this case the want of such coupons to accompany the bills of lading, was not notice that the pledgor had no title, or a defective one.

10. NOTICE—*payment.* A notice of defective title in the pledgor comes too late to affect the pledgee, after he has advanced the money secured by the pledge. To be operative, the notice should have been prior to the payment of the money.

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

Messrs. HOYNE, HORTON & HOYNE, for the appellants.

Messrs. GOUDY & CHANDLER, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The principal question which arises on this record is, whether there was such a delivery of the highwines in controversy, to Ames, as to vest title in him.

The contract of sale was from Moir & Co. to Ames, and on the 18th of July, 1870, Moir & Co. not having the highwines on hand, Phillips & Carmichael, the appellees, commission merchants of Chicago, for Moir & Co., purchased from Conklin & Bro. and Lynch & Co. one hundred barrels of highwines, fifty from each firm, to be delivered on that day to Wilson Ames, with directions, when delivered, to collect from him $1.07 per gallon, that being the contract price with Moir & Co., and pay Phillips & Carmichael nine cents per gallon of the sum collected—the price paid Conklin & Lynch being ninety-eight cents.

The fifty barrels bought of Conklin & Bro. are the wines replevied in this suit. They were at the Rock Island depot at the time of the purchase, the 18th of July. On the afternoon of that day, the whole one hundred barrels were hauled by the teamsters of Conklin & Lynch, and delivered at the store of Ames.

To countervail the effect of this as an absolute delivery, the testimony of Phillips, one of the appellees, is relied upon, who testified that, on the afternoon of the 18th of July, he went twice to Ames' business house, once between 4 and 5, and again between 5 and 6 o'clock, for the purpose of tendering to him the wines, and did not find Ames, nor any book-keeper or clerk, either time; found a laboring man there; and near 6 o'clock, when he left, he says: "I remarked to the man that I would leave those wines there until morning; I wanted to collect for them before I delivered them, and would be there in the morning; told him to tell Mr. Ames I would come down."

The next morning, Conklin & Lynch sent the bills to Ames' place of business to collect, but Ames did not pay them, and was not found, and failed in business, his store being closed by the sheriff that forenoon.

No time being stipulated by the contract for payment of the purchase price, its payment was a condition precedent implied by law, and the property would not vest in the vendee until he performed the condition, or the seller waived it. An absolute and unconditional delivery is regarded as a waiver of the condition. In this case, we should incline to hold that, as between the parties, the delivery was but conditional, and that, on the morning of the 19th of July, when Ames failed to pay the purchase price, the seller might have reclaimed the property from his hands.

It would be similar to the case of *Mathews et al.* v. *Cowan et al.*, 59 Ill. 341, where we held that the delivery of goods, and taking for the purchase price a worthless check, did not vest the property in the vendee.

But here, between the time of placing the goods in the control of Ames, and any movement to reclaim them, Ames had removed the goods and shipped them on board a car of the Michigan Central railroad for transportation to New York; had obtained bills of lading therefor for their delivery to the consignee, and the National Bank of Commerce, of Chicago,

had cashed two drafts drawn by Ames on the consignee, with the bills of lading attached to them, in pursuance of a previous arrangement he had made with the bank to cash seven hundred barrels of highwines he was about to ship to New York, on bills of lading attached to drafts. The drafts amounted to $5700, were duly presented, but neither accepted nor paid by the consignee, and are still the property of the bank, wholly unpaid.

Although there might not have been, here, any waiver of the condition of payment as to the vendors, we are of opinion there was as to the bank, and that it is entitled to the protection of a *bona fide* purchaser without notice, if such be the position it occupies, which will be hereafter considered.

The rule in this respect, whether a *bona fide* purchaser, for a valuable consideration, without notice, in such case, is protected, is held differently in different States.

Such rule of protection is denied in *Dishon* v. *Bigelow*, 8 Gray, 159, it being held that such purchaser acquires no better right than his vendor had, and stands in the same situation. See, also, *Sargent* v. *Gile*, 8 N. Hamp. 225; *Sawyer* v. *Fisher*, 32 Maine, 28. While, in New York and Pennsylvania, the contrary rule seems to obtain. *Smith* v. *Lynes*, 1 Seld. 42; 6 Johns. Ch. 437; 1 Paige, 312; 1 Edw. Ch. R. 146; *Martin* v. *Mathiot*, 14 Serg. & Rawle, 214; *Rose* v. *Story*, 1 Barr, 190. In this State, the rule of protection of *bona fide* purchasers, in such case, must be regarded as the one established by judicial decision. *Jennings* v. *Gage et al.* 13 Ill. 614; *Brundage* v. *Camp*, 21 Ill. 330; *Butters* v. *Haughwout*, 42 Ill. 18; *The Chicago Dock Co.* v. *Foster*, 48 Ill. 507; *O. & M. R. R. Co.* v. *Kerr et al.* 49 Ill. 459.

In *Brundage* v. *Camp*, the authorities on both sides are reviewed to quite an extent.

That was a case of the sale of personal property, upon condition of giving a note with security for the purchase price, and permission to the purchaser to take the property, on the

express condition that the note should be given by the following Monday. The sale of the property by the purchaser, a day or two afterwards, without giving the note, was held to pass a good title. The great stress of the argument in support of the claim of the appellees, is, that all depends on the intent, and that there was here no intent to part with the property, or to give Ames any control over it, until they were paid. Nevertheless, the fact remains that they placed the highwines in the store of Ames, and gave him apparent dominion and disposing power over them, and enabled him to exercise the same, as he did. Now, as we regard the rule of the foregoing cases, had there been an express agreement made on entrusting the highwines in the hands of Ames, that he should have no control over them, and that they should remain the property of the vendors until paid for, it would not have availed to prevent the acquirement of a good title to the property by a *bona fide* purchaser from Ames, for a valuable consideration, without notice. And Phillip's declaration to the laboring man at Ames' store, could have no greater effect than such an express agreement.

The property here, where nothing remained to be done to complete the sale, either to identify the property or ascertain the price, was entrusted to the possession of the purchaser by the consent of the owner, under the form of a regular sale and delivery, and in the completion of the same ; and by its being thus placed under his control, Ames was enabled to obtain credit by pledging it to an innocent party.

The sellers did not see fit to exact payment at the time, as they might and should have done, where rights of innocent purchasers might intervene, but trusted to the personal security of Ames till the following morning ; and the consequence of this misplaced confidence should be borne by them rather than that the bank should be the sufferer by it. It is an instance for the application of the familiar rule, founded on sound reason, that where one of two innocent persons must suffer from the fraud of a third, the loss should fall on him

who, by his imprudence, enabled such third person to commit the fraud.

It is sought to bring this within the class of cases where the property has been held not to pass, where something remained to be done to complete the sale, from the circumstance that the coupons, which accompany sales of highwines, were not sent with the wines, but with the bills the next morning. Although it seems customary for the coupon to accompany the sale of these wines, it is no muniment of title, or requisite of the sale. The making of the coupon on such sale is but a regulation prescribed by the treasury department for its own convenience and use in tracing the wines, in case a question should be raised whether they had paid the government duty or not. It contains descriptive marks of the wines, the serial numbers and wine-house numbers, and is for the purpose of identification.

It is quite unlike the case of *Andrew* v. *Deiterich*, 14 Wend. 32, cited by counsel for appellees, where one Simmons had purchased of the plaintiff carpeting to furnish his house, for which he was to pay cash. The carpeting, according to the custom of trade, was sent to Simmons' house in the *roll*, so that so much as should be required might be cut off, the residue to be returned, and the purchaser to pay for as much as was used. It was held, in an action against the defendant, an auctioneer who had made an advance upon the carpet some three weeks after it had been made up and laid down in the house, that there was no delivery of the property by the plaintiff which could divest his title to the carpet. There, something was to be done preparatory to ascertaining the price, by the vendee, for which possession was necessary; and the roll of carpeting was delivered to him, not because it was all sold to him, but for a special purpose, to wit: that the necessary quantity might be cut off to make the carpet.

We do not regard the non-delivery of the coupon, and its remaining to be made out according to custom, as altering the character of the delivery of the wines.

It is said this was a fraudulent purchase by Ames; that fraud makes void all contracts, and that no title passed because of the fraud.

A fraudulent purchase of property is not a void one; it is only voidable, at the election of the vendor, and until he does avoid it and reclaim the property, the fraudulent vendee may transfer a perfect title to a *bona fide* purchaser for value. *Rowley* v. *Bigelow*, 12 Pick. 306; *Root* v. *French*, 13 Wend. 570; *Mowrey et al.* v. *Walsh*, 8 Cow. 238.

The question remains to be considered, whether the bank stands in the relation of a *bona fide* purchaser for a valuable consideration, without notice, and is entitled to the benefit belonging to such position. The exact position of the bank is to be regarded as that of pledgee, it holding the highwines as collateral security for money advanced, but whether it has an absolute property, or but a lien upon the goods, is not material as respects the right to maintain this defense. In *Grosvenor* v. *Phillips*, 2 Hill, 153, it is said a conventional lien, by way of pledge or mortgage, may as well be raised in the hands of a carrier, as a right by absolute sale.

It is objected that there was no valid transfer of title, because the bill of lading was not indorsed. Where the shipper is the owner of the goods, and no opposing interest or claim arises on the part of the carrier, consignee, or prior indorsee of the bill of lading, but on the contrary the carrier, as in this case, admits and sets up the interest claimed to be derived from the shipper, it is not perceived why the indorsement of the bill of lading should be deemed necessary for the transfer of the title to the goods embraced in it. The shipper's title, where he is owner, does not depend upon the bill of lading, but is independent of, and before it. The mere insertion of the name of the consignee in the bill of lading, does not vest in him the ownership of the goods. In this case, the consignees were merely the factors and commission merchants of the shipper; by the bill of lading the wines were to be delivered to them or the owner, it being the design, manifestly, to

vest the property in the consignees, only in case of their acceptance of the accompanying drafts which were drawn on them.

The bill of lading was the documentary evidence of the shipper's property in the hands of the carrier; it represented the property, and the delivery of the bill of lading to the bank was a good symbolical delivery of the highwines, so as to vest the property in the bank.

It was as effective in transferring the possession as the delivery of the keys of a warehouse is of the goods contained in it, or of a storekeeper's receipt, of the goods described in it, *Wilkes et al.* v. *Ferris,* 5 J. R. 335; or of a warehouse receipt of the property it embraces. *Burton* v. *Curyea,* 40 Ill. 331; *Rowley* v. *Bigelow,* 12 Pick. 314.

And the bill of lading could be transferred to the bank by delivery merely, without any indorsement, so as to transfer the property in the highwines which it represented, to the bank. *Nathan* v. *Giles,* 5 Taunt. 588; *Allen* v. *Williams,* 12 Pick. 302; *The Bank of Rochester* v. *Jones,* 4 Comst. 497; *Marine Bank of Chicago* v. *Wright,* 46 Barb. 45; *O. & M. R. R. Co.* v. *Kerr,* 49 Ill. 459.

The last proposition seems to be conceded by the counsel for the appellees, had Ames been the real owner, but it is claimed not to apply here, where the shipper has no title, and the bank claims against the real owner. But we having already come to the conclusion that Ames was in a situation to make a valid title to a *bona fide* purchaser, it is now but a question as to the mode of transfer; and the authorities cited establish, that the delivery of the bill of lading, unindorsed, was an effective transfer of whatever Ames was enabled to convey.

It seems to be supposed, too, that the bank got but an equitable interest by delivery of the bill of lading, and it is said that the equity of the appellees being equal and prior to that of the bank, they must prevail, as the bank did not acquire possession and the legal title before appellees replevied

the property. The delivery of the bill of lading, unindorsed, did not transfer a merely equitable title, like the delivery of an unindorsed note; it gave as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves. There is no such thing here as a distinction of legal and equitable title, or actual possession being necessary to complete the legal title. The highwines were in the possession of the railroad company, merely as the servant of Ames.

A mere verbal contract of sale, without reference to the bill of lading, and without delivery of possession, would have passed the property as between the parties, and as to the appellees, they not claiming as creditors, mortgagees, or purchasers from Ames—or an independent written assignment, without reference to the bill of lading, might have been made. The delivery of the bill of lading, in connection with the circumstances, was evidence of a contract that the property should be held by the bank as security for the advance made, and was a symbolical delivery of the wines, tantamount to an actual one.

It is said to be a circumstance of suspicion which should have put the bank on inquiry, the absence of the coupon. Certainly not. Whatever the custom among dealers and rectifiers, that the coupon should accompany the transfer, it was shown in evidence that it was not the custom with banks, in advancing on drafts on bills of lading of highwines shipped, to have the coupons accompany the bills of lading, and had never been done in the previous similar transactions between Ames and the bank.

It is finally insisted that the bank did not pay its money before notice of the want of title in Ames.

It appears from the evidence that, on the morning of the 19th of July, 1870, Ames had a small balance of $200 or $300 standing to his credit at the bank; that the amounts discounted to him on these drafts were placed to his credit, and a check by Ames for a somewhat larger amount than both

drafts was presented immediately and certified, and that a check was paid shortly afterwards which reduced Ames' balance to something less than $50, so that if these drafts had not been returned there would have been a balance to his credit of a little less than $50.

The cashier further testifies that, somewhere within a half hour, he should think, after the money had been placed to Ames' credit, he saw Ames standing with another gentleman at the teller's window, and he saw a package of money passed out to the gentleman who was with Ames; and that there has been no settlement with Ames for any portion of his indebtedness to the bank.

We are fully satisfied from the evidence, that this certified check covering the amount of the drafts, was paid before any notice of appellees' claim, notwithstanding the fact that the bank has not produced the check, or shown by its books its payment, and the conjectures made by counsel that it might have been some other check that was paid, or that the check might have been payable to Ames himself, and be still in his hands.

The production by the bank, of the check cancelled, would have been stronger evidence of its payment, but not necessary in order to satisfy us of the fact.

The judgment must be reversed and the cause remanded.

*Judgment reversed.*

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## CITY OF CHICAGO

*v.*

## WILLIAM TORGERSON.

NEW TRIAL—*verdict against the evidence.* In this case the verdict of the jury is regarded as fully sustained by the evidence.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

This was an action brought by Torgerson against the city of Chicago, to recover damages for the breaking of his leg, occasioned, as alleged, by a defective sidewalk in said city. The plaintiff recovered a judgment for $400, to reverse which the defendant appeals.

Mr. I. N. STILES, for the appellant.

Messrs. RUNYAN, AVERY, LOOMIS & COMSTOCK, for the appellee.

Per CURIAM: The only question presented by this record is, the sufficiency of the evidence to sustain the verdict. There seems to be no doubt that appellee was injured by the fall; and whether his leg was broken, was a question upon which there was a conflict in the testimony, and the jury believed that of the surgeon who said it was, as they undoubtedly might, if it was more satisfactory than that of the other physicians. It is the province of the jury to weigh and consider the evidence and give it such weight as they think it entitled to receive. Having done so in this conflict of the testimony, we feel no disposition to disturb their finding, as we think it was fully justified by the proof.

The judgment of the court below is therefore affirmed.

*Judgment affirmed.*

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## MICHAEL GROB

*v.*

## WILLIAM H. W. CUSHMAN.

1. MORTGAGE—*judgment—redemption.* Where a person executed a mortgage on real estate, and subsequently another person recovered a judgment against the mortgagor, which became a lien on the same land, an execution was issued on the judgment, and the premises were sold to another person who assigned the certificate of purchase to still another person, and three days after the right to redeem by the mortgagor had expired,

the mortgagee filed a bill to foreclose, and on the same day the mortgagor entered his appearance, and a decree of foreclosure was afterwards entered ordering the payment of the money in ten days, and, in default thereof, that, on ten days' notice, the land be sold, and the sale was made and the land purchased by a person not in interest, bidding $900 more than the amount of the decree on the foreclosure, and the money was not at the time paid to the mortgagee, but the $900 was paid to the mortgagor, who was the father-in-law of the purchaser at the foreclosure sale; the purchaser at the execution sale, or his assignee of the certificate of purchase, was not made a party to the foreclosure proceeding; the assignee filed a bill to redeem: *Held*, that his right to redeem was not lost.

2. That, in such a case, he might redeem by paying the amount paid by the purchaser under the decree to satisfy the mortgage. When the bill to foreclose was filed the mortgagor's right to redeem had expired, his equity of redemption had been sold, and he had failed to redeem within one year, and the assignee of the certificate of purchase under the execution sale held the equity of redemption, and not having been made a party to the foreclosure suit, his right to redeem was not cut off by the foreclosure sale.

3. DECREE—*evidence to sustain it.* Where the chancellor gives a certificate of evidence heard on the trial, and it is not sufficient to sustain the action of the court, the decree will be reversed, notwithstanding it finds and recites facts that are sufficient. In such a case, the certificate of evidence must control.

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

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

Messrs. STIPP, BOWEN & SHEPHERD, for the appellee.

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

On the 16th day of August, 1861, one Minnehard executed to one Wylie a mortgage to secure a debt of $1400. At the March term, 1863, one Robinson recovered a judgment against Minnehard for $1000, which was a lien on the mortgaged premises, but junior to the mortgage. An execution was issued on the judgment in October, 1864, under which the premises were sold on the 3d of December, 1864, to one Rugg, who, on the 1st of January, 1865, assigned the certificate to

the complainant, Cushman. On the 6th of December, 1865, three days after Minnehard's right of redemption from the sheriff's sale had expired, his attorney in Robinson's suit filed a bill against him, in the name of Wylie, to foreclose the mortgage, and on the same day Minnehard's appearance was entered, and on the 9th of December a decree of sale was rendered requiring the defendant, Minnehard, to pay the amount of the mortgage within ten days, and, in default thereof, authorizing the mortgaged premises to be sold on ten days' notice. They were so sold, and Grob, the appellant, became the purchaser, bidding therefor $2600, which sum was $944 more than the decree. Grob was the son-in-law of Minnehard. The amount due Wylie on the mortgage was not paid at the time, but the parties went through the form of paying to Minnehard the amount due him, being the excess of the bid over the amount of the decree.

Neither Rugg nor Cushman, the former the purchaser at the sheriff's sale, and the latter the assignee of the certificate, was made a party to the bill to foreclose, and on the 21st of February, 1867, this bill was filed by Cushman, asking for leave to redeem by paying the amount due Wylie under the mortgage and decree. The court below so decreed.

This case presents no question of difficulty. When the bill to foreclose was filed against Minnehard, he had ceased to have any interest in the mortgaged premises. His equity of redemption had been sold by the sheriff and bought by Rugg, and the twelve months for redeeming by him from the sheriff's sale had expired. As neither Rugg nor his assignee was a party, their right of redemption was not cut off by the foreclosure. The purchaser at the sheriff's sale succeeded to the right of redemption both of the judgment creditor and of the mortgagor.

Neither, in this case, is there any difficulty as to the terms of redemption. The inference is irresistible, from the circumstances connected with the foreclosure and sale, that the object was to cut off the title under the judgment by bidding at the

master's sale a sum fully equal to the value of the land, and largely in excess of the amount of the decree. Before the bill to foreclose was filed, Rugg, as agent for Robinson, the judgment creditor, had called on Grob, to whom he had been referred by Minnehard, to effect some arrangement in regard to the payment of the judgment. He had also called on Wylie. Minnehard's attorney, as already stated, acted for Wylie in the foreclosure. All parties then had actual notice of the judgment, both at the time of foreclosure and of the sale. The extraordinary speed with which the mortgage was foreclosed, the sale being had in twenty-eight days after the bill was filed, the bid by Grob of $944 more than the decree, although it does not appear there was any competition at the sale, the relationship between Minnehard and Grob, the fact that Minnehard's attorney in the suit in which the judgment was recovered managed the foreclosure and sale, the credit given at the master's sale for the amount due Wylie, although the excess, it is claimed, was paid at once to Minnehard—these circumstances compel the conclusion that the purchase by Grob was by arrangement between him and Minnehard for the purpose of destroying the title acquired by complainant through the judgment and sheriff's sale.

Under these circumstances the court below properly held that the complainant might redeem by paying to Grob so much of the amount paid by him as had been applied to the satisfaction of the mortgage. If cases arise in which the purchaser should be refunded by a junior incumbrancer coming to redeem, the whole amount of his bid, if in excess of the decree and costs, this is not one of them. The bid was made with the full knowledge of complainant's equities, and in pursuance of a collusive scheme to destroy them.

This is the second time this case has been in this court, and we have considered it upon its merits with a view to its final disposition, but we must again reverse and remand it, because the evidence, as set out in the certificate of the court, is incomplete. Thus far we have spoken of the case upon the

theory that the sale under the judgment and execution appeared by the record to be free from objection, and to pass the title. We have given the date of the judgment as recited in the execution, for the purpose of stating the facts as they no doubt exist, but although the counsel for appellant argues the case on that hypothesis, and we have so considered it, he insists, at the same time, that there is no proof in the record showing the date of the judgment, or at what term it was rendered, and therefore it does not appear that it was a lien, or that it may not have been rendered so long ago that lapse of time would raise a presumption of its payment before the sale was made. We find this defect exists in the proof. As these objections are insisted upon, we must hold them valid, and reverse the decree.

We are asked by counsel for appellee to take the recitals of the decree as proof. That can ordinarily be done, but here the certificate of the court states that all the evidence upon which the decree was based is embodied in that certificate. We can not, therefore, look beyond it.

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

*Decree reversed.*

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JAMES BARNETT

*v.*

GEORGE T. CLINE.

1. BILL IN EQUITY—*cloud on title.* A party in possession may maintain a bill to cancel an invalid tax title and certificate of purchase as a cloud on his title.

2. EQUITY—*terms imposed.* In such a case the court will require the complainant to pay the purchase money at the tax sale, and all taxes subsequently paid on the land with six per cent interest, as conditions to granting the relief sought.

3. It is error, on granting relief in such a case, to require the holder of the tax title to release his title to complainant. The court, in such a case, should simply restrain the holder of such title, his heirs and assigns, from ever asserting the same.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. THOMAS S. MCCLELLAND, for the appellant.

Mr. GEORGE G. BELLOWS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The bill in this case was filed to remove a cloud on appellant's title to certain city lots. It charges that appellee had purchased the property at three several sales for taxes, upon the two latter of which he had received a tax deed, but on the first only a certificate of purchase.

The bill charges the sales and the title derived thereunder to have been irregular and void, and states grounds in support of the allegation, which, if true, would render them worthless as title, and that the lots have been redeemed from the tax sales.

No answer was filed, and the bill was taken as confessed. The court below thereupon rendered a decree granting the relief sought, and ordered appellee to convey the title he claimed under these tax sales to appellant by deed of release, and upon his failing to do so, that the master execute the release, which he did. After this decree was rendered, appellee came in and filed affidavits that there had not been a sufficient sum of money paid to the county clerk to effect a redemption from the sale first made for State and county taxes, and thereupon the court referred that question to the master to hear evidence and report to the court.

After a hearing, the master reported that appellee had, after purchasing the lot, in 1854, for State and county taxes, paid city taxes six years, and the sum thus paid was $56.47. He also reported that the law did not require appellant to pay

these taxes to redeem; that the first sale for delinquent city taxes was in 1865, and that only taxes subsequently paid, and not those paid prior to the sale, should be paid to redeem; that, although the city taxes were paid after the sale of 1854, appellant was not bound to refund those taxes in order to redeem, but he recommended that the complainant be required to pay defendant the $56.47, with interest either at six or ten per cent. The court approved the master's report, and rendered a decree for that sum with ten per cent interest, which amounted in the aggregate to $118.96, and it is to reverse this latter decree that complainant brings the record to this court on appeal.

Upon a careful examination of the record, we are of opinion that there was not a sufficient sum paid to the county clerk to effect a legal redemption. But as appellant had the right to have these sales and deeds removed as a cloud upon his title, we shall not determine what sum should have been paid the clerk to redeem.

In the case of *Reed* v. *Tyler*, 56 Ill. 288, it was held that, a bill might be maintained, by a party in possession, against the holder of a void tax title, and have it declared void and cancelled. But in such a case, equity will not exercise its discretion in affording the relief except upon condition of the refunding of all moneys paid by the purchaser and his assigns to extinguish taxes accruing on the land, after the purchase. As a party has the legal right to redeem, if he fails to do so, when he applies to a court for equitable relief he must do equity. And it is eminently just that he should refund all taxes paid upon his land by the holder of the tax title, with interest. But as regards the rate of interest required to be paid on the taxes thus paid, a court of equity seldom requires, in the absence of a contract to the contrary, a greater rate than six per cent, or the rate fixed by the statute, when money is required to be refunded. That is the rate which should have been allowed by the court in decreeing the repayment of the taxes and interest. It then follows that the court erred in allowing ten per cent per annum instead of six.

Again, the court below also erred in decreeing a release of the tax title by appellee to appellant. The bill contains no allegation from which it can be inferred that any contract, trust relation, or equitable grounds, exist requiring appellee to convey his title to appellant. The court should only have found the tax titles void and decreed their cancellation, and that appellee, and all persons claiming thereunder, be forever enjoined from asserting title under his purchases or tax deeds. But cross errors have not been assigned on this decree, and we can not reverse for this error.

The decree of the court below must be reversed because the court erred in allowing ten per cent on the taxes required to be repaid when but six should have been allowed, and the cause is remanded.

*Decree reversed.*

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## DANIEL MCM. MARSHALL *et al.*

*v.*

## THEODORE S. KARL, Administrator, etc.

WITNESS—*competency of, under act of* 1867. In an action on a promissory note, where the plaintiff sued an administrator of a deceased person, a question arising as to what constituted the consideration of the note, a person who acted as agent of the deceased in the transactions out of which the consideration arose, was allowed to testify as to his understanding of what the consideration was: *Held*, that one of the defendants who was a surety on the note, and was present during such transactions, and who testified he knew what was the consideration of the note, was a competent witness, under the second clause of section 2 of the act of 1867, to testify to the same point.

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

Messrs. STEWART & PHELPS, for the appellants.

Mr. JOHN J. GLENN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action before a justice of the peace, on a promissory note executed by the defendants to the plaintiff's intestate, Martha Karl, deceased.

It appears that Martha Karl had made a charge before one Richey, a justice of the peace, against David Trimble, one of the makers of the note, of bastardy, and before justice Froelich, another charge that he had attempted to procure an abortion. This, by our statute, is a felony. Laws of 1867, p. 89. Trimble was arrested on both these charges, and on the execution of notes to the amount of $300 or $400, payable to Martha Karl, of which this in suit was one, the prosecutions were dismissed.

It appears that Mr. Rice acted as the agent of Martha Karl, the deceased, in settling the matter, and it became a question, what was the real consideration of the notes. Was it that the bastardy suit only should be dismissed, or that and the abortion case also? Mr. Rice testified fully as to his understanding on this point.

Marshall, one of the sureties, and one of the defendants in the action, was then called as a witness for the defense, who testified that he was present during the entire negotiation for the settlement of the cases at the time the note was given, being the same time to which Mr. Rice had testified, and that he knew what was then agreed on as the settlement of the two cases, and knew what was the consideration of the note; and being called on by the defense to state what the consideration was, and what took place during the negotiation testified to by Mr. Rice, the plaintiff objected, and the court refused to allow Marshall to testify on that subject. An exception was taken to this ruling, and it is to this alone we have directed our attention.

The fact that Mr. Rice was the agent of deceased, acting as such in the whole matter, and allowed to testify fully in regard to it, opened the door to the testimony of either defendant,

and made them competent witnesses under the second clause of section 2 of the act of 1867. Session Laws 1867, p. 183. That clause is as follows: "When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, (executor, administrator, etc.) testify to any conversation or transaction between such agent and the opposite party, or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction."

The very case contemplated by this clause arose, and we are at a loss to perceive why the testimony of Marshall was rejected. The agent of the deceased had testified fully as to conversations, and to a transaction in which his intestate was interested, and equally so was the defendant Marshall. Common justice demanded he should be allowed to testify in relation to the same subject, and the statute allowed him to testify.

Rejecting Marshall's testimony was error, and for the error the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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HENRY STILLWELL

*v.*

GEORGE BARNETT.

TRESPASS *to realty—of exemplary damages.* In an action of trespass *quare clausum fregit,* to entitle the plaintiff to recover vindictive damages, it should appear that the trespass was wanton, wilful or malicious.

APPEAL from the Circuit Court of Cook county.

Mr. CONSIDER H. WILLETT, for the appellant.

Mr. F. A. MORAN, for the appellee.

Per CURIAM: This was an action of trespass *quare clausum fregit*, brought by appellee against appellant.

Upon the trial it was a disputed question, under the evidence, whether there was even a technical trespass shown by appellee. The court, on behalf of appellee; gave to the jury the following instruction:

"If the jury shall believe, from the evidence, that the defendant is guilty under the evidence and instructions of the court, then, in assessing the damages, the jury is not confined to the actual damages suffered by the plaintiff; but the jury may give, in addition to such actual damages as they shall find, from the evidence, that plaintiff has suffered, *such further damages as the jury shall believe proper to punish the defendant.*"

This instruction declares the right of the jury to assess vindictive damages, irrespective of the question whether the trespass was wanton, wilful or malicious, and, for that reason, is wrong.

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

*Judgment reversed.*

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## JAMES K. BRENT

*v.*

## SAMUEL H. KIMBALL.

1. TRESPASS—*to personal property—killing a dog.* Where one person kills the dog of another, which has been scared and runs upon his premises, but has done no injury, or was attempting to do none, but simply because the party killing it suspects that the dog had previously interrupted his hens' nests, such act is a trespass, for which the perpetrator is liable.

2. OWNER OF DOG—*liable when, for his trespasses.* If a dog is vicious, and the owner has notice of the fact, an action would lie against him for damage by the dog. But the party injured has no more right to kill the dog than he would have to kill a breachy animal for breaking into his corn.

3. SAME—*liability of owner—justification under the statute.* Our statute has enacted the common law in declaring that the owner of a dog shall be liable for all damages sustained by reason of such dog killing, wounding, or chasing sheep, or other domestic animals. And the same act authorizes any person, who may discover any dog, killing, wounding, or chasing sheep, or discover such dog under circumstances that satisfactorily show that the dog has recently been so engaged, to immediately pursue and kill such dog. No one but the master of a dog has the right to kill him, except where the dog is found killing, wounding, or chasing sheep, or under circumstances which show that the dog has been recently so engaged, or where he has been recently bitten by a rabid dog, or by one reasonably supposed to be so, or where a dog is ferocious and attacks persons.

4. RIGHT OF ACTION—*proof of pecuniary injury.* It is error, in such a case, for the court to instruct the jury that, to recover, the plaintiff must prove, by a preponderance of evidence, that the dog was his property, and was of some pecuniary value. The law recognizes the right of property in a dog, and if it was destroyed without legal justification, the law implies damages, and plaintiff is entitled to at least nominal damages, as it does in every case of illegal invasion of the right of property of another.

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

Mr. BATCHELOR, and Messrs. PHELPS & STEWART, for the appellant.

Mr. JOHN PORTER, and Messrs. GLENN & WILLITS, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an action of trespass, brought by appellant against appellee, for the alleged wrongful killing, by the latter, of appellant's dog.

The evidence shows, without conflict, that, as the dog in question was passing along the highway, some boys scared him

into appellee's yard, whereupon the latter came out with his gun and shot him.

Appellee does not pretend, in his evidence, that the dog, at the time of the killing, was doing any mischief to person or property, but claims, more, as it seems, upon suspicion than knowledge, that the dog had previously destroyed his hens' nests or eggs.

If the dog had a vicious habit, and appellant had previous notice of it, an action would lie against him for the damage done by his dog. But it does not follow that the party injured may justify the killing of the dog for that reason, any more than he could the killing of a breachy animal for breaking into his corn.

The common law liability of the owner of a dog is made absolute in a specified class of cases by the statute, without notice to him of any vicious habit.

The 1st section of the act of 1853, Gross' Stat. 45, declares that the owner of any dog shall be liable in an action on the case for all damages that may accrue to any person by reason of such dog killing, wounding, or chasing any sheep, or other domestic animal.

And the 2d section authorizes any person, who shall discover any dog in the act of killing, wounding, or chasing sheep, or discover such dog under such circumstances as to satisfactorily show that the dog had been recently engaged in killing, or chasing sheep for the purpose of killing them, to immediately pursue and kill such dog.

The act of 1861, Gross' Stat. 45, authorizes the county courts, or boards of supervisors in the counties, to impose a tax upon dogs, and make such other regulations within their counties as they may deem advisable in relation to dogs, and then declares that, when such orders or regulations are made, any owner of a dog who shall refuse or neglect to comply with them, shall not recover for any killing or injury done to his dog, and shall also be liable to a fine of $10, to be recovered as therein provided.

Except in the cases where a dog is discovered in the act of killing, wounding, or chasing sheep, or under such circumstances as to satisfactorily show that he has been recently so engaged, the cases provided for by the statute, and except where he has been recently bitten by another dog which is mad, or may be reasonably supposed to be so, or where a dog is ferocious and attacks persons, we do not know that any one, besides the master, has a right to kill it. *Hinckley* v. *Emerson*, 4 Cow. 351, and cases there cited.

The court below instructed the jury, on behalf of appellee, that it was incumbent on the plaintiff to show, by a preponderance of evidence, that the dog killed by defendant was the property of the plaintiff, and of some pecuniary value; and unless they so believe from a preponderance of evidence, they should find for the defendant.

This instruction was manifestly wrong. The law recognizes the right of property in dogs. The one in question was owned by the appellant; this was established by uncontroverted evidence. If, therefore, appellee destroyed this property without legal justification for the act, appellant was entitled to recover at least nominal damages, without proving that the animal was of any pecuniary value whatever. The injury imports damages. It was an invasion of appellant's right of property. Suppose appellee had ridden over appellant's land without authority, the latter could have maintained an action of trespass, though the act did him no damage, because it was an invasion of his property, and the other had no right to come there.

The observations of HOLT, Ch. J., in *Ashby* v. *White*, 2 Ld. Raymond, 955, are very pertinent to this question. "Surely," he said, "every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he

shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

For the error in giving the instruction stated, the judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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## SETH W. HARDIN

*v.*

## JAMES V. CRATE.

1. COLOR OF TITLE—*good faith.* Where lands were sold for delinquent taxes under a judgment rendered at a special term, and the sale made at a day later than that fixed by law, and this appeared from the recitals in the deed which purported to convey the land, it was color of title, and the grantee will not be charged with bad faith by reason of such recitals. This court having, previous to this sale, intimated that such a sale might be made, and the purchaser having bid the land off and obtained his tax deed before this court held that such a sale could not be made on a day different from that fixed by law, bad faith will not be attributed to the purchaser and holder of the color of title.

2. AGENCY—*good faith.* Where persons owned lands, and their agent, to pay taxes, with their assent, and to strengthen their title, purchased the lands at a sale for delinquent taxes, and received a tax deed for the same, and paid all taxes legally assessed thereon for more than seven successive years, and afterwards sold and conveyed the lands to innocent purchasers, and the agency had ceased about the time the lands passed redemption, and the purchasers reduced the lands to actual possession, and the former owners ceased, from the time the lands were conveyed by the tax deed, to give them any attention by paying taxes or otherwise for more than fifteen

years, and then only sold them, consisting of 1000 acres, by quit-claim deed for $200: *Held*, that bad faith would not be inferred from these circumstances, especially as one of the former owners was a witness in the case, and did not claim that the purchaser at the tax sale paid the taxes or held the land as their agent, nor did he impute any act of bad faith to the holder of the tax title.

3. The relation of principal and agent having terminated after the sale for taxes and before the time for a redemption had expired, bad faith in receiving the tax deed will not be inferred by reason of the existence of their former relation. When the length of time and all of the attendant circumstances are considered, the presumption arises that there was some arrangement between the principals and their agent, rather than that the latter had been guilty of a fraud. The acquiescence in such a purchase by the owners, when fully informed of it, and their long silence unexplained, afford a conclusive presumption of good faith of the purchaser.

4. LIMITATIONS—*sale for taxes.* The fact that the land was sold for taxes eleven years after the tax deed was given, did not destroy the bar of the statute. The claim and color of title made in good faith, with seven successive years' payment of taxes on vacant and unoccupied lands, had then been completed, and merely permitting the land to be sold for taxes did not affect rights thus acquired, and the reduction of the land to possession before the commencement of the suit, completed the bar.

5. COLOR OF TITLE—*payment of taxes—possession.* Where a person holds color of title in good faith, and pays all taxes on vacant and unoccupied lands for seven successive years, the statute does not require that he, to render the bar of the statute complete, should take possession immediately on the completion of the seven years of payment of taxes; it is sufficient if the possession is had before the owner shall take steps to remove the bar.

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

Mr. E. S. HOLBROOK, for the appellant.

Mr. G. D. A. PARKS, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

We shall not undertake to determine all the questions presented by the record and argued by counsel, but shall direct attention to one which, in the view we take of it, is conclusive of the right of appellant to the land in controversy.

For the purpose of showing color of title, appellee introduced a tax deed from the sheriff to one Stuart, executed January 13, 1845, and also made proof of the payment of taxes, in the name of the grantee, from the year 1846 to 1854, inclusive.

The land was sold for the taxes of 1855, and redeemed by Stuart on the 11th of May, 1858.

It was also proved that, in January, 1858, Stuart, by a contract in writing, sold the land to appellee, who took possession in March, 1858, continued in possession until the commencement of the suit, and paid all taxes assessed from the year 1858 to 1865, inclusive, except a "school house tax," in the year 1860.

On the 30th of November, 1859, a deed to the land was made by Stuart to one Van Fliet, who advanced the purchase money and took a deed as security therefor, by the consent and request of appellee.

Until the possession of appellee, the land was vacant and unoccupied.

It is contended that the deed to Stuart is not color of title, because it is apparent upon the face of it that it was executed without lawful authority, in this, that it discloses that the judgment for taxes was rendered at the October special term of the circuit court of Will county, in the year 1842, and that the land was sold on the 14th of November, by virtue of a precept issued on the 11th of November.

To hold that these objections are fatal to the deed, as color of title, would overthrow a long series of decisions of this court, from the case of *Woodward* v. *Blanchard*, 16 Ill. 425, to the present time. In that case, although the law under which the sale was made was unconstitutional, and the sale void, the deed was held to be color of title, unless bad faith was imputable to the purchaser.

A title, absolutely void in its inception, held by the grantee of the purchaser at the void sale, is color, in the absence of bad faith. *Laflin* v. *Herrington*, 16 Ill. 301.

Any title, which a reasonable man would pay his money for, and pay the annual taxes assessed, is color of title. *Dickenson* v. *Breeden*, 30 Ill. 279.

The objections urged involve questions of law. The judge upon the circuit, who rendered the judgment at a special term, assumed jurisdiction, and no doubt supposed that he could rightfully exercise it. Ignorance of the law can not have the effect to destroy color of title, if acquired in good faith. The objections made, if sustained, would deprive of all the benefits intended to be conferred by the section which declares the holder of the color of title, made in good faith, to vacant and unoccupied land, and who has paid the taxes and taken possession, the owner of the land.

The precept, tested by the decision in *Hope* v. *Sawyer*, 14 Ill. 254, would be invalid. That decision was, however, not made until some years after the execution of the deed to Stuart, and in *Bestor* v. *Powell*, 2 Gilm. 119, it had been intimated that a sale of land for taxes, made on the second Monday after the close of the term, would be valid. The grantee in the deed might well rely upon this intimation, and take the deed in good faith. He could not be presumed to know, in 1845, what might be the decision of the court in 1852.

The deed purports, upon its face, to convey title. It is a grant of the land in the usual form of deeds to lands sold for taxes, and bad faith can not be implied from its recitals.

Though the deed may be, in itself, color of title, the objection is urged, that it was not made in good faith; that Stuart was, at the time of its execution, the agent and attorney of the owners of the land, and could not acquire title to himself.

The proof relied on to establish the bad faith of Stuart, consists of letters written to the owners of the land in 1841, 1842 and 1843. From them it seems that he acted as the agent of the owners for the payment of the taxes. He informs them that the lands were valuable and worthy of attention, but that there were defects in the title, and he thought

it best not to pay the taxes, but suffer the lands to be advertised, and then bid them in at the sale, and obtain a tax title. This suggestion was acquiesced in, and the result was, the deed in controversy. The steps which resulted in the deed, were known to and acquiesced in by the principals. The acquirement, then, of the title by the agent must have been in good faith, even conceding that his subsequent conduct and disposition of the lands were wrongful.

Stuart continued to pay the taxes for eight successive years. There is no proof that any funds were furnished to him, and no inquiry is made about these lands from 1843 until 1860, when a deed is made to appellant for a mere nominal consideration, when we consider the large quantity of land conveyed. During this long interim between the date of the last correspondence and the deed to appellant, the original owners paid none of the taxes and evinced not the slightest interest in the property.

One of the principals was a witness. He imputes no misconduct to Stuart; does not even claim him as agent only until about 1844, and mentions no act from which bad faith can be inferred. While agent, the proof shows no neglect of duty, no omission to pay taxes, no misappropriation of any funds entrusted to him.

The last letter from Stuart to Wynkoop, dated November 25, 1843,—after the sale of the lands,—is very significant, in the expression of a willingness to communicate any further information. A full list of the lands is given, the amount of the taxes, and the time of the sale, which had already occurred. He then says: "When the time of redemption has expired, and the title perfected as far as it can be, the result will be communicated. Any further information on the subject I shall be happy to give." He further says that he had paid the taxes for 1842 and 1843.

After this no correspondence occurred; no further information was solicited, and, so far as the proof shows, the agency ceased. It was not a continuing agency.

In 1845, when the color of title was acquired, the presumption, from all the circumstances, is, that the agency had terminated. The relation then having ceased, bad faith can not be imputed to the grantee in the deed, merely because of the former existence of such a relation.

When the principal has made no inquiry, and has slumbered upon his rights for nearly twenty years, the simple act of the agent in bidding in the lands in his own name, should not be ascribed as an act in bad faith. The long and silent acquiescence of the principal, with a presumed knowledge of all the facts, utterly forbids the supposition.

Besides, the purchase of the land at a tax sale, in the name of the owners, could not strengthen their title. They were under a legal obligation to pay the taxes, and could not acquire any greater interest in the lands than they already had, by permitting them to be sold for taxes and purchasing them in their names. Why was it done?

The reasonable inference is, that the purchase by the agent was with the consent of his principals. After the sale, they had full information of his action, and prior thereto it seemed to be the mutual understanding that the lands should be sold for the taxes, and bid in to perfect the title. This act, then, could not have been in bad faith.

In two years after the sale a deed is taken. During this time the owners give no attention to the lands, and nothing is heard from them until fifteen years afterwards, when, by a quit-claim deed, they undertake to convey to appellant over 1000 acres of land for $200.

During this long time no complaint was made against the grantee in the deed. He paid the taxes and made sales of lands, of which possession was taken.

From all the facts, the most probable conclusion is, that there was some arrangement between the agent and his principals, rather than fraud in the former.

The acquiescence in the purchase, when informed of it, and the long silence of the owners of the land unexplained, and

the quiet submission for fifteen years, afford a conclusive presumption in favor of the good faith of the purchaser. *Williams* v. *Merritt*, 23 Ill. 623.

A legitimate presumption of assent should arise from the acts and conduct of the principal, as they are inconsistent with any other supposition than a previous authority. *Delafield* v. *State of Illinois*, 26 Wend. 192.

The law presumes that all acts are done in good faith, unless the contrary is clearly established. The deed imports good faith, unless fraud is proved, or unless the facts and circumstances attendant upon its execution show that the party accepting it had no confidence in it, and took it with a design to defraud the holder of the better title. *Dickenson* v. *Breeden*, *supra*; *McCagg* v. *Heacock*, 34 Ill. 476.

The deed, then, to Stuart, amounted to color of title acquired in good faith; the lands were vacant and unoccupied, and he paid all taxes legally assessed for seven successive years before the commencement of this action. Possession followed in 1858 by appellee, the purchaser from Stuart.

Did the fact that the land was suffered to be sold for the taxes in 1856 destroy the bar perfected under section 9 of the chapter entitled "Conveyances"?

Section 8 requires actual possession, under claim and color of title, made in good faith, and the payment of taxes for seven successive years. Section 9 only requires color of title, made in good faith, to vacant and unoccupied land, and the payment of taxes for seven successive years, and this court has construed it that possession must be taken to complete the bar.

Counsel for appellant insists that, in the construction of the 9th section, possession must follow the color of title and payment of taxes, and that it must be an immediate possession, conjoined to a continuous and uninterrupted payment of taxes for the required period.

We do not understand that the possession must be instantaneous with the completion of the payment of taxes, or that the sale of the land destroyed the bar.

The owner of the color of title may unite actual possession to the color and payment of taxes at any time before the holder of the adverse title shall take some step to remove the bar.

This is a fair construction of the section as a limitation law, and this principle is deducible from the decisions of this court. *Newland* v. *Marsh*, 19 Ill. 376; *Hinchman* v. *Whetstone*, 23 Ill. 190; *Paullin* v. *Hale*, 40 Ill. 274; *Hale* v. *Gladfelder*, 52 Ill. 92.

As no bar was proved under section 8, it is unnecessary to consider the remaining questions presented.

The judgment is affirmed.

*Judgment affirmed.*

Mr. JUSTICE WALKER filed the following separate opinion:

I fully concur in the decision of this case, for the following reasons: It appears from the record, and is clearly shown in the opinion of the court, that Stuart purchased the lands for taxes, and acquired the tax deed, with the full knowledge and consent of Bailey and Reynolds, for whom he was acting as agent for payment of taxes. These facts unmistakably prove that Stuart acted in good faith in acquiring this color of title. After he had thus acquired color of title, he paid all taxes legally assessed upon the land for seven successive years whilst the land was vacant, and the bar of the second section of the act of 1839 would have been complete had Stuart then gone into possession. He could then, had he been in possession, have invoked the bar of the statute against the whole world, except against Bailey and Reynolds, or their grantees. I presume no one will controvert this proposition, as it seems to be in harmony with all previous decisions and the spirit of the statute itself. Stuart had acquired the color of title in good faith for the benefit of his principals, and in the case supposed he could have used it precisely as might any other holder of color of title, except as against the persons for whom he held it.

No one can doubt that Crate, when he purchased, succeeded to all of the rights held by Stuart, and when he reduced the

land to possession, all must concede he could have invoked the bar of the statute, at least to the same extent that Stuart could have done. This is manifest, and I fully concur in the conclusion announced in the main opinion, that, inasmuch as Bailey and Reynolds, or their grantees, took no steps to obtain a conveyance of this color of title, and to render it available, and did nothing to indicate to the public that they had any claim to Stuart's title; and as Crate purchased without any notice whatever of their claim, he must be held to have, when he took possession under his purchase, obtained a bar against the grantees of Bailey and Reynolds precisely as against all other persons not under disabilities.

If Stuart acted in bad faith with his principals, or has violated any trust reposed in him by Bailey and Reynolds, he can be compelled to account like any other trustee. But Crate must be protected like any other innocent purchaser of trust property. He purchased what appeared to be a valid legal title, paid for it, and all without any notice whatever, and he should be permitted to avail himself of the right to set up the bar of the 2d section of the act of 1839.

*Judgment affirmed.*

Mr. JUSTICE SHELDON filed the following dissenting opinion:

I am unable to concur in the views of a majority of the court as to the good faith of Stuart.

It appears, from the record, that he was an attorney at law; that Bailey and Reynolds acquired title to the premises in controversy by redemption as judgment creditors of one Egan; that they, May 1, 1841, conveyed to Brower & Wynkoop, assignees of the former, under a deed of assignment of their property for the benefit of their creditors, the claim against Egan, by virtue of which said redemption was made, being a part of such property.

Brower & Wynkoop, as such assignees, conveyed to the plaintiff August 13, 1860.

Of the three letters from Stuart, referred to in the opinion of the court, as disclosing his relation to said parties, the first one, to Bailey & Reynolds, of March 9, 1841, purports to send enclosed $150, which, with previous remittances, made $650 collected on account of claims in the writer's hands, and also the sheriff's deed of the lands, and a list of expenses in regard to it, and the letter gives information respecting sundry other claims.

The second letter, of April 4, 1842, is also to Bailey & Reynolds, which encloses the abstract of title to the Egan lands, and says: "By the abstract of title, which is correct as the books of record will furnish, you will perceive that Dr. Egan did not have, at the time of sale, a full and perfect title to all the lands included in your deed. I have, therefore, in consultation with others, thought it best not to pay the taxes now, but suffer them to be advertised and then bid them in, and obtain a tax title, which will assure the title in you. The sale will not probably take place till some time next fall. If this course, under the circumstances of the case, meets your approbation, you will please, at your convenience, so inform me."

The third letter, of date November 25, 1843, is addressed to F. S. Wynkoop. It purports to send a statement as to the "situation and prospect of the Egan lands purchased by B. & R." in answer to a letter of inquiry by Wynkoop, and advises him of the compromise of one demand, the collection of another, and that there is due on a certain other one, $400; it shows the lands were bid off for taxes November 14, 1842, and says: "You will recollect that these lands embraced in the sheriff's deed were allowed to be advertised for taxes, that they might be bid in for Bailey & Reynolds, and a tax title obtained and added to the former title, which was imperfect. The statement shows what lands were bid in, and what were not advertised because the taxes were paid by rival claimants. The object is to obtain a tax title to all the tracts, as they are advertised and sold. Two years are allowed for redemption.

You will also perceive that the taxes for the years 1842 and 1843 have been paid on all the tracts by me, that have not been paid by other claimants or persons through mistake. The title to the lands is, therefore, in the process of completion as fast as circumstances will permit, the taxes being attended to. The lands are generally valuable, and worthy of attention. When the time of redemption has expired, and the title perfected as far as it can be, the result will be communicated. Any further information wanted on the subject I shall be happy to give."

Nothing further ever occurred between these parties, so far as the record shows.

Wynkoop's statement, referred to in the opinion, is, that Stuart was their agent for said lands a long time, and continued such till 1844.

On the trial it was testified that Stuart resided in the State of New York. At what time he removed from Chicago there, does not appear, further than that the witness had been his attorney for twenty years, and a power of attorney in evidence from Stuart to sell all his lands in Will county, Illinois, of date November 2, 1850, describes him as of the State of New York.

This is all the direct evidence bearing upon Stuart's relation to the parties, or his being divested of it.

The decision of the court rests the validity of the defense upon a bar to the action acquired by Stuart under section 9 of the conveyance act, which is as follows: "Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title."

Stuart's payment of taxes must have been under color of title held adversely to the rightful owner; but, under the state of facts in the case, as I conceive, the law adjudges that

Stuart did not hold title adversely to Brower & Wynkoop. He was a trustee, and they the *cestuis que trust.*

The payment of taxes must have been under color of title, "made in good faith."

Holding the relation Stuart did, the law, I consider, imputes to him bad faith, in making any claim of title for himself.

Presumptions, instead of being in his favor, should be against him.

In my view of the law, this statute of limitations never ran for one moment of time in favor of Stuart against Brower & Wynkoop, or this plaintiff, their grantee.

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## MARION ARMSTRONG *et al.*

*v.*

## MATILDA WILSON *et al.*

1. CURTESY—*tenancy by.* Under our law, and since the passage of the "married woman's act" in 1861, tenancy by the curtesy, does exist, as has been recognized by numerous decisions.

2. Where a person has curtesy in an eighty acre tract adjoining his own land, and in a timber tract adjoining neither, it is waste to use timber growing on that tract to improve the tract of which he is the owner. The tenant by the curtesy, has the right to reasonable estovers, which is confined strictly to timber and wood for the use of the estate, and it must be actually applied, used and consumed on the estate, or with its proper use and enjoyment.

3. DECREE. Where the tenant commits waste, and a bill is filed by the remainder-men to enjoin future waste, and for an account for waste already committed, on a proper showing the relief should be granted in full.

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

Messrs. CLARK, KETTELLE & BAKER, for the appellants.

Messrs. JOHNSON & HOPKINS, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery, filed by Marion Armstrong, one of the five children and heirs at law of Malinda Armstrong, deceased, against four of the defendants, the other children and heirs at law of the said Malinda, for partition of two certain tracts of land of which the said Malinda died seized, and also against the defendant Garrett Armstrong, the husband of said Malinda, and the father of said children, to enjoin him from the commission of waste on said lands, and to require him to account for waste already committed, and for the rents and profits of the premises of which he had been in the use and occupation since the death of the said Malinda.

Garrett Armstrong filed his answer, setting up a tenancy by the curtesy in the lands as the husband of the said Malinda.

The decree found Garrett Armstrong to be a tenant by the curtesy, and as such, entitled to the enjoyment of the rents and profits during his natural life, and enjoined him from committing any waste.

Marion Armstrong, the complainant in the bill, brings the record here by appeal, and assigns for error in it the finding Garrett Armstrong to be a tenant by the curtesy, and as such, not liable to account for rents and profits, and not requiring him to account for waste which he had already committed.

The only question raised in respect to the first ground of error assigned is, that under our law, and especially since the passage of the law of 1861, known as the married woman's act, there is no such estate as that of tenancy by the curtesy.

But there are repeated decisions of this court since the act of 1861, affirming or recognizing the existence of the estate of a tenancy by curtesy, the correctness of which we see no sufficient reason to question, and reference to them is made as a

sufficient answer to the objection in this respect to the decree. *Cole* v. *Van Riper*, 44 Ill. 58; *Clark* v. *Thompson*, 47 ib. 26; *Beach* v. *Miller*, 51 ib. 206.

The proofs show that Garrett Armstrong had committed waste upon the timbered tract of land by cutting off and selling from it wood and timber, and applying and using the same elsewhere than upon the estate.

The lands consist of two tracts, one of eighty acres, all under cultivation, and a timbered tract of forty-six acres, as alleged in the bill, or thirty-seven acres, as averred in the answer. There was no house on the premises, but upon an adjoining one hundred and twenty acres, owned by Garrett Armstrong himself, there was a house in which he now lives and which was occupied by him and his wife at and before the time of her death.

However it might be in regard to wood used as fuel for this house, the taking of timber from the timbered tract and applying it to the making of improvements on the one hundred and twenty acres, must be regarded as waste.

The right of the tenant by the curtesy was that of reasonable estovers, which is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used and consumed upon the estate, or for purposes connected with its proper use, occupancy and enjoyment. *White* v. *Cutler*, 17 Pick. 248; *Cook* v. *Cook*, 11 Gray, 123.

This being, as against Garrett Armstrong, a bill for an injunction to prevent future waste, and an account of the waste done being prayed—waste having been already committed, and the defendant enjoined from its future commission—the court, to prevent a double suit, should have decreed an account and satisfaction for the waste that had been done. 1 Story Eq. Ju. sec. 518, 69 (note).

For error in this respect, the decree as to Garrett Armstrong is reversed, and the cause remanded for further proceedings in conformity with this opinion.

*Decree reversed in part.*

JOSEPH MOODY

*v.*

HENRY NELSON *et al.*

1. ARBITRATION—*of the submission.* It is indispensable to the jurisdiction of courts to render judgment upon an award of arbitrators that the submission be executed with the formalities of, and contain, in substance, what is required by the statute.

2. A submission under the 1st section of the chapter of the Revised Statutes, entitled "Arbitrations and Awards," which authorizes persons to submit to the award of arbitrators any controversy existing between them, not in suit, it appearing the submission was not attested by any witness, was regarded as insufficient to confer jurisdiction on the court to render judgment upon the award.

3. The submission recited: "And it is hereby further agreed and understood, by and between the said parties, that this submission shall be made a rule of the circuit court within and for the county of Kane aforesaid:" *Held*, such language was not equivalent to an agreement that a judgment should be rendered upon the award made pursuant to the submission, as provided by the statute.

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

Messrs. COLEMAN, MADDEN & BYFORD, for the plaintiff in error.

Messrs. BOTSFORD, BARRY & HEALY, for the defendants in error.

Per CURIAM: This is a writ of error to the Kane county circuit court, to bring up for review a judgment entered in that court upon the award of arbitrators.

The 1st section of the statute, under which this proceeding was had, is as follows: "All persons having the requisite legal capacity may, by an instrument in writing, to be signed and sealed by them, and attested by at least one witness, submit to one or more arbitrators any controversy existing between them, not in suit; and may, in such submission, agree

that a judgment of any court of record, competent to have jurisdiction of the subject matter, to be named in such instrument, shall be rendered upon the award made pursuant to such submission." Gross' Stat. 51.

The submission under which the award was made, is not in conformity with the statute. It was not attested by any witness, nor does it contain any agreement that a judgment shall be rendered upon the award made pursuant to such submission. All that it contains on that subject is this: "And it is hereby further agreed and understood, by and between the said parties, that this submission shall be made a rule of the circuit court within and for the county of Kane aforesaid."

This is not equivalent to an agreement that a judgment shall be rendered upon the award made pursuant to the submission. A submission executed with the formalities, and containing, in substance, what is required by the statute, was indispensable to the jurisdiction of the circuit court to render the judgment. *Low et al.* v. *Nolte,* 15 Ill. 368.

The judgment of the circuit court is reversed.

*Judgment reversed.*

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JOHN W. ELDRIDGE

*v.*

MARTIN O. WALKER.

1. TENANTS IN COMMON—*conveyance.* Where two persons own real estate, and are desirous of raising money by its sale, and one of them is entrusted with its sale, and has it conveyed to a third person for the price agreed upon, but the money is paid by the joint owner himself, with the view of acquiring the entire title to the property, such an arrangement is a fraud on the party owing the other moiety.

2. In such a case, the owner entrusted with the sale of the property occupies the same relation to the other owner as his agent, and an agent

can not occupy the relation of both seller and purchaser of the same property. And where the owner whose interest is thus sought to be acquired, does not assent to the sale, he may disaffirm it where the rights of innocent purchasers and creditors have not intervened.

3. DEED—*evidence.* Where a deed is read in evidence without objection, and it is apparent that a description of land therein could be rendered more clear and satisfactory by other evidence, the objection that the description in the deed is not clear can not be urged as a groundof reversal.

APPEAL from the Superior Court of Cook county.

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

Mr. E. A. SMALL and Mr. F. C. INGALLS, for the appellee.

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

In June, 1848, John Frink and Martin O. Walker were copartners in business in the city of Chicago, and as such partners, were joint owners of certain lots, which are the subject matter of the present controversy. Walker, under pretense of having sold these lots to Thomas Dyer, procured the execution of a deed by Frink to Dyer, the deed being also executed by himself. The nominal consideration was $2500, which sum, however, was not paid by Dyer, but by Walker, and was used by him for the benefit of the firm. Dyer, in fact, was not a purchaser, and had no interest whatever in the property, but merely accepted the deed at Walker's request, and agreed to hold the title subject to Walker's order. Walker requested Dyer not to let Frink know the true character of the transaction. Not long afterwards, Dyer, thinking Frink should be informed of the true state of the matter, acquainted him with the facts. Frink replied he was willing Dyer should keep the lots, but was not willing he should convey them to Walker. Dyer said he should convey them when requested by Walker, but before making the deed would inform Frink. The title remained in Dyer for several years, but being at length requested by Walker to convey, he informed Frink of such request, whereupon Eldridge, the grantee of Frink, commenced

this suit to enjoin such conveyance, and to procure the investment in himself of the title to one-half the property. These facts appear from the answer of Dyer, which, by agreement of parties, was taken as evidence. The case was continued through some years, but was finally heard, and resulted in a decree dismissing the bill. From this decree the complainant appealed.

The sworn answer of Walker attempts to explain this transaction, but as the bill dispensed with the defendant's oath, we can not consider the answer as evidence. On the testimony in the record, the case rests merely on the facts we have stated. On these unexplained facts the bill should not have been dismissed. The case falls under well settled rules governing the relation of partners to each other, which relation, in regard to the sale of property by one partner for the firm, is substantially like that of principal and agent. Here, Walker occupied the position of an agent, buying the property of his principal under pretense of selling it to a third person, and, as the case now appears, studiously concealing from his principal the real nature of the transaction. He was, at the same moment, both vendor and purchaser of Frink's undivided moiety of these lots, without the consent of Frink to the transaction. This is a position which the law permits no man to occupy. Such a transaction it presumes to be fraudulent, and permits the owner, whose title is thus sought to be acquired, to disaffirm the pretended sale, if he so elects, where the rights of innocent parties have not intervened. These are principles so familiar as to require no citation of authorities for their support, and they govern the present case.

It is objected by counsel for appellee, that the conveyance read in evidence, from Frink to the complainant, has a different description of the premises conveyed from that contained in the bill, and in the deed from Frink & Walker to Dyer. The deed was read in evidence without objection, for the purpose of showing complainant's interest in the land, and it is

apparent, from other title papers in evidence, that the description included the lots in controversy. If the objection had been made in the court below, all doubt on this question might easily have been removed. Decree reversed and cause remanded.

*Decree reversed.*

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## THOMAS NEWLAN

*v.*

## MARK DUNHAM.

1. PLEADINGS—*evidence—variance.* In a case where an instrument in writing is not declared on as the cause of action, it may, nevertheless, be read in evidence, although it may vary from the averments in the declaration, if it tends to prove the issue.

2. MISTAKE—*measurement of property sold.* Where a party sold a quantity of hay to another, to be paid for at an agreed price per ton, in a particular mode, when the quantity should be ascertained by persons they might choose, and persons were selected and the amount determined and reported by them: *Held*, on a trial in a suit for a breach of the contract, that the defendant could not prove that the persons selected had made a mistake in ascertaining the amount, but their determination might be questioned for fraud. Fraud in an award may be shown either at law or in equity, but mistake is cognizable only in chancery.

3. Even if a mistake could be corrected in an action at law, it would have to appear that the persons making the mistake were misled, deluded, or misapprehended the facts.

4. FRAUD—*evidence.* Where the evidence is admitted as to the basis on which such a calculation is made, the presumption is that it was considered by the jury, and that they determined whether there was so gross a mistake as showed a fraud on the part of the referees.

5. EVIDENCE AS TO VALUE. It is not error to admit evidence of the value of the property sold, at or near the place of delivery, but not at distant points.

6. SAME—*basis of calculation.* Although a witness may not be required to make a calculation of the number of tons of hay in stack, he may be required to give the basis upon which it was made. If the intention was to show that he was unable to make the estimate, he could be asked if he could make it.

7. CHECKS—*stamps—objections not urged on the trial.* Where checks were offered in evidence that had been tendered under the contract, but did not have attached the required revenue stamps, but no objection was made on that ground, the objection can not be urged for the first time on appeal, when the seller did not refuse them on that ground, but placed the refusal upon the claim that the estimates were not correctly made as to the quantity of the property sold.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

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

Messrs. BOTSFORD & BARRY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee in the Kane circuit court, against appellant. A trial was had by the court and a jury, resulting in a verdict and judgment in favor of plaintiff, from which defendant has prosecuted this appeal. It appears that sometime in July, 1870, appellant contracted with appellee to sell him a quantity of hay in the stack, at $7 per ton, and that the parties mutually agreed that Lasher and Lynch should measure and ascertain the amount the lot contained, to be paid for in checks on Coffin & Tallman's bank, one-third in thirty, one-third in sixty, and the remaining third in ninety days; that the persons selected made the measurement, and determined the stacks contained one hundred and two tons. Appellee testifies that after they had signed the agreement appointing the persons to ascertain the amount, he and appellant agreed that five tons should be deducted on account of an injured spot in one of the stacks. This is denied by appellant.

When the persons selected for the purpose reported the amount the stacks contained, appellee offered checks upon the bank for the sum that ninety-seven tons of hay amounted to at the contract price, but appellant refused to receive them or give him a bill of sale for the hay as requested by appellee.

It is first urged that the court below erred in refusing to exclude plaintiff's evidence from the jury on account of a variance. The declaration avers the purchase of the hay in the stacks at a given price per ton, the amount to be ascertained by measurement made by the persons they chose, and that they ascertained the amount to be ninety-seven tons, whilst their report shows that they found the stacks to contain one hundred and two tons. It will be observed that the certificate of the amount of hay the stacks were found to contain, is not declared on, or even referred to in the declaration. And it has been held that, in such a case, where an instrument in writing is offered in evidence to prove an allegation, a variance can not be relied upon for its rejection if it tends, substantially, to prove the averment. *Prather* v. *Vineyard*, 4 Gilm. 40; *Wheeler* v. *Reed*, 36 Ill. 81. This certificate, with the evidence introduced of the contract of the parties, shows that five tons were to be deducted, and the remainder to be paid for, and this, substantially, sustains the averment. Ninety-seven tons were all they found appellee was bound to pay for, although there were one hundred and two tons in the stacks.

It is next urged that the court erred in not permitting appellant to prove that there was a mistake in the computation of the number of tons of hay. In the cases of *Canal Trustees* v. *Lynch*, 5 Gilm. 521, *McAvoy* v. *Long*, 13 Ill. 147, and *Central Military Tract Railroad* v. *Spurck*, 24 Ill. 587, it was held that when parties selected a person to make computations, they were bound by his calculations; that it was, when made, conclusive upon the parties, and could only be impeached or questioned for fraud. But we are referred to the case of *McAuley* v. *Carter*, 22 Ill. 57, as holding that such a calculation or decision may be questioned for fraud or mistake. The rule is, that fraud in an award may be shown either at law or in equity; whilst mistake is only cognizable in the latter forum. A mistake could not be shown in this action, as it was at law. But even if it could be conceded that a mistake could be

shown at law, still there is nothing in this record showing that the persons making the calculation were clearly misled, deluded, or misapprehended the facts.

But whether properly, or not, the court permitted the witnesses to give the basis upon which the computation was made; they stated the height, length and breadth of the stacks, and the number of cubic feet they estimated was contained in a ton. Thus the jury had ample means to determine the accuracy of their calculation, and we will presume they tested its accuracy to determine whether there was any fraud, as the evidence was admitted for that purpose; as, if a gross discrepancy had appeared, the jury might have inferred that the computation was fradulently made.

It is further objected, that the court erred in refusing to permit appellant to prove the market price of hay in Aurora. We perceive no objection to this decision of the court. The question was, what was the hay worth at or near the place where it was to be delivered, and not at distant points. Clintonville, and not Aurora, was the place where the transaction occurred, and where the delivery was to be made, and the price in that neighborhood should have controlled. In this there was no error.

It is also urged, that the court erred in not requiring Lasher, at the instance of appellant, to make the calculation of the amount of hay in the presence of the jury. We know of no rule of evidence that would require a witness to make such a calculation, even where he might be required to state the basis and principles upon which he had conducted his calculation. If it was designed to show that he could not make the estimate, why not ask him if he could have done it? The witness had already stated that Lynch, and not himself, made the calculation; but, even if he had to depend upon Lynch for the purpose, we fail to perceive that it could have affected the rights of appellant, as the estimates were made by the man whom he had chosen, and the parties agreed to abide

the decision of the arbitrators. We can see no force in this objection.

It is also objected, that appellant was not bound to deliver the hay because the checks were not properly stamped. This objection was not urged when they were offered, nor were they refused because they were not certified. The refusal was clear and positive, on the ground that there was more hay than was estimated by the persons to whom it had been referred. It is manifest, from the evidence, that they would have been refused, even had they been properly stamped and certified. If that had been the objection to receiving them, he should have made it when they were tendered. There is nothing in this objection.

Nor do we see any error in instructing the jury. The proper legal principles contained in those refused, were embodied in others that were given, and the other refused instructions, asked by appellant, were improper, and were correctly refused. The evidence warranted the finding, and we find no error in the record, and the judgment must be affirmed.

*Judgment affirmed.*

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## JAMES BAXTER

*v.*

## G. W. LAMONT.

1. AGENT—*of a special agency.* A special agent, to bind his principal, must act within the special authority conferred, and a party purchasing of such agent is bound, at his peril, to know the extent of the agent's authority.

2. A party authorized another by letter to sell for him a certain tract of land. The portion of the letter creating the authority was as follows: "My terms are, parties purchasing it to assume the mortgage now on it, due in one and two years from the twenty-second day of last March, of

$5,275, the balance to be paid to me, one-third cash, the rest in one and two years, at eight per cent. Now, if you can sell it on those terms within a few days, you can sell it for $800 per acre net." The agent contracted a sale of the premises at $850 per acre on substantially the above terms, but with a condition giving the purchaser an option whether or not he would complete the purchase, allowing him thirty days after he was furnished with an abstract of the title, in which to decide, and with a further condition that, in case the title was not perfect, the vendor should pay $2,000 and all other damages and expenses. In an action by the purchaser against the vendor to recover damages for a failure to convey in compliance with the terms of the contract, the above conditions were regarded as exceeding the agent's authority, and hence the contract was not binding on the principal.

3. CONTRACT—*mutuality of obligation.* The owner of certain lands contracted to sell to another at a specified price. The vendor was to receive in payment for the same $50, cash in hand, and so soon as the vendee was satisfied with the title, a conveyance was to be made to him, when he was to pay the purchase money according to the terms of the agreement: *Held*, there was no mutuality in the contract for which the vendor could be compelled to perform.

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

Messrs. HIGGINS, SWETT & QUIGG, 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, to recover damages for a failure to comply with a contract to convey certain real estate in Cook county.

The contract declared on, arose out of the following letter:

"JANESVILLE, April 21, 1870.

*Mr. E. N. Fay:*

Dear Sir: Your letter of yesterday, by the hand of Mr. Story, has been received, etc. In regard to the proposition made to exchange ten acres of my land at Irvin Park for a house and lot in Freeport, I can not think of it for a moment. I have an offer of $800 per acre net for it. Now I desire, if

I sell any, to sell the whole. My terms are, parties purchasing it to assume the mortgage now on it, due in one and two years from the twenty-second day of last March, of $5,275, the balance to be paid to me, one-third cash, the rest in one and two years, at eight per cent. Now, if you can sell it on those terms within a few days, you can sell it for $800 per acre net. I am in receipt of letters daily in regard to that property. I received a letter from a gentleman three days since, wishing to know the least I would take for it. I wrote to him he might have it for $900 per acre on the terms above mentioned.

The property is not in the hands of real estate men to sell at present, excepting one party, and that at $1,000 per acre, and I think it will bring it by the first day of next June.

Yours respectfully,

G. W. LAMONT."

On the receipt of this letter, the party to whom it was addressed made the following contract with appellant:

"This agreement, made this twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy, between G. W. Lamont, at Janesville, Wisconsin, of the first part, and James Baxter, of the city of Chicago, of second, Witnesseth, that the said party of the first part has this day bargained and sold to said Baxter the following described twenty acres of land in the county of Cook and State of Illinois, and more particularly described as follows, viz: Being in the northeast part of the southeast quarter of section 22, in the township of Jefferson and county of Cook and State aforesaid, for and at the price of $850 per acre, actual measurement, (no allowance for roads already made,) said to be twenty acres, and being all the land owned by said Lamont in said section 22 aforesaid, and to receive in payment for the same $50, cash in hand, and so soon as an abstract is placed in said Baxter's hands, which said Lamont agrees to furnish within a reasonable time, then said Baxter has thirty days to examine the

same, and so soon as he is satisfied with said title, a warranty deed is to be signed by said Lamont and wife (if married,) in the usual form; and it is agreed that then the said Baxter shall pay, or cause to be paid, to said Lamont, the sum of three thousand seven hundred and fifty dollars ($3,750,) and assume a certain mortgage on said premises of $5,275, payable in one and two years from the twenty-second day of March last, and the balance of said purchase money to be paid, half in one year, and balance in two years; all of the unpaid principal to bear interest at eight per cent per annum, payable with each payment as it becomes due and payable, and the said Lamont binds himself under a penalty of $2,000, in case the title is not perfect to said twenty acres of land, and which amount he agrees to pay said Baxter in such case, as also all other damages and expenses."

To the action the defendant pleaded the general issue, with notice of special matter, which it is not necessary to notice.

The jury found for the defendant, and the plaintiff brings the record here by appeal.

The question presented is one of fact. Was the agent, Fay, authorized by the letter of April 21st to make the contract sued on? Comparing the contract made, with the authority conferred by that letter, the answer must be, as the jury found, in the negative.

The letter authorizes an absolute sale at a stipulated price, on specified terms; the contract gives to the purchaser an option. There is no warrant for this in the letter. The purchaser, by the contract, had the option to forfeit the $50 or complete the contract, and he had thirty days after the abstract should be placed in his hands in which to decide. And this forms another objection to the contract made by Fay. There is no mutuality in it, for whilst Lamont could be compelled to perform, appellant could not be so compelled. In addition, the agent has contracted that Lamont shall pay $2,000 in case his title is not perfect, and all other damages

and expenses. It is very clear no such authority was given Mr. Fay by the letter of April 21st.

Fay was a special agent for a special purpose, and it was the duty of appellant to know the extent of his authority. This he was to see to at his peril. *Peabody* v. *Hoard*, 46 Ill. 242.

These are the only points deemed important to be noticed, and they dispose of the case.

The judgment is affirmed.

*Judgment affirmed.*

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## IRA A. W. BUCK

*v.*

## ELLEN BUCK.

1. DIVORCE—*alimony*. Where the court has decreed a divorce on the application of the wife, and thereupon the parties agree upon the alimony which the husband shall pay the wife, consisting of a gross sum of money, furniture and silver ware, etc., and it is also agreed that the husband shall support and educate an adopted daughter: *Held*, that the court will not inquire whether the amount decreed for alimony is too large, as it was fixed by the voluntary agreement of the parties.

2. Inasmuch as the support and education of the adopted child was agreed upon by the parties, the court will not determine whether such a decree could have been rendered without consent; and that, as the decree finds that the parties had agreed upon its terms, it will be presumed that the court was satisfied that the parties had voluntarily agreed upon that part of the decree.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. I. G. WILSON, Judge, presiding.

Mr. C. J. METZNER, for the plaintiff in error.

Mr. CHARLES WHEATON, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The defendant in error exhibited her bill in the circuit court of Kane county, to the February term, 1867, asking to be divorced from her husband, the plaintiff in error.

The summons issued therein was duly served, and there being no appearance, a decree *pro confesso* was rendered against the plaintiff in error. The court heard the evidence and pronounced a decree of divorce.

The court found that the plaintiff in error was "a man of large property," and the decree further finds and recites that, "the alimony having been settled by the consent of parties upon the basis hereinafter stated," the court thereupon decreed that the plaintiff in error should pay the defendant in error the sum of $12,000, also $1000 worth of furniture, and, in addition thereto, she was to retain "all clothing, trinkets, jewelry and silver ware" which she then had; and the decree further provided that the plaintiff in error should maintain and educate Eva Buck, the adopted child of the parties.

It is now insisted, as a ground of reversal, that the alimony allowed by the court was excessive and oppressive in the amount, and that it was error in the court to decree that the plaintiff in error should maintain and educate the adopted child, Eva Buck.

It sufficiently appears from the recitals in the decree, that the whole question of alimony was fixed and settled by the agreement of the parties, not only the amount of money and articles of personal property allowed to the defendant in error, but also the provision made for the support and maintenance of their adopted daughter. Having consented to these provisions of the decree, the plaintiff in error can have no relief against the force of his own voluntary agreement.

Whether the alimony is too high, or whether the court had any lawful authority to make provision for the maintenance of the adopted daughter without the consent of the plaintiff in error, it is not now necessary for us to express an opinion. It

was competent for the plaintiff in error to consent to such a decree, and having done so, it must remain forever binding on him.

It will be presumed that the court did not enter the decree in regard to alimony, by consent of parties, without being first legally and sufficiently advised of the consent of the plaintiff in error thereto.

No error appearing in the record, the decree is affirmed.

*Decree affirmed.*

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## S. M. MOORE *et al.*

*v.*

## THE CITY OF CHICAGO.

SPECIAL ASSESSMENT—*void ordinance and assessment.* Where an ordinance, directing the improvement of a street upon which an assessment is made for the purpose, directing it to be curbed with curb walls, where they are not already built, and curb walls be re-built where they are not in a good and sound condition, the work to be done under the superintendence of the board of public works: *Held*, the ordinance and assessment under it are void, as the ordinance attempts to confer discretionary power which can only be exercised by the common council, and tended to induce unfair assessments, favoritism and fraud.

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

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

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The ordinance in this case, upon which the assessment proceedings are based, orders that Quincy street, from the west

line of Clark street to the east line of LaSalle street, and from the west line of LaSalle street to the east line of Wells street, and from the west line of Wells street to the east line of Market street, be curbed with curb walls *where curb walls are not already built*, and that the curb walls in the portions of Quincy street thereinbefore described, be re-built and repaired *where the same are not now in a good and sound condition*, etc., said work to be done under the superintendence of the board of public works.

We have repeatedly held that the common council is the only body which can exercise the discretion by this ordinance vested in the board of public works; that vesting such discretion in the board, prepares the way to unfair assessments, and tends to favoritism and fraud in letting contracts for the work. *Foss* v. *City of Chicago*, 56 Ill. 354. Such an ordinance is illegal and void.

For that reason, and that the collector was unauthorized to apply for the judgment, the same is reversed and the cause remanded.

*Judgment reversed.*

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## LEWIS W. THOMPSON

*v.*

## THOMAS CANDOR.

1. DEED—*delivery—what sufficient.* The delivery of a deed need not be made by the grantor himself, nor is it indispensable that it be made to the grantee. If made to any person for the grantee, and it is absolute and not conditional, his assent will be presumed.

2. Where a party proposes to make a donation of a tract of land to an educational institution, makes a deed thereto and hands it to one of the trustees who was superintending the erection of the buildings thereon, but imposes no conditions and gives no directions in reference to the deed, and subsequently dies, the presumption is that he intended to deliver the deed.

3. The deed, in such a case, takes effect from the time it is delivered to the trustee, and not when it is handed by him to the secretary of the institution; no act was to be done by the company, and they were in possession and engaged in erecting a building thereon when the deed was made. This was evidence of an intention to deliver and to accept, and the intention must control.

4. CORPORATION—*organization.* Where parties endeavor to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body *de facto*, and the regularity of its organization can not be questioned collaterally. Such irregularity can only be questioned by *quo warranto* or *scire facias*.

APPEAL from the Circuit Court of Mercer county.

Mr. C. J. BARTELSON, Mr. LEWIS W. THOMPSON, for the appellant.

Messrs. BASSETT & CORNELL, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This bill was filed for the cancellation of a deed.

Willits and Thompson were proprietors of the town of Aledo, and, for the purpose of the establishment of an institution of learning, to be called the "Mercer Collegiate Institute," proposed to donate the tract of land in controversy, and a large sum of money. On Willits and Thompson's addition to the town the land was designated as "Mercer Collegiate Institute." The institution was to be under the control and management of the Old School Presbyterian Church, and the deed was executed to the Mercer Collegiate Institute on the 13th of February, 1858, and placed in the hands of Thompson who was then one of the trustees. Willits died in March, 1858, and the deed was not delivered to the acting secretary of the board of trustees until in March of the following year.

In the meantime, and before the death of Willits, a part of the subscription in money had been paid, and the trustees had commenced and prosecuted the erection of a building. The

basement was nearly completed before his death, and the work was superintended by Thompson. Before the filing of the bill, in 1868, the brick work had been finished, the chapel plastered and heated, some other rooms completed, and a school kept in the building for a number of years. The chapel was used as a place of worship by the Presbyterian church, and one room was occupied by the janitor, and others by the teachers and their families.

In 1865 the building and grounds were leased to one Williams, and he obligated himself to complete the building, and to keep therein a school of such character as should be approved by the trustees, for at least nine months in each year; and at the commencement of the suit the property was in the possession of the lessee of the corporation.

In 1868 the heirs of Willits quit-claimed their interest in the land to appellant.

Appellant, whose bill was dismissed by the court below, contends:

*First*—That there was no delivery of the deed to the Mercer Collegiate Institute.

*Second*—That there was no organization or incorporation of the Institute, and therefore the deed was void for want of a grantee.

*Third*—That the property conveyed was a donation, and reverts on account of the acts of the grantee.

Delivery need not be made by the grantor himself, nor is it indispensably requisite that it be made to the grantee. If delivery be made to any person for the use of the grantee, and is absolute and not on condition, his assent is presumed from the fact that the deed is beneficial to him. *Bryan* v. *Wash*, 2 Gilm. 557.

The only question in this case is, as to the delivery by Willits. He and Thompson were the grantors, and the latter, at the time of the execution of the deed, and with the knowledge of Willits, was one of the acting trustees, and had been selected to superintend the erection of the college building.

Thompson testified that the deed came into his hands as one of the grantors; but he further said, that there was no conversation between him and Willits about the deed, and he presumed that it was the understanding that he should deliver it.

If this delivery to Thompson was, in fact, no delivery, and not intended as such, why was it executed and left in the possession of the trustee who was the superintendent of the work, and interested in the perfection of the title? Why were no directions given, nor conditions mentioned, as to the delivery? This omission raises a presumption in favor of delivery. *Verplank* v. *Sterry*, 12 Johns. 535.

From the evidence, it is an irresistible conclusion that the deed was executed and left in the hands of Thompson, the trustee, for the use and in behalf of the grantee; and its operation was not postponed until the delivery to the secretary of the corporation, which was made by Thompson in the year 1859. No act was to be done by the corporation to entitle it to a deed. In fact, it had possession of the property in the year 1857, and, prior to the death of Willits, had completed the basement of the building; and he had declared, in 1857, that he had given the land for the erection of the college building on it. The conveyance was absolute, and without any power of revocation. The grantee had possession, and continued the expenditure of money.

A controlling element in determining the delivery, as well as the acceptance of a deed, is, the intention of the parties. From all the facts and circumstances, it may be inferred that there was a delivery and acceptance. *Matteson* v. *Cheek*, 23 Ill. 76; *Walker* v. *Walker*, 42 Ill. 311.

Did the corporation have such an existence that it could take, as grantee?

In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected

by the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large amount of money.

Here, then, was a corporate body *de facto* which had been engaged in an undertaking, involving important interests. The regularity of its organization can not be questioned collaterally. Any alleged non-compliance with the law can only be inquired into by the writ of *quo warranto* or *scire facias*. *Rice* v. *R. I. & A. R. R. Co.* 21 Ill. 93; *Tarbell* v. *Page*, 24 Ill. 46; *Baker* v. *Backus, Adm'r*, 32 Ill. 79.

Hence, it is improper in this case to discuss the right of the grantee in the deed, to take; or the power of the legislature to legalize the irregularities complained of.

The proof does not show an abandonment of the purpose of the grant. The trustees of the original grantee were appointed by the presbytery of the Old School Presbyterian Church, and the purchasers, at the sale under the decree foreclosing the mortgage, were the trustees of the Presbyterian church. According to the terms of the mortgage, the money secured thereby was for the use of the Mercer Collegiate Institute in the erection of a building; and it is expressly required on the part of the lessee, to whom the premises were leased for fifteen years from 1865, that he should maintain a school of high character, and with such religious influence as the trustees should approve; and that he should employ such teachers, and make suitable arrangements, so as to accommodate all the pupils who desire to attend, to the full capacity of the building, or forfeit all rights under the lease.

School has actually been kept in the building from the fall of 1865 to the summer of 1867, from the fall of 1868 until the spring of 1869, and from September, 1869, to June, 1870.

The deed is absolute, and contains no provision for reversion. The proof does not show a failure or perversion of the trust, and the decree, dismissing the bill, is affirmed.

*Decree affirmed.*

Syllabus. Opinion of the Court.

## HENRY GROVE

*v.*

## CONRAD JEAGER *et al.*

1. MORTGAGE—*trustee—husband and wife.* Where a husband and wife held land in equal parts, and it was agreed that the husband should purchase the wife's half at a stipulated price, a part of which he paid, and to secure the balance he and his wife conveyed to a trustee, who conveyed to the husband, and he gave to the trustee a note for the balance of the purchase money, and a mortgage on the premises to secure its payment, and the trustee afterwards transferred the note and mortgage to the attorney of the wife for collection, and he brought a bill to foreclose the mortgage: *Held*, that, as between the husband and wife, the note and mortgage amounted to no more than an unexecuted voluntary promise by the husband to give her that sum of money, and that equity will not enforce such a promise against the land of the husband previously held.

2. But in such a case, it would be a fraud on the wife to permit the husband to retain the title to the half of the land previously held by her, and that a foreclosure would be allowed as to that half.

3. SAME—*cancelling conveyance.* Where a wife, by threats of abandoning her husband, and that she would not live with him, procured from him a conveyance, through a trustee, of a half of a tract of land, and he acquiesced therein for a considerable time: *Held*, that such acts do not constitute grounds for cancelling the deed from him to her.

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

Mr. HENRY GROVE, *pro se.*

Messrs. O'BRIEN & HARMON, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This case, in substance, is as follows: Conrad Jeager, and Margaretta, his wife, being the owners of certain premises, each an undivided half thereof, an agreement was made between them that the former should give to his wife $600; he paid to her $200, and in order to secure to her the payment

of the remaining $400, the following mode was devised: Jeager and his wife conveyed the whole premises to defendant Merkle; he conveyed them back to the husband, Conrad Jeager. The latter executed to Merkle his note for $400, payable one year after date, with ten per cent interest, and, together with his wife, Margaretta, a mortgage on the same premises to secure the payment of the note, and the note and mortgage were delivered to Mrs. Jeager, Merkle acting merely as a trustee for her in the transaction. Subsequently, at the instance of Henry Grove, the appellant, the attorney of Mrs. Jeager, Merkle indorsed the note to Grove for the benefit of Mrs. Jeager.

Grove brought this bill in chancery against Conrad and Margaretta Jeager, and Merkle, defendants, to foreclose the mortgage for the benefit of Mrs. Jeager.

The court below dismissed the bill, and Grove brings the case here by appeal.

So far as this contemplated provision for the wife was executed, it was made effectual, and it was so to the extent of the $200 which were paid; but, so far as it remains executory, it would be contrary to the practice of courts of equity to aid in enforcing it, the doctrine being that a court of equity will not enforce a voluntary contract. 1 Story Eq. Ju. sec. 433; 2 ib. sec. 793 a.

We must regard this proceeding as one to carry into execution a voluntary executory contract by enforcing the payment of money under a voluntary promise to pay it, and that the execution of the mortgage does not give to it the character of an executed promise, the mortgage being but an incident to the note, which is the principal; if payment of the note can not be directly enforced, neither can it be indirectly by foreclosure of the mortgage for the purpose of its payment.

This is true as respects Conrad Jeager's own interest in the mortgaged premises which he conveyed to Merkle; but we think it should be held otherwise as to the interest in the premises which Margaretta Jeager owned in her own right,

and which she conveyed to Merkle for the only purpose of having this mortgage made of it to secure the payment to her of this stipulated provision. It would seem to be highly inequitable that this scheme, designed purely for her benefit, should result in depriving her of her own property and lodging it in her husband. To allow the husband to make a successful resistance in full to the foreclosure of this mortgage, would be enabling him to get his wife's land into his own hands by a fraudulent device.

To avoid the force of such seeming injustice, Conrad Jeager sets up that all the land was once his; that he gave to his wife her undivided half of it, she having prevailed upon him, by unwarrantable means, to convey it to her.

His own sworn version of the affair is, substantially, that she wanted something for her children (she having three by a former husband); that she forced him to make the deed; that she said if he did not give her some claim on his property, she would not live with him; that he made a deed to one Fiense, and the latter made one to her; that the deed was for just one-half of the property; that she seemed to be satisfied at the time with this deed, but afterwards wanted the other half, too. In compliance with which want, and to avoid a threatened prosecution by her against him, before a justice of the peace, for an assault and battery, he settled with her by agreeing to give her this $600, and securing its part payment as above mentioned.

Some other circumstances of conduct on the part of his wife, are detailed by Jeager, as going, as he says, to prevail upon him to make this deed, which certainly fall much beneath the standard of propriety of conjugal deportment, and merit censure; but they all, in our view, do not amount to means of that extreme character which would call for the interference of a court of equity to set aside, or to justify it in holding for naught, a deliberately executed deed, the making of which was procured through the use of such objectionable means.

This conveyance to his wife, in the mode of conveying to Fiense, and the latter conveying back to her, was on the 17th day of September, 1868, with which Jeager appears to have rested entirely content; and, on the 5th day of April, 1869, he undertook to make the further provision in question for his wife. The voluntary conveyance of this land to the wife, as between the parties, made it as much hers as if she had paid a full valuable consideration for it; and it is not to be permitted to Jeager, after this land of his wife has come back into his hands, in trust for a purpose of benefit to her, to hold on to it for himself under the claim that he, in the first instance, gave it to his wife, and that she never paid him anything for it.

We think the mortgage should be held and made effective, so far as it embraces that interest in the land which belonged to Mrs. Jeager, and which she conveyed to Merkle; and that, to the extent of that interest, she is entitled to have the mortgage foreclosed for her benefit, and the proceeds of that portion of the mortgaged premises applied towards the satisfaction of this note.

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

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DANIEL F. BUCKLEY

*v.*

JOEL EATON, JR., and

SAME

*v.*

E. L. H. AND CHARLES S. GARDINER.

ASSIGNMENT OF ERRORS—*abstract.* Upon an appeal to this court, where there was no assignment of errors upon the record in accordance with the rule of court in that regard, and none accompanying the record, and the

appellant failed to file an abstract in the manner required, but instead thereof merely a printed index to the transcript, the court refused to consider the case, and affirmed the judgment of the court below.

APPEALS from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. JOHN L. DORAN, for the appellant.

Messrs. SAWIN & WELLS, for the appellees E. L. H. & Charles S. Gardiner, and Mr. S. M. DAVIS, for the appellee Eaton.

Per CURIAM: In these cases there is no assignment of errors found upon the record, as required by the rule of court, nor do we find any accompanying the record; and the rule in reference to abstracts has been disregarded. Appellant, in each case, has failed to prepare and file an abstract of the record; but there has been filed in each case a printed index to the transcript. We must presume the attorney was aware of the rules of the court, and has intentionally disregarded them.

As the cases have not been prepared as required by the rule, we decline to consider them, and affirm the judgments.

*Judgments affirmed.*

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## ELIZABETH J. NORWOOD *et al.*

*v.*

## HENRY GUERDON.

1. LIFE INSURANCE POLICY—*assignment by wife.* Where a person insured his life for the benefit of his wife, and she endorsed her name on the policy in blank, and the husband procured a loan of money and pledged the policy as collateral security, and afterwards paid the agent of the company the larger portion of the premium, and the creditor holding the policy

having called on the agent to learn whether the premium had been paid, and being informed by the agent that the greater part had, and the balance would be paid in a few days; the time for its payment was permitted to pass, and the agent declared a forfeiture, and a new policy was issued to the wife in her name, for the same amount, on the same terms, and in other respects similar to the first, and the sum paid towards the premium on the first policy was applied to the premium on the new policy; and the person whose life was insured having died, the creditor claimed that he was entitled to payment out of the funds: *Held*, that the declaring the forfeiture and the issuing of the new policy did not affect the rights of the creditor, and that his lien attached to the fund under the new policy as he held it under the first.

2. The new policy was, in substance, though different in form, a mere renewal of the old. It was a renewal evidenced by the policy instead of a receipt, and the creditor should be allowed the same interest he would have had in the old if the same money had been applied in procuring the ordinary renewal.

3. ASSIGNMENT BY WIFE—*its effect.* The wife having placed her name on the back of the policy at the request of her husband, and delivered it to him, she thus enabled him to procure the loan of money, and it would be opening a door to fraud to permit the wife to deny the power of the husband to fill up the assignment. Such an assignment by the wife must be held valid and binding in equity. By signing her name in blank, she gave the public the evidence of her consent—an act that could only be interpreted as designed for an assignment—and the same consequences must attach against her as would follow from such an act performed by any other person.

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

Mr. O. B. SANSUM, Mr. ROBERT HERVEY, Mr. H. A. WHITE and Mr. WM. T. BURGESS, for the appellants.

Messrs. MILLER, FROST & LEWIS, for the appellee.

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

In January, 1860, Joseph E. Norwood took out a policy of insurance upon his life for the sum of $10,000, from the Manhattan Life Insurance Company, payable at his death to one George W. Pulsifer. In August, 1865, Pulsifer assigned this

policy to Elizabeth, the wife of Joseph E. Norwood, by endorsement thereon. Norwood being in embarrassed circumstances, and desiring to raise money upon the policy as collateral security, his wife placed her name upon the back thereof in blank, and he then pledged the policy to Alfred Sturges as security for a loan of $1200. In June, 1867, Norwood being then indebted to one Kimball, and Kimball indebted to Guerdon, the appellee herein, in the sum of $3400, it was arranged between the parties that Norwood should pay Kimball's indebtedness to Guerdon, thus cancelling a like amount of his own indebtedness to Kimball. It was further agreed that Guerdon should pay Norwood's debt to Sturges, and that Norwood should give his note for $5000 to Guerdon, who should hold the policy of insurance as security for its payment. This arrangement was carried into effect. Guerdon paid Sturges and received the policy. He also surrendered to Kimball the notes held against him and gave to Norwood his own note for $400, being the difference between the amount of the Sturges and Kimball indebtedness and the $5000 note.

The annual premium on the policy, amounting to $524.90, fell due on the 11th of January following. Prior to that day, Guerdon called at the office of the company's agent, in Chicago, to pay the necessary amount, and was then told by a clerk in the office that Norwood had paid $400 of the premium, and would pay the residue the next week. He also saw Norwood, who made a similar statement. Relying upon this partial payment and its acceptance by the company, and upon Norwood's promise to pay the residue, Guerdon gave himself no further trouble in regard to the matter. Norwood, however, did not pay the residue of the premium within the required time, but it was agreed between him and the insurance agent that the policy should be forfeited, and that a new policy should be issued in its place, to Norwood's wife, on precisely the same terms, as to premiums and dividends, as those pertaining to the old policy. This was done. Soon after the day when the premium was due, Norwood paid the excess over the $400

already paid, and received a new policy, payable to his wife, for the same amount as the one cancelled, and on the same terms. Norwood died in the following April, and this bill was brought by Guerdon against the insurance company and the widow of Norwood, to compel payment from the proceeds of the last policy of the amount due him from Norwood. The Superior Court decreed in his favor, and the defendants appealed.

The evidence in the record tends strongly to show a fraudulent combination between the insurance agent and Norwood, by which Guerdon was to be led to rely upon payment of the premium by Norwood, and thus, by allowing the day to pass, be deprived of the security of his policy, while a new one should be issued to Norwood, to which the $400 paid by him should be applied. Independently, however, of such fraudulent purpose, the decree of the court below was clearly right. This new policy was, in substance, though not in form, a mere renewal of the old. As the agent himself testifies, it was issued upon the same terms, was entitled to the same benefits, and assumed the same liabilities. The greater part of the premium was paid before the first expired, and professedly to keep it in force. It was, in fact, kept in force and renewed, but the renewal was made to take the form of a new policy instead of a renewal receipt. It was the same contract evidenced by another piece of paper. It was the duty of Norwood, according to his agreement with Guerdon, to pay the premium and keep the existing policy in force. He did, in fact, pay it, the company consenting to receive a part of it after the day of payment, as the evidence shows it had repeatedly done in former years; and in a court of chancery, an innocent party, having an interest in such contract, can not be divested of his interest by this childish juggle in the matter of form, to which Norwood and the insurance agent resorted. We entertain no doubt that Guerdon should be allowed the same interest in the new policy paid for by Norwood's money, that he would have

had in the old, if the same money had been applied in procuring the ordinary renewal.

It is, however, urged that the wife of Norwood never consented to the assignment of the original policy to Guerdon, or at least that there is no proof of such consent; but she placed her name upon the back of the policy, as she herself admits, at the request of her husband, and left the policy in his possession. Armed with this evidence of his right to pledge the instrument, he goes upon the money market and does pledge it, first to one person and then to another, and by such pledge raises money and pays his debts. It is not in evidence, and we can not presume, that the wife ever had any interest in this policy from having contributed from her separate estate towards the payment of the premium. So far as appears, her interest consisted merely in the fact that the money was to be paid to her by virtue of the assignment by Pulsifer, to whom it was originally made payable, in the event of her husband's death, and not in the fact that she had ever paid anything either to Pulsifer for the assignment, or to the company as premium. But whatever her interest, by endorsing the policy in blank and delivering it to her husband, she clothed him with all necessary evidence of a power to pledge the instrument by filling up her blank assignment, and we should be opening a door to the grossest frauds if we were to permit the wife, after having done all this, to come forward and claim that her husband had no right to assign the instrument. These assignments are valid, and are recognized by the companies. They are also of daily occurrence in the way of collateral security, and where a policy is made payable to the wife, and she endorses it in blank, and the husband pledges it, we are wholly at a loss to conceive on what ground it can be claimed that such an assignment is not valid in a court of equity. The husband and the wife are the only parties interested, and they have both participated in the assignment. The law provides no particular mode by which the wife is to manifest her consent, as in the case of conveyance of lands, and

if such an assignment as was made in the present case is not valid, then a policy payable to a married woman is not assignable at all. It is not, however, and can not be claimed that a policy payable to a married woman is incapable of assignment within the purview of a court of equity, but it is only claimed that in this case the wife did not consent. She gave to the public, however, the evidence of her consent by endorsing the policy in blank—an act which could be interpreted as done for no other purpose than an assignment—and the same consequences must be attached to this act against her as would follow from such an act performed by any other person. When innocent parties have advanced money to her husband on the faith of such blank assignment, she can not be permitted to repudiate the transaction. She can not be permitted to enable her husband to perpetrate a fraud.

*Decree affirmed.*

Mr. Justice WALKER and Mr. Justice MCALLISTER dissent, holding that it is a fair conclusion from the evidence that the wife never intended to assign the policy; that the mind did not accompany the act of signing. She wrote her name in blank on the back at the request of her husband, he not intimating what use he intended to make of it, and she not knowing or suspecting that such use would be made of it, or what effect could be given to it. The signature was obtained purely through the dominion of the husband, and was made by her with no intention of entering into a contract of assignment. And as the instrument is not assignable at law, she has the right in equity to rely upon the circumstances under which it was made to defeat it. The assignee took it subject to her equities, and was bound to make inquiry as to the circumstances.

Syllabus.

## JOHN L. FINLEY *et al.*

*v.*

## WILLIAM H. MCCONNELL.

1. DEED OF TRUST—*sale under.* Where a person, being indebted, conveyed his property, real and personal, to a trustee, to be sold for the payment of his debts, and a portion of the real estate was conveyed to his principal creditors in satisfaction of their claims: *Held*, that those debts formed a sufficient consideration to support the conveyance, although the proceeds were not applied on all of the debts.

2. SAME—*rights of creditors.* A deed of trust so executed, although in fraud of creditors, is, nevertheless, binding on the grantor and his heirs and assigns. The statute only makes such deeds void as to creditors and *bona fide* purchasers. Where, in such a case, the grantor is estopped by such a deed, those who subsequently become his grantees are in like manner estopped.

3. SAME. If a trustee, in such a case, conveys the land in violation of the trust, other creditors have the right to have the fund properly applied. If a purchaser of such a trustee has not acquired title in good faith, a court of equity, on a proper application, would appropriate the fund to the purposes of the trust. But even if the purchase from the trustee was not *bona fide*, that does not give the grantee of the debtor the right to wrest it from the purposes of the original trust.

4. CONVEYANCE—*homestead—claim of.* Where a party conveyed the house and lot on which he resided with his family, and the right of homestead was not released, and the wife did not join in the deed, the conveyance passed the fee, but subject to the right of the grantor to retain it and occupy it as a homestead, but when he abandons it, the homestead right ceases. That right is not an estate, but simply a privilege conferred by the statute, which ceases when the grantor and his family cease to occupy the property. As soon as he ceases to so occupy it, the right to hold it, adversely to the fee, is gone, and the grantee may enter and hold possession.

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

Messrs. BENNETT & VEEDER, for the appellants.

Mr. H. BIGELOW, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought in the Henry circuit court by appellee against appellants, to recover a house and lot in the town of Galva. A trial was had by the court without the intervention of a jury, by consent of the parties, who found the issues for the plaintiff and rendered judgment in his favor, and the record is brought to this court by defendants, on appeal.

On the trial, it was agreed that one John Youngberg, being indebted to a large amount, on the 14th day of July, 1857, executed a deed of assignment, by which he transferred and conveyed his personal property, chattels, *choses in action*, and real estate, including the premises in controversy, to one C. C. Bemis, in trust for the benefit of his creditors. But, in conveying the property to Bemis, there was no release of the homestead right in these premises. It is also agreed that Youngberg occupied the same with his family at the time, and continued to do so until in 1863; that full power was given by the deed of trust to the assignee, to sell any and all of the property named in the deed and schedule attached, for the payment of the debts. On the 25th day of October, 1858, Bemis conveyed the premises in dispute to appellee, in trust for Isaac C. Kendall, assignee of Ely, Bowen & McConnell, and for Bowen, McNamee & Co., for the expressed consideration of $1,000. On the 8th day of January, 1863, Youngberg and wife conveyed the premises by warranty deed to Clark M. Carr, and on the same day surrendered possession of the premises to him. On the 17th day of January, 1865, Carr conveyed the premises to Olof Johnson, and he, on the 9th day of September of the same year, conveyed the premises to Daniel E. Morris, who afterwards sold and conveyed to appellants.

It is further agreed that, from the date of the assignment until the time when Youngberg conveyed to Carr, the premises were worth no more than $1,000, although valued in the

schedule at $5,000; that the only real consideration in the deed from Bemis to appellee, was the indebtedness due from Youngberg to Ely, Bowen & McConnell, and Bowen, McNamee & Co., they being Youngberg's principal creditors. It is also admitted that Bemis paid one dividend of seventeen per cent on Youngberg's debts, and absconded with the balance of the trust fund and defrauded Youngberg and his creditors. It was agreed that either party should be at liberty to object to the several deeds, and other evidence that might be offered.

When appellee offered the deed from Youngberg to Bemis, appellant excepted, upon the grounds that it was void because it contained a clause that the assignee might sell the trust property on a credit; that it authorized him to compromise debts, and could not be made the foundation of any sale but for the payment of the debts of Youngberg. They also excepted to the reading of the deed from Bemis to appellee, because it is shown by the deed and agreement that it was executed without consideration, and on trusts in conflict with and to defeat the original trust; that the trust upon which he held only authorized a sale for the benefit of all of the creditors, and that the deed to appellee was executed without power, and is void.

In support of these objections, many authorities are cited. They all, however, relate to cases where creditors assailed the assignment upon the grounds that the deeds were in fraud of their rights; that the deed of trust was made to hinder and delay them in collecting their debts, and was therefore void as to them. But it is believed no case can be found which holds that such a deed is void as to the grantor and his assigns, or that they may avoid it upon such grounds. The third section of the statute of frauds declares, that every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, etc., had and made, or contrived of malice, fraud, covin, collusion or guile, to hinder, delay, or defraud creditors of their just and lawful actions, suits, debts, etc., shall be from thenceforth deemed and taken only as against the person

or persons intended to be defrauded, etc., to be clearly and utterly void. This statute, in terms, declares that such fraudulent deed, etc., shall only be void as to the persons attempted to be defrauded. And if only as to them, it must be valid and binding on all others, and if binding on all others, it follows that it must be valid as to the grantor, his heirs and assigns. No other reasonable construction can be given to the statute. In fact, it will bear no other.

Appellants do not pretend to claim as creditors, or as any other class of persons entitled to invoke the aid of the statute. They only claim as assignees of Youngberg, and if his deed bound and estopped him from claiming the right to avoid it, they could acquire no greater or better right than he had. All of the deeds were duly recorded, and the grantees purchased with a full knowledge, either actual or constructive, of appellee's rights. There can not be the least question that Youngberg transferred the legal title in fee to Bemis, and he so held it. The deed of trust lacks no essential requisite to pass all of the grantor's title. It has the requisite parties, a sufficient consideration, and all other forms and requirements to pass the legal title to Bemis. Whether it would be sufficient in a court of equity, on a bill filed by creditors, is a question not now before us, and into which it is unnecessary to inquire; nor do we express any opinion on that question.

Then, Bemis having the legal title, he had the power to convey it to a purchaser so as to vest him with the fee; and an examination of his deed, to appellee, shows that it possesses all of the requisites of a valid instrument. If it is fraudulent, or otherwise in violation of the trust, that can only be availed of by the creditors in a court of equity. The deed states that the consideration paid was $1,000, and the agreement states the only consideration was Youngberg's indebtedness to appellee, and the persons named in the deed as *cestuis que trust*, of whom appellee seems to have been one. The conveyance on such a consideration is sufficient to pass the title at law to the grantee. If there has been a perversion of the

trust fund, and appellee is not a *bona fide* purchaser, a court of equity, on an application by the creditors, would seize the fund, unless superior equities have intervened, and apply it according to the declaration of the original trust. But even if it appeared that this property had been perverted, that gives to appellants no right to wrest it from the creditors to whom it was conveyed in part payment of debts, to pay which, together with others, the original trust was created. But the equities of the parties can not be settled in a court of law, and it will be the proper time to settle them if the aid of chancery shall be invoked.

But it is also urged that, inasmuch as Youngberg occupied the premises, and was entitled to hold them as a homestead when he conveyed to Bemis, and as his wife did not join in that deed, and as there was no release of the homestead right, appellants, by purchasing the premises of Youngberg and wife with such a release, and being let into possession, have thereby acquired such a title as will bar appellee's right of recovery.

The cases of *McDonald* v. *Crandall*, 43 Ill. 231, and *Hewitt* v. *Thompson*, 48 Ill. 367, are decisive of this question. It was there held, that the homestead exemption was not an estate, but is simply an exemption; and that, when the husband and wife convey the premises without releasing the homestead, such a conveyance operates to pass the fee, but its operation is only suspended until the grantor abandons the premises or surrenders the possession to the grantee. It is true, that this case is not precisely similar to either of those, nor have we ever known two cases precisely alike in all of their facts; but the principle upon which they are based is the same. Here, Youngberg made a deed which transferred the fee, but it was suspended so far, only, that his grantee or his assigns could not dispossess him so long as he occupied it as a home for himself and family. He had the right to set it up against them, not as an estate in the land, but as a privilege conferred upon him by the statute. But Youngberg abandoned the premises as his homestead, and then the assignee of his first

grantee, holding the fee, had the right to enter. The privilege of holding adversely to the fee, was gone. Then the right of possession which had been suspended became united to his fee, and his right to recover and hold the premises had become complete, just as it did in the cases before referred to, and for the same reason. Appellee, we have seen, held the legal title, and holding it, his right to recover in ejectment was complete, and the judgment of the court below was correct.

Finding no error in the record, the judgment of the circuit court is affirmed.

*Judgment affirmed.*

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## CITY OF STERLING

*v.*

## HENRY THOMAS.

1. STREETS AND SIDEWALKS—*duty of a city to keep them in repair.* Where, by the charter of a city, the streets and sidewalks are under the control of the city authorities, it is incumbent on the city to keep them in repair, and for any neglect in its performance the city is liable in damages.

2. In an action against a city for injury to the plaintiff occasioned by the alleged neglect of the city to keep a sidewalk in proper condition, it appeared that a person who was erecting a building in the city, did, with the knowledge and consent of the city authorities, in order to reach the basement of his building, make an excavation under the sidewalk. This excavation was kept covered with loose boards, except when access to the basement was necessary, the boards, or a portion of them, were removed, and replaced after the necessity had passed. The opening was thus covered up to six o'clock of the evening of the injury, after which time some person unknown removed the covering, and the plaintiff, it being very dark that night, in going home, fell into the basement and broke his shoulder: *Held*, the question whether this covering of boards, which could be easily removed, afforded sufficient security, was properly left to the jury, and this court concurs with them in opinion it was not sufficient.

3. Adequate security should have been afforded, which could have been done by erecting a sufficient railing around the excavation, which would have prevented any one falling into it, and the authorities of the city, by the exercise of reasonable diligence, and at a slight expense, could have done this or compelled the owner of the property to do it—thus far their duty extended.

4. The authorities had power to forbid the excavation, and, not having forbidden it, they permitted it.

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

Messrs. HENRY & JOHNSON, for the plaintiff in error.

Messrs. WILKINSON, SACKETT & BENNETT, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case for an injury occasioned by the negligence of plaintiff in error in allowing an opening in the sidewalk of the city of Sterling to remain unprotected, by means of which the defendant in error, though walking with all due care and caution, in the night time, was precipitated into the opening, and was seriously injured.

It appears one Edwards, who was erecting a building on the corner of Spruce and Third streets, in the city of Sterling, did, with the knowledge and consent of the city authorities, in order to reach the basement of his building, make an excavation under the sidewalk. This excavation was kept covered with loose boards, except when access to the basement was necessary; the boards, or a portion of them were then removed, and replaced after the necessity had passed.

This was the condition of the opening up to six o'clock of the evening of September 23, 1869, after which time some person unknown removed the covering, and the plaintiff, it being very dark that night, in going home, fell into the basement and broke his shoulder.

Boyden, the street commissioner, testified he knew the opening was there the day before the accident; saw it open when

the sidewalk was first built; went down to it on purpose to see if it was covered.

It is insisted by the plaintiff in error that it is not chargeable with negligence, it having performed its duty in causing this excavation to be covered.

It is admitted, by the charter of the city its streets and sidewalks are under the care and control of the city authorities, and the duty to keep them in repair is incumbent on them, and for any neglect in its performance, they are liable in damages. *City of Bloomington* v. *Bay*, 42 Ill. 508.

The question whether this covering of boards, which could be easily removed, afforded sufficient security, was fairly left to the jury, and we concur with them in opinion it was not sufficient. Adequate security should have been afforded, which could have been done by erecting a sufficient railing around the excavation. This would have prevented any one from falling into it, and was more secure than boards. The authorities of the city, by the exercise of reasonable diligence, and at a slight expense, could have done this, or compelled the owner of the property to do it. That the duty of the authorities extended thus far is shown by the cases of the *City of Chicago* v. *Gallagher, Adm'x*, 44 Ill. 295, and *City of Springfield* v. *LeClaire*, 49 Ill. 476.

We have said, this opening was made with the consent and knowledge of the city authorities. The street commissioner knew of its existence, and it had been made a long time. The question of knowledge from lapse of time was a fair question for the jury, and they have found the fact. Those authorities had power to forbid the excavation. Not having forbidden it, they permitted it. They knew it was dangerous, and neglected to provide sufficient safeguards.

We see no error in the instructions, and must affirm the judgment.

*Judgment affirmed.*

Syllabus.

FRANK PARMELEE *et al.*

*v.*

THE CITY OF CHICAGO,

and

ELIZABETH BUNCH *et al.*

*v.*

THE CITY OF CHICAGO.

1. ASSESSMENT FOR WIDENING A STREET—*horse railway not exempt.* Where a horse railway company constructed their road in one of the streets of the city, with the agreement that the company should keep so much of the street as they occupied in repair, according to the requirements of the common council for the repairs of such streets, but the company were exempted from assessment for grading, paving, macadamizing, filling or planking the streets or parts of streets upon which they should construct their railways: *Held*, that this agreement did not exempt the company from assessment to defray the expense of widening the streets upon which their railways are constructed.

2. FORMER DECISION. An ordinance of a city provided that a street railroad company, as respected the grading, paving, macadamizing, filling or planking of the streets upon which they should construct their railways, should keep so much of said streets as should be occupied by the railways, in good repair and condition, in accordance with the regulations of the city in that regard. It was held, in *Chicago* v. *Sheldon*, 9 Wallace, 50, that an ordinance of that character, which had been recognized and confirmed by the legislature, was not unconstitutional, and it was upheld, upon the principle of commutation, and as being a contract, the obligation of which could not be impaired. To this extent the case of *Chicago* v. *Baer, et al.* 41 Ill. 306, is modified.

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

These two cases are in all respects the same, and the facts appear in the opinion.

Mr. JOHN BORDEN, for the appellants.

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

At the March term, 1871, of the Superior Court, an application was made by the collector of the city of Chicago, upon his report in certain condemnation proceedings for widening State street, for judgment against delinquent real estate, for the special assessment levied thereon in such proceeding; to which application various objections were made, in apt time, by the owners of such real estate, among which was the objection that the property and franchise of the Horse Railroad Company, whose tracks were in the street proposed to be widened, were specially benefited by the proposed improvement to a large amount; and that no part of the cost thereof was assessed against that company, but the same was omitted therefrom, knowingly and fraudulently, by the commissioners; and that the ordinance was void for not ordering any part of the cost to be assessed on the property and franchises of the said company, and not ordering the amount to be assessed on all property specially benefited.

To sustain the objections made, the objectors introduced in evidence certified copies of the entire proceedings, from which it appears that the commissioners, in their report recommending the improvement, and stating to what extent property could be found specially benefited, made no mention of the property of the Horse Railroad Company, but specified only real estate, and the entire proceedings show that the railroad company was not charged with any of the burdens of the improvement.

The first section of the ordinance authorizing the improvement, is as follows: "That State street, from Madison street to Jackson street, be and is hereby ordered widened to the width of one hundred feet, condemning the property necessary therefor, on the east side thereof, in accordance with the plan hereto annexed."

The second section requires that an appraisal be forthwith made of the damages and recompense due to the owners of the real estate necessary to be taken.

The third section declares that the sum of $194,951.61 be assessed by the commissioners upon the real estate by them deemed specially benefited by the improvement, in proportion as nearly as may be to the benefits resulting thereto. And the fourth section, that the sum of $3978.61 be chargeable to the general fund. The total estimate was $198,930.30. When the assessment roll was completed it comprehended as the only property benefited, real estate, and made no reference to the Horse Railroad Company or its property.

Upon the hearing of objections, it was shown that there was a double track horse railroad on State street, from Lake street southward to Egan avenue; that it belongs to the Chicago City Railway Company; that it had occupied State street for about twelve years; that the tracks occupy a space of from 16 to 18 feet in width of the street; that the street is 73 feet wide, and cars run each way every two minutes; that there was a great deal of travel on the street, and in the winter the railroad travel was greatly impeded by the teams of other vehicles being compelled to go upon the track. The addition to the width of the street was to be 27 feet. The counsel for objector offered to prove that this addition would obviate the necessity of teams getting upon the tracks, and that the interest of the railroad company would receive a special benefit from the proposed widening; which offers were excluded by the court, and exception taken.

The exemption of the Horse Railroad Company is based upon the following ordinance: "The said parties and their associates shall, as respects *the grading, paving, macadamizing, filling* or *planking* of the streets or parts of streets upon which they shall construct their said railways, or any of them, keep *so much* of said respective streets as shall be occupied by the said railways, or either of them, in good repair and condition during all of the time to which the privileges hereby granted

to said parties shall extend, in accordance with whatever orders or regulations respecting the ordinary repairs thereof, may be passed or adopted by the common council of said city." Gary's Ord. 398.

In the case of *Chicago* v. *Sheldon*, 9 Wallace, 50, it was held, contrary to the decision of this court in *Chicago* v. *Baer et al.* 41 Ill. 306, that an ordinance like that just quoted, and which, like this, had been recognized and confirmed by the legislature, was not unconstitutional, and it was upheld upon the principle of commutation, and as being a contract, the obligation of which could not be impaired. To that extent only are the grounds taken in the *Baer* case affected by the decision of the Supreme Court of the United States, and we adhere to them still, in all other respects.

Although it may be conceded, as was held by the United States Supreme Court in *Chicago* v. *Sheldon*, *supra*, that the legislature had the constitutional power to commute for a tax or to contract for its release, for a consideration, still we think that the railway company was not exempt in this case, for the reason that the subject matter of the assessment is not, by any fair interpretation, included within the terms or spirit of the ordinance. By its terms, the company were exempt from assessment for *grading*, *paving*, *macadamizing*, *filling* or *planking* the streets or parts of streets upon which they should construct their railways, in consideration of their agreeing to keep so much of the street as they occupied in good repair and condition, in accordance with the regulations of the council in respect to ordinary repairs. But an assessment for *widening* the street is wholly outside of the act of commutation, and as to *that*, the matter stands as if no such ordinance had ever been passed.

This case also falls within that of *Hills* v. *Chicago*, *ante*, 86.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

JOSEPH ULLMANN

*v.*

ALBERT E. KENT *et al.*

1. MEASURE OF DAMAGES—*refusal to receive property and pay for it.* Where a person purchased of another the hair and bristles of all hogs he might kill during the season, at a specified price per head, and was to take and pay for them, and the seller, when he commenced slaughtering, gave the buyer notice and requested him to take away the hair and bristles and pay for the same according to the agreement, but the buyer refused, and the vendor then sold the hair and bristles for the highest market price: *Held*, that he could recover the difference between the contract price and the market price; that this is the true measure of damages for such a breach of contract.

2. SALE—*breach—re-sale—notice.* Where such a breach of contract occurs, the vendor may re-sell the goods without notice to the buyer that he will do so, and the vendee will be liable for the loss sustained.

3. SAME—*time for payment.* Where a party purchases goods at an agreed price, and no time is fixed for payment, the law implies that payment is to be made when the goods are delivered.

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

Messrs. KING, SCOTT & PAYSON, for the appellant.

Messrs. SCAMMON, MCCAGG & FULLER, and Mr. W. I. CULVER, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

We have fully considered this case, and have arrived at the conclusion that no notice to the vendee was necessary, of the re-sale of the goods.

We shall first dispose of a preliminary question:

The first count of the declaration is, that the plaintiffs agreed to sell to the defendant the hair and bristles of all hogs to be killed during the season, the defendant to remove the same and pay for them upon removal, at twelve cents per hog; that the plaintiffs killed a certain number of hogs, and were

ready and willing that the defendant might enter on the premises and remove the hair and bristles, of all of which he had due notice, yet the defendant would not accept or pay for the same, and they were re-sold.

The second count is the same as the first, with the additional averment that the defendant informed the plaintiffs that he would not accept of the goods or pay for the same.

The third is the same as the first, with the further averments that payment was to be made upon delivery, and that the defendant was requested to take away the goods.

We shall not notice the evidence further than to remark that the declaration was sustained by the proof; that notice of the commencement of killing was given to the defendant; that he wrote a letter refusing to accept the goods, and that a re-sale was made without notice to the defendant, at which the highest market price was obtained.

This suit is, therefore, brought for the difference between the market and contract price of the goods.

It is contended by counsel for appellant, that the legal effect of the contract was, that payment should be made upon request; and as there is neither averment nor proof of request, there is a manifest variance.

The general principle is, that a contract must be stated according to its legal effect, and it is so laid down in all the elementary books.

The legal operation of the agreement in this case was, that the goods were to be paid for upon delivery. No credit was given, and it would be a harsh rule to require the seller to part with his goods without payment unless he consented to do so. It would be an interference with the right of parties to make their own contracts, which, ordinarily, can not be permitted.

If a contract specify no time, the law will imply performance within a reasonable time. What is a reasonable time is a question for the court to decide, and in determining it, all the facts and circumstances of the case and the nature of the

contract will be considered. The intent of the parties must be ascertained. We can not infer that the vendors intended that the goods should be removed without payment, in the absence of any proof. This would be most unreasonable.

One count sets out the legal effect of the contract to be for payment upon delivery. The time of delivery, under the circumstances as proved, would be a reasonable time for payment on the part of the vendee. He contracted for no longer time, and he ought not to have it.

The averment, then, that payment was to be made upon delivery, is equivalent to the averment that payment was to be made within a reasonable time.

In *Brady* v. *Anderson,* 24 Ill. 109, this court held that an allegation in a petition that labor or materials furnished were to be paid for on performance or delivery, would be sustained by evidence that no time was specified.

In this case, the reasonable time for payment should be determined with reference to the date of the agreement, and not the time of delivery.

But this action may be maintained upon another count, which avers notice to the defendant of a readiness to deliver the goods, and his refusal to accept.

The notice and refusal appear from the evidence.

Chitty says, that where the defendant has so acted as to render a previous request of performance useless and unnecessary, the statement of a request may be omitted in the pleadings. 1 Chit. Pl. 330; *Amory* v. *Brodrick,* 5 Barn. & Ald. 712.

In this case, before the re-sale, the defendant not only refused to remove the goods, but in a letter informed the plaintiffs that it was impossible for him to go into the business, and requested them not to delay for him.

In this class of cases we do not think that any notice to the vendee, of the re-sale, was necessary.

This was an executory contract to deliver a specified article at a specified price. The buyer unreasonably refused to accept upon notice of readiness to deliver. The goods were

subject to decay and destruction, and the seller was not obliged to let them perish on his hands. It was his right and duty either to sell them or to make some disposition of them for the best advantage of both parties.

If a sale is desired and is the best, upon the failure of the vendee to comply, and notice to him is the positive requirement of the law, what shall the seller do if the buyer abscond, or is temporarily absent, or his locality is unknown? The instances would be numerous, in which a notice would be impracticable and could not be given. What then is to be done? The law does not require impossibilities, and the seller would be compelled to sit idly by and see the property perish because he could not comply with an absurd rule.

There is no necessity for the rule; it would greatly embarrass trade; would subserve no good purpose; would impose always an unnecessary, and sometimes an impossible, duty upon the seller, and would afford no protection to the buyer.

The safest, wisest and most honest rule is, that parties should be left to the consequences flowing from their contracts.

It is both reasonable and right that a party, guilty of a breach of contract, should pay damages therefor if any have accrued.

In this case the buyer is only asked to pay the difference between the contract and the highest market price of the goods at the time of delivery. For this difference the law holds him responsible. He might have avoided the liability by acceptance and payment. Having refused, it would have been idle ceremony to have given him notice of the re-sale merely that he might witness it, for it is not probable that he would have given at the sale more than the highest market value.

If the goods had been sold without any regard to their market value, and the attempt was made to hold the buyer liable for the difference between the contract price and the price on a re-sale, without any reference to value, there would then be

a necessity for notice so that he might protect himself against a sacrifice of the property.

Counsel for appellant have cited some authorities in favor of the position assumed. *McEachran* v. *Randles*, 34 Bar. 301, is most applicable, and this case is virtually overruled in *Pullen* v. *Leroy*, 30 N.Y. 549.

In *Sands* v. *Taylor*, 5 Johns. 395, the action was brought to recover for a cargo of wheat sold. Part of the wheat was delivered and the residue tendered, and notice given that, unless the whole cargo was received and paid for, the residue would be sold at public auction.

Three opinions were delivered, but the necessity of notice does not seem to have been much considered. It seemed to have been taken for granted that it was necessary because it had been given.

Chancellor KENT merely remarked: "The usage in such cases is, to sell the article after due notice to the other party to take it, and that, in default of doing so, the article will be sold."

To the same effect is the authority in 2 Kent's Com. 504, referred to by counsel; and Chancellor KENT cites, as authority for the text, *Sands* v. *Taylor*, and some cases in Pennsylvania.

Van Ness, J., in his opinion, refers to *Langford* v. *Administratrix of Tyler*, and quotes it as follows: "that after *notice* given, the vendor can not sell the goods to another," etc.

Upon examination, it will be found that the quotation is not correct. The language of Ch. J. Holt is as follows: "After *ernest* given, the vendor can not sell to another; but if vendee does not come to pay and take the goods, vendor ought to come and request him to come and pay, and if he does not come in convenient time, the agreement is dissolved and he may sell." *Langford* v. *Administratrix of Tyler*, 6 Mod. 162.

In the same case it is said that, "If bargain be made without an express agreement that payment is to be made at a

certain time, the *money must be paid before the goods be removed.*"

The opinion of Ch. J. Holt, upon which *Sands* v. *Taylor* is based, does not require notice of the re-sale, but only notice to pay and remove the goods.

This authority was strictly followed in the case at bar. Notice was given to the vendee to come and take the goods.

In *Saladin* v. *Mitchell*, 45 Ill. 80, the question of notice of the re-sale was not considered, and the allusion to it is entirely incidental. But the court does hold, that the commencement of the suit was a sufficient notice to the vendee to take and pay for the goods.

That no further notice was required than was given, and that, under the circumstances, it was the right of the party to sell for his own protection, is established by the following authorities: *Chamber of Commerce* v. *Sollitt*, 43 Ill. 519; *Langford* v. *Administratrix of Tyler, supra; Acebal* v. *Levy*, 10 Bing. 376. In the last case, Ch. J. Tindall said: "There can be no doubt that the plaintiff might, *after re-selling* the goods, recover the same measure of damages in a special count, framed upon the refusal to accept and pay for the goods."

In *McLean* v. *Slum*, 4 Bing. 722, Best, Ch. J., said: "With regard to the re-sale, it is clear to me that it did not rescind the contract. It is admitted that perishable articles may be re-sold. It is difficult to say what are perishable articles and what not; but if articles are not perishable, price is, and may alter in a few days or in a few hours. It is a practice, therefore, founded on good sense, to make a re-sale of a disputed article, and to hold the contractor responsible for the difference." See also *Pullen* v. *LeRoy*, 30 N. Y. (3 Tiff.) 549.

The rule as to the measure of damages was the correct one. It was the difference between the contract price and the market price at the time and place of delivery.

The errors assigned do not exist, and the judgment must be affirmed.

*Judgment affirmed.*

Syllabus.

## DANIEL S. BURSEN *et al.*

*v.*

## MARTIN L. GOODSPEED, Adm'r, etc.

1. LIMITATION—*application by administrator for sale of land to pay debts.* There is no period of time fixed by the statute of limitations within which an administrator is required to file his petition for leave to sell real estate for the payment of debts, but, in analogy to the statutes of limitation relating to the lien of judgments, and, under certain circumstances, to bringing the action of ejectment, seven years have been held to bar numerous proceedings, but in the absence of statutes on such subjects, each case must largely depend on its own circumstances, and where more than seven years have elapsed, the delay may be explained.

2. ADMINISTRATOR—*petition to sell real estate.* An administrator, a short time after the grant of letters of administration, filed his petition to sell real estate to pay debts, and a portion of the creditors opposed the sale at that time on the ground that the proceeds thereof would amount to but little more than enough to pay the widow $1,000 for her homestead and the value of her dower in the land, and a sale would operate as a sacrifice of the property without benefit to the creditors; the application was continued from term to term and finally discontinued; and after a number of years the administrator was removed and another appointed; and subsequently, after the lapse of some eleven years from the grant of the first letters, this proceeding was commenced; the widow had died, and the heirs were all of age: *Held*, that these circumstances sufficiently explained the delay, and that, as the land was held by the heirs of deceased, the order for the sale thereof might be made, notwithstanding more than seven years had elapsed.

3. EVIDENCE. The evidence that one of the heirs had purchased the interest of others, but whether before or after the commencement of the proceeding, did not appear, nor whether the purchase had been consummated or the consideration paid, was too loose to be considered by the court.

4. EQUITY. In a proceeding of this character the court has no power to adjust the equities of the parties. The statute only confers power to order the sale of the real estate, in a proper case.

5. MINORITY—*guardian ad litem.* The minority of a woman ceases in this State at the age of eighteen years, and in a case of this kind the statute does not require the appointment of a guardian *ad litem* for a female defendant over eighteen, and under twenty-one years of age.

6. PRACTICE. Where defendants, in a case of this kind, demur in the county court, to the petition, and the demurrer is overruled and they file an answer, it is not error in the circuit court on appeal to strike a demurrer from the files when it has been filed in that court.

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

Mr. S. M. KNOX, for the appellants.

Mr. GEORGE O. IDE, and Mr. MILO KENDALL, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an application by an administrator for leave to sell eighty acres of land for the payment of debts of his intestate.

The intestate died January 1, 1856; letters of administration on his estate were granted February 5, 1856. This petition by the adminstrator was not presented until September 27, 1869.

The main question in the case is, whether the lien which creditors have upon the real estate of their deceased debtors, for satisfaction of their debts, and which they may enforce through administration, has not been lost by the lapse of time between the intestate's death and the filing of the administrator's petition in the county court.

It is insisted that the lapse of more than seven years has barred the proceeding. There being no statutory period of limitation within which the lien must be enforced, this court has held that, in analogy to our statutes of limitation relating to the lien of judgments, and under certain circumstances to bringing the action of ejectment, the period of seven years should be adopted by the courts as the time within which the application should be made. But while this is the general rule where the delay is unexplained, every case depends much upon its own circumstances, and if the delay is satisfactorily

explained, the mere lapse of time is not a reason why the order of sale should not be made. *McCoy* v. *Morrow,* 18 Ill. 519; *Rosenthal* v. *Renick,* 44 Ill. 203; *Moore* v. *Ellsworth,* 51 Ill. 309.

We are brought, then, to the inquiry, whether the circumstances of the case afford a justification for this delay on the part of the administrator.

The land described in the petition comprised only eighty acres. It was occupied by the intestate at the time of his death, as his homestead, and appears from the evidence, at that time, to have been worth not to exceed $1,200. The intestate left, surviving him, his widow and eight children, four of whom were minors, the youngest of whom attained the age of eighteen years in April, 1869. The widow continued to reside upon the land from the death of the intestate up to the first day of July, 1869, the date of her death, occupying it during all this time under her right of homestead and of dower, her children, except Samuel S. Smith, living with her until they married or went off to care for themselves.

Judgments in favor of the creditors of the decedent were rendered by the county court against the estate, amounting in all, with the unpaid part of the widow's allowance, to the sum of $1914.14, all rendered within two years from the grant of letters of administration, except two, rendered September 19, 1859, and these were before any inventory of the real estate had been filed by the administrator. There was a deficiency of personal assets to pay any part of this indebtedness. On the 1st of March, 1858, the administrator rendered to the county court an account current of his administration of the estate, showing an entire exhaustion of the personalty, and that the estate was indebted to him in a balance of $321.74, which was approved by the court. The estate being wholly unable to pay the judgments allowed, the administrator, on December 6, 1858, petitioned the county court for leave to sell the land for the purpose of paying the indebtedness. The widow answered the petition, setting up her rights of dower

and homestead, asking the court to reserve from sale for the payment of debts a homestead of the value of $1,000 and her dower.

On the 9th day of February, 1859, two of the creditors of the estate presented and filed in the county court their petition in writing, asking the court not to grant the leave asked by the administrator to sell the land, for the reason that if the land should be sold then, in their opinion it would not sell for more than $2,000; that of that, the widow would be entitled to $1,000 in lieu of homestead exemption, and her dower besides, so that, after satisfying these claims, nothing would be left to pay the debts, and that, in their opinion, it would be for the interest of the heirs, as well as the creditors, not to have the land sold, especially at that time, as by such sale the heirs would lose the land, and the creditors their debts.

The opinion which might be inferred from the petition, that the land would sell for $2,000, was a mistaken one, as appears from the testimony of witnesses, none of them fixing the value of the land, at that time, as higher than $1,600, or thinking that it would realize on sale at public auction more than $100 or $200 over and above these incumbrances of homestead and dower.

This application was regularly continued from term to term, until the March term 1859, and then seems to have become discontinued, as the record of the county court shows nothing further in regard to it.

On the 7th of March, 1859, Blake, the administrator, was removed from office on account of the insufficiency of his security, and inability to give further security, and Goodspeed, the appellee, was appointed administrator in his stead.

On the 28th of June, 1867, at the instance of two of the creditors, a citation was issued by the county court against Goodspeed, to compel him to make a settlement of the estate, in answer to which he made a written statement setting forth, substantially, the same facts and reasons for not proceeding to have the land sold for payment of the debts, as in

the above petition of creditors against selling the land, which the court approved, and dismissed the citation.

The land still remains in the hands of the heirs; nothing deserving the name of valuable improvements has been put upon it since the decease of the intestate.

It is contended by appellee's counsel that, to constitute a sufficient reason for the delay, there should have been some obstacle in the way of selling the land; that here it might have been sold subject to the incumbrances upon it, and would have been sold but for the interference of the creditors themselves, and that regard for their interests affords no excuse for delay.

There were here both the rights of a homestead and of dower in the land, (*Walsh* v. *Reis*, 50 Ill. 478,) the former to continue, if there was occupancy of the premises, until the youngest child should become twenty-one years of age, and until the death of the widow, unless extinguished by the payment of $1,000; and by virtue of the latter right the widow was, by the statute, entitled to retain possession of the land until her dower should be assigned, which appears never to have been done.

The land descended to the heirs subject to the debts. The amount of the indebtedness was so large in comparison with the value of the land, that it may be said, that aside from the homestead right, and the enjoyment of the rents and profits until the land might be sold to pay debts, the heirs had no substantial interest in the property; and as it was no interference with the full enjoyment of the rights of homestead and dower, and of the rents and profits, it is not perceived wherein there was injustice to any one in consulting the interests of the creditors by delaying to enforce a sale until those rights might become extinct. It is quite evident that, forcing the land to a sale at public auction, incumbered as it was with the claims of homestead and dower, would have been a palpable sacrifice of the creditors' rights in the land; that they would not have derived any appreciable benefit from the sale;

as expressed in the petition of the creditors against it, the heirs would have lost the land and the creditors their debts. What just cause of complaint have the heirs that that result was not precipitated? We think it unreasonable to hold the creditors bound to resort to a fruitless and destructive sale.

No one appears to have been misled by the delay to his injury. The heirs did not go on and make valuable improvements under the belief that the estate was settled, and that there were no unpaid demands against it to be enforced against the land. The debts all appeared established in due time upon the records of the county court. An early application had been made to have the land sold for their payment, to which the heirs were made parties, and was discontinued under circumstances such as to apprise them that resort to the land was not finally abandoned, but suspended only, to be renewed at a future time.

There has been no alienation of the land to strangers, nor any as among the heirs themselves, whereby intervening rights have been innocently acquired, which might be injuriously affected:

We do not recognize as such, the agreement testified to by Samuel Smith, that, at the time of his buying the notes and trust deed on the land from Dodge, which will hereafter be adverted to, the heirs, who were then of age, agreed that he should have the land after the death of the widow if he would secure the homestead for her. We do not perceive what the purchase of the notes and trust deed had to do with securing the homestead, or how he did so secure it for the widow. The deed of trust does not appear in the record, and we do not know whether the homestead was released by it or not.

Samuel Smith, at the time of giving his testimony, a year after the petition was filed, testifies to having bought out some of the heirs, without stating the time or for what consideration, and also testifies to some uncompleted arrangement for disposing of his interest to the husband of one of the heirs. But we can not perceive, from the record, that at the time

this proceeding was commenced, even as among the heirs themselves, in any dealing in regard to the land, any valuable consideration had been parted with from one to another, on the faith of their ownership of the property.

We are of opinion that the state of facts existing in this case furnishes a satisfactory excuse for the delay in making this application.

It appears that the decedent, in his life time, had made a deed of trust on the land to one John Dodge, to secure the payment of his notes to the latter for $360 and interest; and Samuel S. Smith, one of the heirs, sets up that, after the death of the intestate, he purchased from Dodge the notes and deed of trust, and claims that such purchase money should be first paid, and that he should be subrogated to the rights of Dodge in the premises, and that it was error not to allow such claim. The court had no jurisdiction to settle the priority of equities in this proceeding. It is a statutory and not a chancery proceeding. *Moline Water Co.* v. *Webster*, 26 Ill. 233. Under the statute the court is only authorized to license the executor or administrator to sell real estate, and in a proceeding under its provisions all beyond is unauthorized.

Neither the county court nor the circuit court could exercise any other jurisdiction than that conferred by the statute, and that does not confer chancery powers or enable the court to settle equities. *Bennett* v. *Whitman*, 22 Ill. 449; *Cutter* v. *Thompson*, 51 Ill. 390.

Wealthy M. Gordon, one of the defendants, was under the age of twenty-one years, and it is claimed there was error in not appointing a guardian *ad litem* for her, under the statute under which this proceeding is had, which provides, "When it shall appear that any of the persons required to be made parties defendants are minors under the age of twenty-one years, without a guardian, etc., the court shall appoint a guardian *ad litem*, who shall be required to appear and defend in behalf of the minors aforesaid." But this defendant, although under twenty-one years of age, was not a minor, she being

upwards of the age of eighteen years, when the minority of females under our law ceases. It was not the meaning of this statute that a guardian *ad litem* should be appointed for a female defendant who had attained the age of eighteen years.

It is claimed there was error in striking the demurrer of the defendants from the files of the circuit court. They demurred in the county court, and their demurrer was overruled; and then, instead of abiding by the demurrer, they filed their answers upon which the issue was formed and hearing had. The statute provides for written pleadings by filing answer and replication, and forming issues as in chancery proceedings, and on appeal the circuit court takes up and disposes of the issues as they were formed in the county court, and the defendants in this case could not claim the right to file a demurrer in the circuit court.

Perceiving no error in the record, the decree of the court below must be affirmed.

*Decree affirmed.*

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## The Great Western Railway Company of Canada

*v.*

## Thomas W. Burns *et al.*

1. Railway company—*common carriers—their duty.* A railway company having received a large quantity of wool for transportation to Boston, carried it to within fifty miles of the terminus of their road, where, owing to the obstruction of the road with which it connected on the route to Boston, from snow, the wool was stored for two months, within which time the price declined in the Boston market: *Held*, that the company were liable, if for no other reason, because the agents of the company knew that the road was so blocked with freight that the wool could not go through in a reasonable time, and failed to inform the shipper of the fact, that he might have either sold at the point whence shipped, or have selected another route if he had so chosen.

2. The company, as a common carrier, having received the wool without giving notice, were required to carry it through in a reasonable time or respond in damages growing out of the delay.

3. The company were liable for another reason: When they stored the wool, there were twelve hundred car loads of freight stored ahead of the wool, and when the track of the other road was cleared and freight could be shipped through, there was sent forward nineteen hundred car loads before this wool was reshipped. The wool should have been reshipped in its turn, and the road had no right to give freight, shipped after it was, the precedence. Nor was the fact, that a portion of the latter shipments were perishable freight and live stock, any legal excuse for the delay in reshipping the wool, as they should have declined to receive such freight until it could be sent through without delaying freight having the precedence.

4. Nor is it any defense that the wool was shipped from the warehouse in which the company had stored it, in advance of other goods stored there before the wool, and having the precedence, as, if the company had received no new freight until the blockade was removed, the wool would have gone through several weeks earlier than it did, and this is the real ground of the liability of the company. A common carrier has no right to store a part of the freight received for transportation, and leave it there whilst he receives new freight and sends it through, and when it does so it must make compensation to parties injured thereby.

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

Messrs. Walker & Dexter, for the appellant.

Messrs. H. W. & D. K. Tenney, for the appellees.

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

On the 26th of January, 1865, Burns & Co. delivered to the Michigan Central Railroad Company, at Chicago, two hundred and eighty-three bales of wool, consigned to Boston. On the 2d and 4th of February, the wool was received by the Great Western Railway Company, the appellant, at Detroit, and on the 7th and 8th of the same month forwarded eastward to Hamilton, a point forty-three miles west of its eastern terminus, at Suspension Bridge. It was there unloaded and

placed in a warehouse, where it all remained until March 13th, when six bales were forwarded, and on the 3d, 7th and 8th of April, two hundred and seventy-seven bales, comprising the rest of the wool, were sent forward to their destination. In the meantime there had been a great decline in the price of wool, and this suit was brought to recover the damages suffered by the appellees in consequence of this detention.

It appears, from the evidence, that the winter of 1864–5, was one of great severity, and the snow fell to a very unusual depth over the region traversed by the New York Central Railroad, which connects with appellant's road at Suspension Bridge. One of the effects of this kind of weather had been to block up, with snow, the track of the New York Central, and disable its locomotives and cars to such an extent that it was wholly unable to carry all the freight brought over the Great Western. This state of affairs began about the middle of December and continued to the middle of April. When the wool in question was shipped, the means of storage at the eastern terminus of the road had been already exhausted, and the appellant was obliged to unload such freight as the New York Central could not carry, at the stations most convenient for safe-keeping and reshipment, one of which was Hamilton.

It appears, however, the stoppage in the transfer of freight from one road to the other, was not complete. From the 2d of February, when the wool was stored at Hamilton, to the 5th of April, taking that day as the average date of shipment from that point, the New York Central received from the appellant an average of thirty-one loaded cars per diem, amounting in the aggregate to nineteen hundred and twenty-two cars. At the time the wool was delivered to defendant, the accumulation upon its line already amounted to about twelve hundred cars. It thus appears that, during the period when this wool lay in store, the defendant actually transferred to the New York Central an amount of freight equal to about seven hundred cars more than the entire accumulation, at the time the defendant received the wool. A great amount of

freight was received by the defendant at Detroit, carried to Suspension Bridge and there delivered to the New York Central, while the appellees' wool was in store at Hamilton.

Upon this state of facts, the jury rightly found a verdict for the appellees.

If there were no other question in the case, we should be much inclined to hold this railway company had committed a wrong to the appellees by receiving their wool for shipment without explaining to them that there was a vast amount of freight in store upon its lines, and entitled to precedence in being forwarded. By the mere act of accepting the freight without explanation, the company undertook to transport and deliver it within a reasonable time, and, although the defendant was in nowise responsible for the condition of the New York Central, yet, as a consequence of that condition, its own lines were already blocked with twelve hundred car loads of freight entitled to immediate delivery, and which could not, under the most favorable circumstances, be delivered for many days. The company knew that its lines were in such condition as to incapacitate it for performing its full duty as a common carrier by delivering goods not only in safety, but in a reasonable time. In order to save itself from liability, it should have disclosed to shippers the condition of its road. These appellees, if thus informed, might have sought another line of transportation, or have chosen to sell their wool for what it would bring in Detroit. They could then have exercised their own judgment. As it was, the company, by receiving this freight without explanation, placed it for a very unusual period beyond the control of appellees, although its immediate sale may have been of vital importance, and did this without their consent.

But, independently of this question, the verdict of the jury was correct, because, after this wool was in store at Hamilton, the defendant continued to receive freight at Detroit, large amounts of which were carried to Suspension Bridge and there delivered to the New York Central without delay. It

is urged by counsel for appellant, that the freight to which precedence was thus given consisted either of dutiable goods, or was of perishable character, or live stock. By dutiable goods are meant such goods coming to this country from Canada as were liable to the payment of a duty. Such goods leaving Detroit in locked cars, could, if the cars remained unopened, re-cross the boundary at Suspension Bridge without the payment of a duty.

As to perishable freight, or live stock, it is very true, if shipped at the same time with other freight, the company might properly give it precedence if necessary to its preservation. As to dutiable goods, we see no reason why they should, in any case, be entitled to precedence over other goods of the same character.

But the question here is, not between the wool of appellees and perishable freight shipped at the same time, but between that and perishable freight shipped subsequently, and at a time when the defendant knew that, by accepting such shipment, it was, to that extent, delaying the forwarding of appellees' property. The defendant had no right to consign appellees' wool to a warehouse at Hamilton for two months, and during that period deliver to the New York Central large amounts of freight received subsequently to the shipment by appellees. This was, in substance, the instruction given by the court below to the jury, upon which they doubtless found their verdict, and the instruction was clearly right. The company had no right to receive fresh shipments which would prevent the performance of its duties in regard to shipments already made. Its duty was to deliver these in their order, and it should have said to persons seeking to ship live stock or perishable goods, that the road, without the fault of the defendant, had become so blocked with freight that no further goods could be received until the accumulation had been removed.

It is urged by appellant, that when the contents of the warehouse at Hamilton were sent forward, the wool in question

was forwarded in advance of other freight in the warehouse received at an earlier date and entitled to precedence. That may be true, but the fact remains, that if the company had declined to receive any new through freight from west to east after the appellees' wool was shipped, until the blockade of its lines was removed, the latter would have reached its destination some weeks earlier than it did, and that is the solid ground on which this verdict rests. A common carrier has certainly no right to place a part of his freight in store, and there leave it, while he continues to receive and transport new freight. This company was sacrificing the rights of the appellees in order to keep up, to a considerable extent, the through business of the road. It may have been so situated that it could not well decline to do this, but it must make compensation to injured parties.

The instruction given by the court on its own motion stated the law to the jury with substantial correctness, and the verdict upon the evidence was just.

*Judgment affirmed.*

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## GEORGE S. PALMER

*v.*

## JOHN A. MARSHALL.

1. PROMISSORY NOTE—*usury.* To a plea that the note sued on grew out of an usurious contract, a replication was filed that the note was executed in the State of California, and that, by the laws of that State, parties might contract for any rate of interest as they might agree—the statute of that State, being read in evidence, so providing: *Held*, that the statute sustained the replication.

2. STATUTE OF LIMITATIONS—*averments—proof.* Where the statute of another State is relied upon as a defense, it must be pleaded and set out at least in substance, and it must be proved on the trial. If not pleaded it is error to permit it to be proved.

3. PLEA—*limitations.* A plea that the cause of action did not accrue within five years, and the laws of no State are recited, it will be referred to the laws of this State, and when the suit is on a promissory note, such a plea presents an immaterial issue, and should be disregarded. It is error to admit the statutes of limitation of another State under such a plea.

4. ASSIGNMENT *in blank.* An instruction, where the suit is by an assignee of a note, announcing that a note is indorsed in blank when the name of the indorser is simply written on the back of the note, leaving a space over the signature to insert the name of the indorsee or subsequent holder, and that whilst the indorsement remains blank, the note may be passed by mere delivery, and the indorsee or other holder has authority to demand payment, or to make it payable to himself or to another person, is proper, and should be given. It is error to refuse it.

5. It is not error, in such a case, to instruct the jury that if the note was placed in the hands of an agent for collection indorsed in blank, and it was purchased of the agent in good faith, the holder can recover, unless the note was past due when purchased, and had been paid. In such a case, if purchased after maturity in good faith, and it had not been paid, it could be enforced. Or if purchased under the supposed circumstances, before it was due, its payment could be enforced, although it had been paid.

6. FOREIGN STATUTE. Where the statute of another State is not pleaded, it is error to base an instruction on such a statute.

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

Messrs. HANNAMAN & KRETZINGER, for the appellant.

Messrs. WILLIAMS, CLARK & CALKINS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellant, in the Knox circuit court, against appellee, on a promissory note given in the State of California, by the latter to the former, on the 17th of March, 1860, for $356, with interest at the rate of four per cent per month, and due in three months from date, payable to H. J. Fleming, and indorsed by him to appellant.

The declaration contained a special and the usual common counts. The defendant filed the general issue and four special pleas. The first of these was a plea of usury, and avers that,

being in want of money, he applied to the payee for a loan of $356, which he loaned to him, and took the note, payable at Visalia, in the State of California, which is alleged to be contrary to the statute. The second is a plea of payment to Fleming, before the indorsement, and that the note was indorsed after maturity. The third is a plea of the statute of limitations, that the cause of action did not accrue within six years before the commencement of the suit; and the fourth is a plea of the statute, that the cause of action did not accrue within five years.

Plaintiff filed a demurrer to the second, third and fourth pleas, which was confessed to the second and fourth, and overruled as to the third. Leave was given to amend the second and fourth, which was done. A replication was filed to each of the four special pleas, traversing them, and issue was joined thereon, and a trial was had by the court and a jury, and a verdict rendered in favor of defendant. A motion for a new trial having been overruled, judgment was rendered on the verdict, and the cause is brought to this court on appeal.

On the trial, plaintiff introduced the statute of California, by which it appears that parties in that State are authorized to contract in writing for the payment of any rate of interest on money due or to become due. This statute therefore fully sustained the replication which set up that statute as an answer to the plea of usury.

The court permitted appellee to read the statute of limitations of the State of California, against the objection of appellant. It will be observed that neither of the pleas of limitation pleads the statute of California. Unless the statute had been pleaded, it was error to permit it to be read in evidence.

In the case of *Smith* v. *Whitaker*, 23 Ill. 367, it was said that the provisions of the laws of a foreign country are facts that must be pleaded and proved as other facts.

In the case of *Walker* v. *Maxwell*, 1 Mass. 103, the court say that, when a defendant relies upon the statute of another State, he must, in his plea, set it out, that the court may see

whether proceedings were warranted under it, and that the general averment that proceedings were pursuant to such a statute, is not sufficient. It may be a literal recital is not necessary, but it must be pleaded. And the same rule is announced in *Cobbett* v. *Keith*, 2 East, 260. And the rule is so stated in 1 Chitty's Pleading, 247. This statute was therefore inadmissible, because it was not pleaded.

These pleas seem to apply to and rely upon our statute of limitations, as the law of no other State is referred to or relied on as a defense. The suit having been brought on a promissory note, it would, under our statute, not be barred until sixteen years had elapsed after the action had accrued, and hence the issue formed on these pleas was immaterial, and should have been disregarded on the trial. Under them no question of a bar to the action by the laws of California could arise, as that statute was not pleaded.

Appellant complains of the court below in refusing his second instruction. It is this:

"The jury are instructed that, where a note has been indorsed in blank, the holder of the same may fill the blank with the name of the indorsee; that the indorsement of the note is said to be in blank when the name of the indorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the indorsee, or of any subsequent holder; and in such a case, while the indorsement continues blank, the note may be passed by mere delivery, and the indorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable at his pleasure to himself or to another person."

We are unable to see any objection to this instruction. It embodies a correct legal proposition applicable to the issues in this case. The principles announced in it are acted upon in the daily commercial intercourse of the world, and, so far as our knowledge extends, have never been challenged. This instruction should have been given.

At the instance of appellee, the court below gave this instruction:

"Unless the jury, from the evidence, believe that the defendant, John A. Marshall, left the State of California, and permanently ceased to reside there within five years after the note given in evidence became due and payable, the plaintiff can not recover in this action, and the jury will find a verdict for defendant.

Unless, from the evidence, the jury believe that George S. Palmer, when he brought this suit, was the honest owner of the note sued on; and further believe, from the evidence, that the same is now justly due and unpaid, from Marshall to George S. Palmer, the jury will find verdict for defendant."

The California statute not having been pleaded, it was error to admit it in evidence, and equally so to give this instruction. We can not, therefore, pass upon its correctness or incorrectness, as it has no application to the case as presented by the issues which were tried below.

Appellant also insists that the court erred in giving this instruction:

"If the jury believe, from the evidence, that the note in question was put in the hands of Johnson & Co. for collection, by Fleming, indorsed in blank, and that D. M. Walser bought said note in good faith, and it was transferred to him in blank, and he sold and transferred it in good faith, then the plaintiff can recover, unless the note was past due when Walser bought it, and it had been paid."

We see no objection to this instruction. There can be no objection that appellant could recover if the supposed facts appeared from the evidence. If the note was past due and was paid, when Walser purchased it, there can be no pretense, according to commercial usage and law, that Walser, or his assignee, could recover, as he, in such a case, would take it subject to all equities. On the other hand, if it was not due

when purchased, he could recover; or if it was due and unpaid, he could enforce it according to its terms, and any person to whom it might subsequently pass would succeed to his rights in precisely the same state he acquired them.

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

*Judgment reversed.*

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ERASTUS OLIN

*v.*

JEREMIAH GIFFORD.

NEW TRIAL—*verdict against the evidence.* In this case, the evidence is regarded as sufficient to sustain the verdict of the jury.

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

Messrs. PEPPER & WILSON, for the appellant.

Messrs. MCCOY & CLOKEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the circuit court of Mercer county, from a judgment rendered in an action on the case for malicious prosecution and false imprisonment.

The only error assigned is, that the finding is not sustained by the evidence, and a new trial should have been awarded. It appears appellant had instituted a prosecution against appellee for perjury, which, on a full hearing, had been dismissed and appellee discharged.

It is insisted by appellant, that there was probable cause for instituting the prosecution. On this fact the controversy turned.

There was much testimony on both sides fairly submitted to the jury. It seems there was a question whether or not McDowell, who borrowed the jack-screws of appellee, did so as the agent of appellant. It is useless to examine all the evidence upon this point; it is sufficient to say that the weight of the evidence is, that appellee did not so testify at either trial before the magistrate.

We have examined the evidence carefully, and can not find anything in it to justify a prosecution for perjury against appellee. It is not proved appellee testified as appellant, in his affidavit for the warrant, swore he did.

All the facts and circumstances have been carefully scanned by the jury, and we coincide with them in the opinion that there was no probable cause for the criminal prosecution. It is a very serious matter to cause a citizen to be arrested on a charge so infamous as that of perjury, and he who does so should be careful to see that he is able, when called upon, to show probable cause for the arrest. This, appellant has failed to do, and the judgment must stand.

*Judgment affirmed.*

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## Chicago, Burlington & Quincy Railroad Co.

*v.*

## William Seirer.

1. Negligence—*repairing fence.* Where a person's cattle break through the fence on the side of a railroad track, and the owner of the cattle repairs it with defective materials, in a temporary manner, but it is apparently sufficient, and his cattle again break through the same place, and are killed, and it appears that he knew that the fence thus repaired was defective, and he failed to notify the employees of the company: *Held*, that he was guilty of negligence. The owner of adjoining lands has no right to remain inactive and let his cattle get upon the railroad track through the known deficiency of the fences along the road. When he undertook to

repair the fence, and did it negligently, and failed to notify the company, he became liable for the natural consequences of his negligence.

2. It was not error for the court to amend an instruction so as to inform the jury, in such a case, that the company should have had notice that the fence apparently good was defective, before they would be liable for the injury to the stock. But the failure on the part of the owner to use reasonable efforts to notify the company of such defects, in any case where the defects are known to the proper agents of the company, would not justify the company in failing to repair.

3. In such a case, it was error for the court, without limitation or qualification, to instruct the jury that, if the fence was defective, the company were liable. It should not, under the facts in the case, have laid down the rule of absolute liability.

Appeal from the Circuit Court of Warren county; the Hon. Arthur A. Smith, Judge, presiding.

Messrs. Kidder, Norcross & Glenn, and Mr. B. C. Cook, for the appellant.

Mr. James W. Davidson, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

This was an action under the statute, brought by appellee against appellant, in justice's court, to recover the value of a cow and steer of appellee, which had been killed upon appellant's track running through or adjoining appellee's farm.

Appellee having obtained judgment in that court, appellant took an appeal to the circuit court of Warren county, wherein the cause was tried before a jury, who returned a verdict in favor of appellee, assessing his damages at $85. Appellant moved for a new trial, which was overruled by the court, and judgment given upon the verdict. All the evidence, instructions and exceptions were preserved by a bill of exceptions, and the case brought here by appeal.

It appears, by appellee's own evidence, that, about a year prior to the killing of the cattle, they broke down the fence and got upon the railroad track, and he undertook to repair

the fence where so broken; that he put on a board of his own and nailed it; that at the time the cow and steer got on the track and got killed, they broke through the same place, and he says that the fence at the place where they got through this last time was insufficient to turn stock; that he saw the place where they got through, the day before. There were four boards on the fence where the cattle broke through; one of these boards he put on himself; it was not a good board, but it looked well enough. There was (meaning at the time of the first breach) one broken board, but it was repaired by him by putting another in its place, and by nailing one perpendicularly on the four boards, and this was on the side next his pasture; that this was done temporarily; he just tacked them on; that he never notified the defendant, or any of its agents, that the fence was out of order. He told one of the section hands, whose name he did not know, that the fence had been broken down, and that he had fixed it up, but should not fix it again. This was the only evidence as to the insufficiency of the fence.

Appellant introduced evidence tending to show that the company kept a section agent, whose business it was to look after the fences; that this locality was in his section; that he was along there, in the performance of his duty, the morning before the cattle were killed; that the fence was good and sufficient, to all appearances; that it was made of cedar posts 10 inches in diameter, with four boards; that the boards were battened at every post, put on with 16-penny nails, and about eight nails to each batten, and that the fence was five or five and a half feet high, being four boards.

The case made by appellee's own evidence is simply this: Sometime before the injury happened his own cattle had broken down a portion of the fence between the railroad track and his pasture. Without notifying appellant, or any of its agents, he undertakes to repair it, and, in doing so, seems to have knowingly made and left it insufficient. He testified that the board he put in was a bad one, though it looked well enough; that he only tacked up the boards temporarily, and

it was insufficient at this place to turn stock. With this knowledge, he permitted his stock to run where they were continually exposed to the danger of getting upon the track by means of this defective portion of the fence.

In *Poler* v. *New York Central Railroad*, 16 N. Y. R. 476, Mr. Justice SELDEN said: "There is no doubt that, although the statute imposes upon the railroad company the absolute duty of maintaining fences, yet a duty in this respect also devolves upon the proprietors along the road. They have no right quietly to fold their arms and voluntarily permit their cattle to stray upon the railroad track through the known insufficiency of fences which the corporation are bound to maintain."

The law, certainly, will not permit a man to set a snare for his own cattle, voluntarily expose them to it, and then to recover of somebody else for the injury thus received.

If the fence were originally a suitable one, and there is no evidence that it was not, it was the duty of appellee to notify, or make reasonable efforts to notify, the company of the defect occasioned by his cattle breaking down a portion of it, unless he was prepared to show that the defect was known to some agent of the company whose duty it was to communicate information of the fact to the officers having charge of such matters. But if he volunteered to repair it, without attempting to give such notice, we are unable to see why the same considerations of public policy which dictated the passage of the act requiring railroad companies to erect and maintain sufficent fences along their tracks, would not devolve the duty upon him to use reasonable care and skill, to make it sufficient; and if he fail in that duty, why the law would not hold him liable for all the ordinary natural consequences. If a man volunteer to repair a bridge which others, and not he, are bound to repair, and in doing so, knowingly puts in rotten, unsafe and insecure planks, and another's team fall through and get injured in consequence, would it be contended that

such volunteer was not liable? Did he not create the nuisance? But what would be said if his own team should get injured by falling through the same planks, and he seek to recover of those bound to repair?

It is apparent, from the undisputed testimony, that appellee was guilty of a considerable degree of negligence, if he did not actually cause the injury.

The counsel for appellant urge that the court erred in amending the following instructions:

6th. That, if the jury believe, from the evidence, that the plaintiff in this case was interested in having a good fence maintained along the railroad track, when the cattle got upon the track, and knew that the fence was insufficient where he had repaired it—amended by the court, ("and it appeared to be sufficient without examination")—and failed to notify the railroad company of such defect, or some one in its employ, then the plaintiff cannot recover in this action. Amended by the court, ("unless the railroad company was guilty of neglect on their part.")

8th. That, if the jury believe, from the evidence, that the plaintiff fixed the fence at the place where the cattle broke through it, and fixed it in such a manner as to cause it to appear to the defendant to be a sufficient fence, although in truth and in fact it was not a sufficient fence, then the jury must find for the defendant. Amended by the court, ("unless he notifies defendant of the insufficiency of the fence.")

The 6th instruction, whether taken as asked or after the first amendment made by the court, did not correctly embody the proposition of law intended, because it wholly omits the hypothesis of the defect not having been known by the proper agent of the railroad company from other sources.

The failure of the owner or occupant of adjoining land to use reasonable efforts to notify the company of defects, will not defeat the recovery in any case where such defects are

known to the proper agent. Shearman & Red. on Neg. p. 546, sec. 470.

The 8th instruction was not correct as asked. It should have contained the hypothesis that the defect was unknown to the appellant or its agents. It might have been constructed in such a manner as to cause it to appear to the defendant to be a sufficient fence, when it was not, and still the defect be known to defendant. The proposition intended seems to be, that the plaintiff so fixed the fence as to deceive the defendant by having it supposed that the fence was sufficient when it was not, and defendant being so deceived, was thus prevented from making the repairs. It is too obscure, and we should be unwilling to reverse for refusing it altogether.

But the court gave to the jury, on behalf of appellee, the following:

1st. That it is the duty of the railroad company, within six months after building their road, to erect and maintain good and sufficient fences along the side of their road to prevent cattle, etc., from straying thereon. If the jury believe, then, from the evidence, that the C., B. & Q. road has been running for more than six months; and if the jury further believe, from the evidence, that said company failed to keep and maintain such sufficient fence, by reason of which failure the cattle of the plaintiff strayed on said road and were killed, they will find for plaintiff and assess his damages at such sum as they think the plaintiff entitled to receive, not exceeding $100.

This instruction declares the absolute liability of appellant, without reference to the breach of any correlative duty on the part of appellee. It was too broad, and, under the evidence in this case, should not have been given.

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

*Judgment reversed.*

Syllabus. Statement of the case.

## HENRY M. SHEPHARD

*v.*

## JOSHUA RHODES *et al.*

1. LIMITATIONS. A claim against an estate not presented within two years of the grant of letters testamentary or of administration, is barred by the statute, except it may share in any estate discovered after the expiration of the two years.

2. WILL—*letters of administration—letters testamentary.* Where a person died in the State of Pennsylvania, leaving a will, and having property and creditors in this State, letters of administration were granted in this State without it being known that there was a will, but on its discovery it was probated and recorded, and the letters of administration were revoked, and letters with the will annexed were granted to another person: *Held*, that the grant of the first letters was not void, but voidable, and the acts performed by the first administrator are binding in a collateral proceeding.

3. ADMINISTRATION—*revocation.* Under our Statute of Wills, upon the revocation of letters of administration on the discovery and probate of a will, the various acts done and performed under the first grant of letters are binding until set aside in a direct proceeding. The court having jurisdiction of the person and the subject matter, its act is not void in granting letters, although it may have proceeded erroneously.

4. CLAIM AGAINST THE ESTATE—*when to be presented for allowance.* In such a case as this, claims, to share equally in the distribution of assets, should be presented for allowance within two years from the grant of the first letters of administration. The limitation of two years begins to run from that time, and it is error to allow a claim to be paid out of assets inventoried within two years from the first grant of letters. A claim exhibited after that time should, if established, be allowed and paid out of assets discovered after the expiration of two years from the grant of the first letters.

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

Charles W. Rickitson, a citizen of Pennsylvania, died in Pittsburgh, in that State, on the 27th day of September, 1866, leaving a will, which was probated in the proper court in that State on the 15th day of October, 1866. The executors named

in the will renounced, and letters of administration, with the will annexed, were granted to William Phillips. Deceased left assets in Cook county, in this State. On the 5th day of August, 1867, Benjamin F. Quimby, a creditor of Rickitson, residing in Cook county, applied to the probate court of that county and obtained letters of administration on the estate.

On the 6th day of May, 1868, Quimby, having learned that Rickitson died testate, filed his petition in the probate court, stating the fact, and asking that his letters be revoked, and letters with the will annexed be granted, which was done, and letters with the will annexed were issued to Henry M. Shephard. They bear date May 8th, 1868.

On the 20th of July, 1869, Quimby recovered a decree in the United States Circuit Court, in the Northern District of Illinois, against Shephard as administrator of the estate of Rickitson, for $30,048.81, which was subsequently allowed against the estate in the probate court of Cook county.

On the 14th day of December, 1869, Phillips, the Pennsylvania administrator, filed a claim for $39,580.38, as due to Rhodes & Rhodes & Co., and which Phillips had purchased in October, 1869, for $30,000, of the assignee in bankruptcy of that firm.

On the 2d day of February, 1870, this claim of Phillips was allowed by the probate court of Cook county, payable *pro rata* out of other estate of deceased than that inventoried within two years from the grant of letters to Quimby, as might be discovered subsequent to the expiration of the two years. From this order Phillips appealed to the Superior Court of Cook county, where the judgment of the probate court was reversed and the claim was allowed for $30,000, with interest, to be paid in due course of administration, and the judgment was so entered. From that judgment Shephard appeals to this court, and assigns errors.

Messrs. GOUDY & CHANDLER and Mr. MELVILLE W. FULLER, for the appellant.

Mr. J. V. LE MOYNE, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The deceased died testate, in Pennsylvania, where his will was proved and recorded. At the time of his death he had creditors, and owned real estate, in Illinois.

Without any knowledge of the existence of the will, letters of administration were granted to Quimby, in this State, and after the discovery of the will they were revoked, and letters with the will annexed were granted to appellant.

If the letters to Quimby were valid, then the claim of appellees is barred, having been presented after the lapse of two years from the grant of the letters, and it was error to allow it to be paid in the due course of administration.

The only question, therefore, presented by the record, is, were the first letters void, or only voidable?

It is laid down in Toller's Law of Executors, p. 119, that a grant of administration, before probate and refusal, shall be void if the will shall afterwards be proved, although it were suppressed or its existence were unknown. The author declares the administration a nullity in such case, because the interest of the executor is incapable of being divested. This is referred to and relied upon by counsel for appellees, to show the grant to Quimby void.

There is a difference in the facts between the case supposed and the one at bar. In this case the probate had been made, and the executors had refused to accept, before the appointment of Quimby. The grant of administration to him did not, therefore, divest the executors. They had voluntarily deprived themselves of all right and interest, and the reason assigned for the nullity of the administration did not exist.

Reference was also made to 1 Williams on Executors, 367, where it is said, "If administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from the commencement, all acts performed by the administrator in that character shall be equally void."

The same author says, on page 370, that, whether the administration be void or voidable, a *bona fide* payment to the administrator of a debt due to the estate will be a legal discharge of the debtor. See, also, Toller, 129. It was also held, in *Allen* v. *Dundas*, 3 T. 125, that the payment of money to an executor who had obtained probate of a forged will, was a good discharge.

If all the mesne acts of an administrator, between the grant of letters and the revocation, are void, then there is a manifest inconsistency in the reasoning in the books to which reference has been made. From a careful reading of the text of Toller and Williams, both writers make a marked distinction between revocation on appeal and on citation. An appeal suspends the grant, and upon reversal it is as if it had never been; and hence, upon appeal and reversal, the intermediate acts of the administrator are invalid. The object of the citation is different; it is to countermand or revoke the former letters.

In this case, the revocation partook somewhat of the character of a citation. The first administrator had been appointed for ten months, and upon discovery of the will presented his petition for letters with the will annexed. The court then revoked the administration and appointed appellant.

The principles of law adverted to, as laid down in the books, can not be strictly applicable to this case. The executors had renounced before the grant of administration, and the test that the grant must be in derogation of the right of an executor did not exist.

Even if it were the rule of the common law that letters of administration were void where a will was in existence, we do not think, in view of our statute, that the rule obtains in this State.

The chapter of the statute entitled "Wills," provides, in the condition of the bond required to be given by each administrator, that if a will should afterwards appear and be proved

in court, and letters testamentary be granted thereon, the administrator shall deliver up the letters of administration. It is enacted by section 71, as follows: "If, at any time after letters of administration have been granted, a will of the deceased shall be produced and probate thereof granted according to law, such letters of administration shall be revoked and repealed, and letters testamentary, or of administration, with the will annexed, shall be granted in the same manner as if the former letters had not been obtained." Section 72 provides for the repeal and revocation of letters granted upon a will, where the latter has been annulled by due course of law. Subsequent sections confer the power to revoke and repeal letters for numerous causes.

It would, therefore, seem that the legislature had provided for the case at bar. The power to repeal, implies the power to make, a law. The revocation of an order or decree must be the act of an authority which has the power to publish it. The power to revoke and repeal letters of administration upon the production and probate of the will, necessarily presupposes the power to grant the administration.

Chancellor KENT, (2 Vol. Com. 413), says: "It is the received doctrine, that all sales made in good faith, and all lawful acts done, either by administrators before notice of a will, or by executors or administrators who may be removed or superseded, or become incapable, shall remain valid, and not be impeached on any will appearing, or by any subsequent revocation."

In *Wight* v. *Wallbaum*, 39 Ill. 554, this court held, that any mistake in the grant of letters of administration did not make them void; that, whether a will was properly proved or not, could not affect the validity of the letters or a sale of property made by the administrator; and that, where jurisdiction existed of the subject matter and of the parties, the judgment must be conclusive, except in a direct proceeding for its reversal.

This is not a direct proceeding for the reversal of the grant. The question as to the validity of the first letters arises collaterally. In this case, it is as necessary to hold the grant voidable only, for the protection of creditors, and to make the bar of the statute effectual, as if third parties had acquired rights from a sale of property, or other acts of the administrator. If the first grant was void, the creditor who presented his claim within two years will receive no reward for his vigilance, for the assets must be shared with creditors who have been less diligent.

The county court had cognizance of the subject matter; the proper application was made, and the judgment of the court was properly exercised. The grant of administration was, then, made by a court of competent jurisdiction.

The judgment was for a legal purpose, to reach the property of the deceased for the satisfaction of his debts, and, under the facts, was not in derogation of the rights of the executors.

The claim of appellees should have been allowed to be paid out of any estate to be discovered subsequent to the bar of the statute, which commenced to run from the date of the first grant of letters.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

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## John A. McLennan

*v.*

## William V. Johnston.

1. Mistake—*misdescription of lands conveyed.* When lands, verbally agreed to be sold, are found misdescribed, or other lands are described instead, a court of chancery will order a proper conveyance.

2. Parol evidence is competent to fix the intention of parties.

3. Statute of frauds. The fact that the intention of parties is shown by parol evidence of the original agreement, does not bring the case within the statute of frauds, when the proceeding seeks, not the specific performance of an executory contract, but the correction of a mistake in an executed contract.

4. And parol evidence may be received to show a mistake in a written instrument, whether required by the statute of frauds to be in writing or not.

5. Non-joinder—*parties.* A grantee who, having title by a wrong description, sells a portion of his purchase, following the erroneous description, must, in seeking relief against his own grantor, make his own grantee a party defendant. Omission to do so is fatal.

6. Re-conveyance. He should also tender a reconveyance, and the court, in decreeing the correction of the original error by a new deed, should require him to return the title he erroneously received.

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

Mr. James S. Murray, for the appellant.

Messrs. Brainard & Calkins, for the appellee.

Mr. Justice Sheldon delivered the opinion of the Court:

In March, 1870, the appellant, McLennan, was the owner of two sub-lots, one described as the south 50 feet of lot 18, and the other as the south 50 feet of the north 100 feet of lot 23—both situated in the same block, the former fronting *east*, and the latter *west*.

Both pieces had been previously purchased from the appellee, Johnston, and McLennan finding himself unable to meet the payment of an unpaid portion of the purchase money about to fall due, an arrangement was made between the parties, whereby Johnston bought back one of the lots at a fixed price. Some weeks after this arrangement was made, it was perfected (as was supposed at the time) by the execution of a deed from McLennan to Johnston, and receipt of the consideration.

Subsequently, Johnston, as he claims, discovered a mistake in the description of the lot in the deed, it being described as

the south 50 feet of the south 100 feet of lot 23, when it should have been described the south 50 feet of lot 18, and to correct this alleged mistake, this bill was filed by Johnston on the 13th day of September, 1870.

McLennan, in his answer, alleges that, since the execution of the deed, the complainant had altered the description in it from the south 50 feet of the *north* 50 feet of lot 23, to the south 50 feet of the *south* 100 feet of lot 23, and that by reason of such fraudulent alteration, complainant ought not to receive any relief from a court of equity.

Undue pains, as seems to us, have been expended to fix upon the complainant a fraud in this respect. There is no doubt that a change was made in the word indicated, after the deed was written, by an alteration of the letter "N" to "S."

The deed, after having been drawn up, was sent to McLennan to execute, who testifies that he examined the deed in the presence of two room mates of his, and the alteration had not then been made, and his two room mates testify to the same, saying they read the deed. The deed was written by one Munson, at the request of Johnston, as the latter testifies, and that after being drawn, Munson handed it to him, and upon looking at it, as his eye fell upon the word "North," he instantly discovered a mistake, as there was no word north in the description of the lot he had bought, it being the south 50 feet of lot 18, and named it to Munson, who immediately altered the letter "N" to "S." Munson testifies to the same fact, that he himself made the alteration at the time, before the deed went out of his possession. McLennan did not own the south 50 feet of the *south* 100 feet of lot 23, but did own the south 50 feet of the *north* 100 feet.

No motive has been suggested, and we can conceive none, which should have induced Johnston to fraudulently change the description from a piece of ground that McLennan did own, to one that he did not own. We feel satisfied, from the evidence, that this alteration was made with innocent intent, before the execution of the deed.

As to the alleged mistake, the parties directly oppose each other in their testimony, Johnston testifying that the subject of the purchase and sale was the east front, the south 50 feet of lot 18; and McLennan, that it was the west front, the south 50 feet of the north 100 feet of lot 23. The deed appears to have been prepared on the part of Johnston, and sent to McLennan for execution, and executed by the latter out of the presence of Johnston.

Munson testifies that he was temporarily occupying an office with Johnston; that the latter requested him to make out the deed, handing him an abstract for the purpose; that he made one out for the south 50 feet of lot 18, as he believes; that Johnston called his attention to an error he had made in the amount of an incumbrance he was to assume, being double the true amount; that witness then destroyed that deed; that subsequently, on another day, Johnston renewed his former request to draw the deed, and witness took the abstract and made out the deed in question, Johnston being out of the office, as he recollects, at the time the deed was drawn; that Johnston came in somewhat in haste; remarked that witness had made another mistake; that it was the "south," instead of the "north;" that witness took the deed and made the alteration in that respect, in the manner which has before been adverted to; that Johnston then took the deed and put it in his pocket, without reading it, as witness thinks.

The abstract, which appears in evidence, contains a description of both pieces of land, with the names of the same parties; the east front lot, the south 50 feet of lot 18, being at the bottom of the first page of the abstract, and the west front lot, the south 50 feet of the north 100 feet of lot 23, at a corresponding place on the second page; and Munson explains that the way the mistake occurred, was in copying the description on the second page of the abstract, instead of the one on the first page; that he was not particularly acquainted with the property. He states that Johnston had made a pencil mark on the abstract

against the south 50 feet of lot 18, as the lot to be included in the deed. That pencil mark so appears upon the abstract.

Johnston gives substantially the same testimony as Munson upon the same points.

It appears in evidence that Deverell, the trustee in the original trust deed from McLennan to Johnston, was present at the time of the delivery of the deed from the former to the latter, and released the deed of trust, at which time McLennan offered to sell him his remaining lot for $1000. McLennan says that this was the east front, the south 50 feet of lot 18. Now he admits that was higher ground and more valuable than the west front which he claims he sold to Johnston; and Johnston testifies that in his sale to McLennan, but a short time before, a difference of $5 a foot was made in the price of the lots, the east front being sold at $30 per foot, and the west at $25; and that, in buying back the east front, he paid the same amount as the difference in value between the two fronts, and $100 in addition, and there is no contrary testimony as to this comparative difference in value.

Now, it is not in exact harmony, that McLennan should sell the west front lot, the inferior one, to Johnston for $1300, the price he admits he got for it, and, at the same time, offer to sell the more valuable one to Deverell for $1000. We may fairly take $250 as the difference in value, from the evidence, and if the latter lot was worth but $1000, Johnston, as the fair value of the other, should have paid only $750 instead of $1300. This indicates that it was the west front lot, the inferior one, which McLennan then offered to sell to Deverell, as the latter clearly so understood.

Turner, a clerk in the office of Johnston, testifies to a conversation between the parties, about the middle of May, as he thinks, when a check was given by Johnston to McLennan, and that he heard them talking about $5 more for the east front than for the west front; and to another one, in the latter part of June or July, when Johnston told McLennan there

was a mistake in the deed; that he had deeded him the wrong front. And McLennan replied there was no mistake; that he intended to deed him the east front, and he had done so.

Upon a review of all the testimony, we are satisfied with the correctness of the finding of the court below, of the existence of the mistake as alleged, and with the decree for its correction.

The statute of frauds was set up, and is relied on, in defense.

It is true, the bill alleges that the defendant entered into a verbal agreement with the complainant for the sale and conveyance of the lot in question, and prays the defendant may be ordered to specifically perform the agreement. It also sets forth that the defendant, affecting to comply with the agreement, pretended to convey the lot, but that, through ignorance or mistake, or fraudulently and wrongfully, he conveyed a different one.

The bill is not properly one to enforce the specific performance of an executory contract, but to correct a mistake in an executed one, and parol evidence may be received to show a mistake in a written instrument, whether it is one given in the case of a contract required by the statute of frauds to be in writing or not. The statute does not apply to such a case. Adam Eq. 85, 169, and cases collected in notes; also cases cited in note to *Woolburn* v. *Hearn*, 2 Lead. Cas. Eq. 570.

It appears, however, that, on reception of the deed from McLennan, Johnston directed a deed to be made out to one Miss Quincy, of the south 30 feet of the lot described in the deed, which was done, and the deed executed by Johnston. We think Miss Quincy should have been made a party, in order that she might be bound by the decree, so that McLennan might not hereafter be exposed to a liability to her, on the covenants contained in his deed to Johnston. It would have been proper, too, to have required Johnston to release to McLennan all claim to the lot embraced in that deed.

For want of a necessary party, the decree is reversed and the cause remanded, with leave to amend the bill by adding parties, and for further proceedings in conformity with this opinion.

*Decree reversed.*

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## TIMOTHY WRIGHT

*v.*

## THE CITY OF CHICAGO.

SPECIAL ASSESSMENTS—*in the city of Chicago—by whom the character of the improvement to be determined.* An ordinance of the city of Chicago directed a certain street to be curbed with curb walls "where the same are not now already built, and where the same are not now in a good and sound condition," the work to be done under the superintendence of the board of public works: *Held*, the ordinance vested the board of public works with a discretion required to be exercised by the common council alone, and was void.

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

This was a proceeding in the court below for a judgment upon a special assessment warrant, which resulted in a judgment against the property upon which the assessment was made, from which the owner appealed.

Mr. DANIEL L. SHOREY, for the appellant.

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Per CURIAM: The ordinance under which the assessment in question was levied, orders that West Randolph street, from the west line of Halstead street to the east curb line of Carpenter street, be curbed with curb walls *where the same are not now already built*, and *where the same are not now in a good*

*and sound condition;* and that said street, from the west line of Carpenter street to the western terminus of said Randolph street, at Union Park, be curbed with curb stones where the same are not already set, and where the same are not now in a good and sound condition; and that said West Randolph street, from the west line of Halstead street to the west terminus of Randolph street, at Union Park, be filled, etc., and paved with wooden blocks, excepting a space sixteen feet wide in the middle of said street, from the west line of Halstead street to the western terminus, etc., now occupied by the tracks of the Chicago West Division Railway Company, the work to be done under the superintendence of the board of public works.

This ordinance vests the board of public works with a discretion, required to be exercised by the common council alone. It falls within the decision of the case of *Foss* v. *City of Chicago,* 56 Ill. 354, and is void.

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

*Judgment reversed.*

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## ELIZABETH PALMER

*v.*

## JAMES A. CONVERSE.

1. DEED—*reforming of.* A deed will not be reformed by the decree of a court so as to make it express something entirely different from what is written upon its face, except upon evidence of the clearest and most satisfactory character.

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

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

Messrs. HINMAN & MARSTON, for the appellee.

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

This was a bill in chancery, brought by Elizabeth Palmer, to reform a deed made to her by the defendant, Converse, conveying a certain lot in the town of Cambridge. The deed describes the lot conveyed as having a depth of eighty feet, and the complainant insists the lot should have extended to a certain fence, distant about one hundred and ten feet from the front.

A deed will not be reformed by the decree of a court so as to make it express something entirely different from what is written upon its face, except upon evidence of the clearest and most satisfactory character. After a careful examination of the testimony in this record, we are satisfied it would not justify such a decree as the complainant asks.

The premises in question were part of lot 13, as laid out in the original survey. There were several subdivisions of this lot, owned by different persons. The defendant not only owned the portion of the lot now in controversy, and on which was a building used for mercantile purposes, but he owned a lot in the rear on which was a stable. A fence separated these two lots at a distance of about one hundred and ten feet from the front.

It appears that, for several days previous to the execution of the deed, Samuel Horn, an agent for the complainant, was negotiating with the defendant for the purchase of the front lot. He testifies with entire positiveness that the defendant pointed out to him the fence as the rear boundary of the lot, and that it was the lot thus bounded for which he contracted. The defendant, on the other hand, swears that nothing was said about the size of the lot. It is to be remarked that Horn bases his testimony, as to the depth of the lot, entirely on the

position of the fence. He swears to that as the boundary line, and not to a depth of one hundred and ten feet. The bill alleges, not that the lot bought was, by the terms of the contract, to extend north from the front a distance of one hundred and ten feet by measurement, but that it was to run north to the fence bounding the stable lot. The allegations of the bill and the testimony of Horn correspond.

The complainant, herself, was sworn, and testified that she first saw the defendant on the 13th of January, and that he said the depth of the lot was one hundred and ten feet, and that nothing was said about the lines. She further testifies, in chief, that she made him an offer on that day, and in the evening he called on Horn and accepted the offer.

But, on the cross-examination, she testifies that on the 15th she went to see defendant and have the deed executed. In the interview which then occurred, some modification was made of the proposed terms of the contract in regard to possession, and the complainant, looking out of a window in the store upon the lot, asked if it extended to the fence. The defendant replied that it extended to within fifteen feet of the fence. This was before the execution of the deed.

The complainant's son swears, that when, subsequently to the execution of the deed, the complainant had an interview with the defendant, she claimed she had bought to within fifteen feet of the fence.

However honestly Horn may have sworn that he bought to the fence, this testimony, from the lips of the complainant herself, completely disposes of this suit. This bill is based upon the contract to which Horn swears. It does not allege the line of one hundred and ten feet as the proper boundary, but the fence, and in the prayer it asks that the defendant be decreed to convey to the fence. Yet the complainant testifies that, before the contract was consummated, she was told by the defendant that the lot he was selling only extended to a line fifteen feet from the fence. Upon what ground, in the face of this testimony, we can be expected to reform the deed

and carry the boundary line to the fence, we do not understand.

It is true, the complainant also swears the defendant told her, on the 13th, the lot had a depth of one hundred and ten feet. It is to enforce the contract alleged to have been made with Horn, and calling for the fence as a boundary, that this bill is filed; and, as we have already shown, the complainant's own testimony tells us she did not understand her purchase in that way. As to her statement in regard to the one hundred and ten feet, while it is not the contract set up in the bill, or sworn to by Horn, it rests merely on her own testimony and that of one other witness who chanced to hear the conversation. But it is met by the face of the deed calling for eighty feet, which the magistrate, who took the acknowledgment, swears he read over to the parties in the presence of complainant. Not only that, but he testifies, when he read the description, he remarked he did not know how far the eighty feet would reach, and he heard no objections. The complainant's attention was thus called to the description, and she did not object, as she certainly would have done if she had bargained for one hundred and ten feet. Her testimony on this point is also contradicted by that of defendant. Having on one side the testimony of the complainant and of the witness Shephard, that the defendant said the lot was one hundred and ten feet deep, and on the other the deed itself calling for eighty feet, and accepted by the complainant, and the testimony of the magistrate and of the defendant sustaining the deed as it is written, we can not hesitate in saying that, even if it could be reformed on the evidence of the complainant standing alone, it can not be when contradicted as this evidence is in the present case.

*Decree affirmed.*

## CHARLES C. MŒLLER *et al.*

*v.*

## ALEXANDER MCLAGAN.

SALE *of grain to be delivered at a future time—of keeping the margin good.* A party residing at a distance from the city of Chicago, employed a commission merchant in that city to purchase for him a quantity of wheat, to be delivered at a subsequent day. He agreed to allow the commission merchant one-half of a cent per bushel as compensation for purchasing, and to advance ten cents per bushel as a margin, and to keep it good at that sum. It was also understood that when the grain should be delivered, the commission merchant was to pay for and store the same, holding it to secure his advances, which, with interest and storage, were to be paid when the wheat should be sold. The wheat was purchased, and the margin, as agreed upon, was paid to the commission merchant, and soon after, the price of wheat began to decline, of which the commission merchant advised the party for whom he had purchased, and asked for instructions in regard to the sale of the wheat. Subsequently, the latter was advised that the margin already deposited had been absorbed by the further decline in the market, and was requested to put up more margin, which he failed to do, and thereupon the commission merchant sold the wheat at a considerable loss: *Held*, the margin not being kept good, the commission merchant had the right to sell the grain upon the notice given.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. NISSEN & BARNUM, for the appellants.

Mr. JOHN J. MCKINNON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In June, 1870, appellee employed appellants, as commission merchants, to purchase for him ten thousand bushels of wheat, to be delivered to him at his option at any time during the following month of July. He agreed to allow appellants one-half of a cent per bushel as compensation for purchasing, and to advance ten cents per bushel as a margin and to keep it good at that sum. It was also understood that, when the grain should be delivered, appellants were to pay for and store

the same, holding it to secure their advances, which, with interest and storage, were to be repaid when the wheat should be sold. The wheat was purchased, and appellee paid to appellants, as a margin, $1037.15. At the time of the purchase, appellee was living on the Dixon Air Line Railroad, some fifty-five miles from Chicago, and between Chicago and Cortland, his place of residence, with which there was telegraphic communication.

On the 24th of the same month appellants wrote to appellee, notifying him of a heavy decline that day, and that the market was sensitive. They also ask appellee to give positive instructions in regard to the sale of the wheat, and to state whether he wanted them to sell if the margin became absorbed, or to hold it at his risk. To this letter appellants received no reply. On the 27th they again wrote appellee, informing him of another heavy decline, and that "the bottom seemed to have dropped out of wheat." They also asked him to inform them by return mail whether he wished them to sell the wheat should prices decline to $1.05½, or whether he would send them more margin. On the next morning appellants sent him two telegrams. The first said, "Answer our yesterday's letter by telegraph on receipt of this." The second said, "Answer my dispatch of this morning immediately." Appellee answered, "Please hold that wheat until you get my letter." On the 28th, wheat declined to $1.03½, which more than exhausted appellee's margin, but they did not sell, as they say, hoping the letter would bring the necessary margin.

On the 28th, appellants again wrote: "Your margin was absorbed when prices touched $1.05 to-day. We received your dispatch before the decline to $1.03½, and did not sell your wheat, awaiting your letter of to-day. Our market is badly demoralized, and there is no telling how low prices may go. The bears are using their influence to break down prices, in view of the anticipated large delivery on the first of July, and we shall have to take in your wheat, pay for it and carry it. Awaiting your letter, we remain, etc."

Appellee also, on the 28th of June, wrote appellants as follows: "I do not want that wheat sold yet; I can put up more margin the last of the week; I think wheat will react the first of the month; it is a heavy loss for me at this present time; could it not be sold for the last half of July, so as to save something if we should conclude to sell? If you can get along without telegraphing so much I will be much obliged; it is quite expensive; no rain here yet—crop all gone up, except corn."

On the 29th, appellants wrote as follows: "Your favor of yesterday was duly received and contents noted. We are very sorry that the market has gone against you; nobody expected to see such a decline in so short a time; prices declined this A. M. to $1.00, but reacted and advanced to $1.07, closing this P. M. at four o'clock between $1.04 and $1.05. The sellers of your wheat informed us to-day that they will deliver the wheat on the first day of July; please send us an additional margin of $1000, and we will carry the wheat for you as long as it remains in good condition in our elevator. Should wheat get out of condition, we shall be compelled to sell out to the best advantage. There have been rumors of bad condition for the last six weeks, but they have never been substantiated, and are considered to be gotten up by the 'bear clique' to further their interest. Awaiting your immediate reply, we remain," etc.

Appellee says he received this letter on the 30th, and immediately answered as follows: "Your favor of the 29th is received. I hope you will not give yourself any uneasiness in regard to more margin; it is quite hard to collect money just at present; I may have to send you some good securities. How long do you think it will be before it will be known whether wheat is hot or not? What will it cost per bushel to carry it fifteen or thirty days? Perhaps it may be so that it can be sold for the last half of July and save something."

On the same day appellants also wrote as follows: "With reference to our letter of yesterday, we inform you that we

have sold out your wheat, to-wit: 5000 s. July at 1.04, and 5000, same option, at 1.04½. The condition of the wheat in our elevators is rather doubtful, and we did not feel like paying out good money for doubtful property. One cargo was being loaded at the Central Elevator to-day, and a large portion of the wheat was out of condition. We will not render account sales for this transaction, as we are prepared to assist you in making up your loss without charging another commission. We have refused to carry regular receipts of wheat for several of our customers for less than fifty cents per bushel margin on account of the uncertainty of the condition, and most of them have changed their deals to seller last half of July, paying the enormous difference of eight and nine cents per bushel. Let us know what we can do for you."

Appellee swears that he, at this time, had both the money and security to put up the additional margin, but he does not say that he offered to put it up otherwise than as proposed in his letters. Appellants swear that they purchased on the terms that appellee was to keep his margin good, and they were to carry it after it should be delivered, and charge appellee the usual rates of storage and interest. It was proved that the usage and custom of commission men in the city is, to require ten cents per bushel on grain as a margin, and that in cash. Such is shown to be the rule of the board of trade, and with business men. It appears that appellants would have been required to pay $11,700 had the wheat been delivered on the first day of July. This would have exceeded the margin some $87 as we understand it.

Appellants notified appellee that his margin was absorbed, and on the 27th he was asked whether appellants should sell if prices declined so as to exhaust his margin, or whether he would put up more margin. Here the alternative was presented, either to sell, or put up additional margin if the former deposit should be absorbed. They, on the 28th, notify him that the decline had more than absorbed his margin, and they notified him the seller had chosen to deliver on the first

of July; that wheat was heating in some of the elevators; and still he does not send a deposit to make his margin good, or give any orders to sell. He, it is true, says he does not want the wheat sold, but takes no steps to prevent it. He recognized the right of appellants to call for an additional deposit by saying he could send it the last of the week, and as a reason for not sending it at once, says that it was difficult to make collections.

From all the evidence in the case, we have no hesitancy in saying that appellants had the right to sell if the deposit was not kept good upon the notice they gave.

It might be urged that their statement in the letter of the 28th, that there would be a large delivery on the first of July, and they would have to take in appellee's wheat, pay for it and carry it, implies appellants were under obligation to do so, and appellee may have relied upon that statement. This, we do not think, is a fair construction of the language. They were urging him to deposit more money, according to the agreement, or direct them to sell. As we understand the usage in such cases, if he had kept his margin good they would have been required, on the delivery of the grain, to pay for it and store it as long as the margin should be kept good, and he paid interest and commissions. But they were not bound to do so except upon these conditions. This language, then, had reference to his keeping a sufficient deposit in their hands, and was used to remind him of the necessity of putting up the margin if he desired to carry the wheat. The evidence fails to sustain the verdict, and the court below should have granted a new trial.

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

*Judgment reversed.*

## CITY OF CHICAGO

*v.*

## HARRIET A. FOWLER.

1. OBSTRUCTION OF STREETS—*notice to the municipal authorities.* In an action on the case against the city of Chicago, for negligence in permitting a portion of one of its streets to be obstructed by a rope stretched and attached to stakes set in the street, and failing to place any sign of warning to protect travelers from the danger, by means of which the plaintiff, while traveling the street, was thrown from her carriage and severely injured, where there was no proof of actual notice to the city authorities of the obstruction, but it was proved that the street in question was one of the most fashionable and crowded thoroughfares in the city, the fact that the street was so obstructed for at least two days and nights previous to the accident, was regarded as sufficient, in view of the importance of the street and the throng of carriages and pedestrians that crowded it, to charge the city authorities with notice of the existence of the obstruction, and as affording them time to have provided against accidents by lighting the street or otherwise signaling the danger.

2. NEW TRIAL—*excessive damages.* While, in this case, a verdict for the plaintiff of $4400 was regarded by the court as much greater than they would have allowed, and the injury did not appear to them to be exclusively attributable to the accident, yet the damages were not considered so excessive as to warrant them in disturbing the verdict on that ground.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. I. N. STILES and Mr. JOHN LEWIS, for the appellant.

Mr. E. W. EVANS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case for negligence in permitting a portion of Michigan avenue to be obstructed by a rope stretched and attached to stakes set in the street, and failing to place any sign of warning to protect travelers from the danger, by means of which the plaintiff, while traveling this street, was thrown from her carriage and severely injured.

There was a verdict and judgment for the plaintiff for $4400. To reverse this judgment the defendant appeals.

The duty of an incorporated city to keep its streets and important thoroughfares free from obstructions, and in a safe condition for all persons who may use them, has been often discussed by this court, and we have no desire to add anything to what was said in *Browning* v. *The City of Springfield*, 17 Ill. 143; *City of Bloomington* v. *Bay*, 42 ib. 503; *City of Springfield* v. *Le Claire*, 49 ib. 476; *City of Chicago* v. *Johnson*, 53 ib. 91, and *City of Sterling* v. *Thomas*, *ante*, p. 264, and other cases.

The point in this case is, notice on the part of the city authorities of this obstruction. There was no actual notice proved, but it was proved that the street in question was one of the most fashionable and crowded thoroughfares in the city, and that this guy rope had been there at least two days and nights, a time sufficiently long, when we consider the importance of the street and the throng of carriages and pedestrians who crowd it, for the authorities to have known of its existence, and to have provided means by lighting the spot, or otherwise to signal the danger. This question of notice by lapse of time was fairly left to the jury, and they have found in favor of appellee, and we can not say they erred in so finding.

We perceive no objection to the instructions, nor can we say, though the damages are much greater than we should have allowed, that they are so excessive as to warrant us in setting the verdict aside on that ground. The opinions of medical men as to the true condition of appellee after the accident, and the extent of the injury, were before the jury, and they have felt justified in placing a very high valuation upon an injury which does not appear to us to be exclusively attributable to this accident. Yet we can not say the injury was not quite serious, entitling appellee to the damages awarded.

The judgment must be affirmed.

*Judgment affirmed.*

## MARY HEMINGWAY *et al.*

*v.*

## THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*to open an alley—notice.* In a proceeding to levy a special assessment to open an alley, the notice is sufficiently certain if it states the location of the alley and the land to be taken, in the language of the ordinance, giving the numbers of lots in the block and the portions to be taken for the alley. This is a compliance with the charter.

2. DEDICATION OF WAY FOR ALLEY. Where ground has been set apart as a private alley, or conveyed to adjoining property owners as a private alley, although used by the public as a pass way without hindrance, such acts do not amount to a dedication to the public, as the intent to dedicate is wanting.

3. NOTICE—*certificate of publication.* Where a notice that an assessment has been completed, and that application will be made for confirmation, and the certificate of publication fails to state the last day it was inserted, there is no legal evidence that publication was made, and the collector has no authority to apply for a judgment on the assessment roll.

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

Messrs. KING, SCOTT & PAYSON, for the appellants.

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an application made by the collector of the city of Chicago, at the March term, 1871, of the Superior Court of Cook county, for judgment on a special assessment warrant, in a proceeding for opening an alley 16 feet wide running north and south through block 16, Johnston, Roberts & Storr's addition, condemning therefor the east 4 feet of lot 10, all of lot 11 and the east 16 feet of lot 12, all in said block 16.

Objections to the application were filed by appellants, which were overruled by the court, judgment given for appellee, and the case brought to this court by appeal.

The following points are relied upon for reversal:

*First.* That the city collector was not authorized to apply for judgment.

*Second.* The land appropriated for opening the alley had all been previously dedicated by the owners for the purpose of a public alley.

*Third.* The notices required to be given by the commissioners did not properly describe the location of the alley, and were calculated to mislead appellants, who were property owners in the adjoining block 13.

We will dispose of these points in the inverse order in which they are stated.

We think the notices were sufficient. They described the location of the alley and the land to be taken in the precise language of the ordinance, giving the numbers of the lots in block 16, and the definite portions thereof to be taken for the proposed alley. All the description required by sec. 6, chap. 7, of charter, (Gary's Laws, 62-3,) is, that the commissioners shall specify in the notice what such assessment is to be for, "and shall describe the land to be condemned as near as may be done by general description."

The second point involves the question of dedication, which is claimed to have been effected in two different modes: one, an act *in pais,* respecting the north half of the alley; the other, by deed, relating to the south half.

Flentye, one of the appellants, testified that one half of the alley in question had been in use from ten to thirteen years, by everybody, and the other half four or five years; that he dedicated the north half, next to Wendall street, himself, he having bought the land and paid for it. He made it 12 feet wide.

On cross-examination, he said that, by dedicating, he meant that he made it a private alley; in fact it is a private alley, but they have made it a public alley. Somebody drove into his barn and broke down a pillar. He tried to fence it up, but they broke the fence down and told him it was a public

alley. This was two to four years ago. His land is the north 37 feet of lot 2 and the whole of lot 3, block 13. Hemingway's is next south. He did not buy this alley as a private alley. He bought it as a lot. It was made a public alley, though witness bought it as a private alley. He made an alley in the first instance, and it has been broken into and used as a public alley, without let or hindrance.

Scranton, another witness, testified, on behalf of the city, that he was the present owner of lot 11, formerly part of said alley; that he bought it of Moss for $25; that witness never dedicated it as a public alley; he had paid taxes on it all the time; it had been used by the public all that time without obstruction; he did not know whether Moss had dedicated it or not; the 12-foot alley was fenced off from the adjoining lots on both sides, and was used by the public as a thoroughfare for several years.

It appeared in evidence that, in 1856, Moss sold and conveyed to Mrs. Hemingway a right of way over said lot 11, described in the deed as follows: "Said strip of ground to remain forever unobstructed, and to be used as a private alley by the said Mary Hemingway and said Moss, their heirs and assigns, as an appurtenance of said 21½ feet south, and adjoining the north 37 feet of said lot 2." Mrs. Hemingway was the owner of said 21½ feet.

This is all the evidence given, and it is not satisfactory as to establishing a dedication.

The most that can be made out of Flentye's testimony is, that at first he did not intend to make the part opened by him a public alley, but the public tore down his fences and used it in spite of his efforts to the contrary, and for several years he had ceased to interfere with such use.

The deed from Moss to Hemingway did not operate to dedicate lot 11 to the public as an alley, but created in the grantee an incorporeal hereditament, a perpetual right of private passage to her and her heirs and assigns over the lands of Moss, his heirs or assigns. How or upon what basis this lot 11 was

estimated in the condemnation proceedings, does not appear. The proceeding itself is extraordinary, under all the circumstances, and there is reason to suspect some private scheme at the bottom. For several years this alley was open to the public. It had been put in good condition, and nobody interfered with the public use of it. Whether it was the interest of the purchaser of lot 11, at the sum of $25, who was seeking to obtain, by this proceeding, the full value of that lot, notwithstanding the burden of a perpetual easement upon it, does not very definitely appear, although there is strong reason to suspect it. The proceedings show that $1800 were awarded to Scranton as damages. It would be very strange if the mere naked fee of that lot, subject to the easement, should be worth $1800, and very unjust if the value of the incorporeal hereditament in Mary Hemingway should have been entirely disregarded, and she assessed $430 to pay Scranton for her own property.

There is enough in this record to afford ground for a strong belief that this affair was a fraud upon these appellants. The common council, after the mischief was done, repealed the ordinance. The entire record was introduced in evidence, from which it appears that the certificates of publication by the commissioners of the notice of completion of the assessment, and of application for confirmation, are in the exact form we have repeatedly held defective, for not stating the date of the last paper containing the same.

The city collector was not authorized to apply for judgment. *Hills* v. *City of Chicago, ante.* p. 86.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

Syllabus.

## RUFUS HAYWOOD

*v.*

## WATSON COLLINS *et al.*

1. ATTACHMENT—*notice—certificate of publication—judgment.* Where a writ of attachment was sued out against a non-resident, sent to another county, levied upon lands, but returned not found as to the defendant, a judgment was rendered at the return term against the defendant, but the court did not find there was notice, either actual or constructive, and there was no personal service, and the notice of publication filed did not purport to be signed by the publisher or printer of a newspaper: *Held*, the notice was fatally defective, and the court thereby acquired no jurisdiction of the person of defendant, and the judgment was void.

2. NOTICE. It is a principle of natural justice that a person must have notice of some kind before his property shall be bound by a judicial sentence. Without this principle is enforced, the right to possess and enjoy property can not be sustained, and our attachment law has, in accordance with this well settled rule, required notice, either by service or by publication.

3. SAME—*service.* Proof of publication may be made in some other mode than by a certificate of the printer or publisher, but when the latter mode is adopted it must conform to the requirement of the statute. The certificate of a person not appearing to be the printer or publisher of a newspaper, does not comply with the statute; nor will any presumption be indulged, but the fact must appear. And where there is not a proper certificate, and the court does not, in its judgment, find that notice of some kind was given, the judgment can not be sustained.

4. JURISDICTION—*circuit court.* The general jurisdiction of the circuit courts extends to all matters and suits at common law and in chancery; and when so acting it is a court of superior jurisdiction, and the rule is, that nothing shall be intended to be out of the jurisdiction of such a court but that which appears to be. Where a court of superior jurisdiction exercises statutory and extraordinary powers, it stands on the ground and is governed by the same rules as courts of limited jurisdiction, which is, that nothing shall be intended to be within the jurisdiction but that which is so expressly alleged.

5. ATTACHMENT—*common law.* An attachment is not a proceeding at common law; it exists and is conferred alone by the statute, and is in derogation of the common law. It derives all its validity from the statute, and in all essential particulars must conform to its requirements, and where

there is not personal service, notice by publication is as essential to jurisdiction as the issue of the writ and the levy on property, and the authority must be strictly pursued.

6. LEVY ON PROPERTY—*jurisdiction.* By a levy of the writ on property, the court acquires jurisdiction of the subject matter, but there must also be jurisdiction of the person of the defendant in some of the modes known to the statute, and without it the judgment will be void, and its validity may be questioned collaterally. And the facts showing jurisdiction must appear on the face of the proceedings.

7. SUMMARY PROCEEDINGS—*strictness required.* In summary proceedings in courts, under a special statute prescribing the course to be pursued, that course ought to be exactly observed, and those facts, especially, which give jurisdiction, ought to appear, in order to show that the proceedings are *coram judice.*

8. JUDGMENT—*attachment—notice—certificate—amendment.* Where a judgment in attachment was rendered without evidence of publication, and without personal service, and error was prosecuted and the judgment reversed and the cause remanded, and the note upon which the judgment was rendered was withdrawn and no further trial was had in the attachment case, and the defendant in the attachment suit filed a bill to set aside the deeds on a sale under the judgment in attachment as a cloud on his title, and after the bill was filed, plaintiff in the attachment, ten years after the rendition of the judgment, on leave of the court, but without notice to defendant, filed an amended certificate of publication: *Held*, that the judgment being reversed and the cause remanded, and no trial subsequently had, there was no judgment existing; the amendment did not revive it. The plaintiff should have re-docketed the suit in the court below, and by proof on the trial, or by default, obtained another judgment, and failing to do so for such a length of time, there was an abandonment of the cause. But had the case been reinstated after it had gone from the docket five years, notice should have been given to the defendant.

The suit was in attachment, and it was under the statute that it commenced and progressed, and the reversal of the judgment did not change it to a common law proceeding; the judgment, as it stood when the sale was made, was under the statute and must be tested by its provisions, and if void, the purchaser acquired no title.

9. SERVICE BY PUBLICATION—*parol evidence.* Where there has been an effort to procure service by publication, and the publisher's certificate is insufficient, the judgment reversed, and the defendant files a bill to set aside sales under the judgment as a cloud on his title, the judgment which was void for want of proof of service can not be rendered valid by the evidence of the printer or publisher that the publication was legally made; that must appear from the certificate of the printer or publisher, or by the

finding of the court. It can not be shown by parol in a collateral proceeding. To permit it, would be violative of all the rules of evidence; would destroy all the safeguards to purchasers at judicial sales; render records useless, and open wide the door to fraud and perjury.

APPEAL from the Circuit Court of Cook county.

This was a bill in chancery, filed by Rufus Haywood in the circuit court of Cook county, against Watson Collins, Nathan B. Gladding, Allen Bacon, John M. Ware, Henry J. Goodrich, Charlotte P. Goodrich and Moses D. Wells, for the purpose of having deeds of conveyance of lands they claimed set aside as a cloud on title to his lands. It is claimed that the judgment in attachment against complainant, and under which the lands were sold, was void for want of service on complainant, either actual or constructive.

Defendants filed their answer to the bill, a trial was had, and the court, after hearing the evidence, refused the relief and dismissed the bill at the costs of complainant; and from that decree he appeals to this court.

Messrs. BENNETT & VEEDER, for the appellant.

Messrs. SLEEPER & WHITON, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

We propose to consider two questions:

*First*—Was the judgment of the circuit court of Coles county void or only voidable?

*Second*—Does the record of the court, as amended in 1870, afford evidence of the due publication of notice?

In May, 1860, proceedings in attachment were commenced in the Coles county circuit court against appellant and one Bane.

Appellant was a resident of New York, and Bane resided in Coles county.

A writ of attachment was issued and directed to the sheriff of Cook county, levied upon the real estate in controversy

as the property of appellant, and returned "not found" as to the defendants.

At the October term of the court, in the year 1860, judgment was rendered against appellant and Bane, by default; but the court did not find that any notice had been given to appellant, either actual or constructive. The only pretended notice of the pendency of the attachment was, by publication. Conceding that the court might have received other proof of the fact of publication than the certificate of the publisher, the record does not so state.

The certificate attached to the notice did not purport to have been made either by the printer or publisher of any paper.

In *Haywood* v. *McCrory*, 33 Ill. 459, this notice was held to be fatally defective. Beckwith, J., in delivering the opinion of the court, said: "The record of the judgment fails to show that notice was given of the pendency of the suit; and the certificate of publication on file is not such an one as the statute requires. It does not purport to be made by the printer or publisher of any newspaper. In suits by attachment, where there is no personal service upon the defendant, in order to sustain the judgment the record must show affirmatively that the prerequisite of the statute in regard to notice by publication was complied with." The judgment in the case was accordingly reversed.

Counsel for appellees insist that this judgment of reversal is the only erroneous judgment given in this case.

The force of the remark we can not appreciate; of its fitness and good taste, others must judge.

The implied rebuke, however, shall not deter us from an adherence to the opinion, as it is in consonance with good sense and essential to secure the rights of property.

By virtue of executions issued upon this judgment, a large amount of the real estate of appellant has been sold. It appears, from the record in this case, that the note upon which the judgment was founded was either a forgery, or at least

made without the authority of appellant. After the judgment in 1860, the note was withdrawn from the circuit court of Coles county, and a suit instituted against appellant in the State of New York, on the trial of which the payee of the note was defeated.

The circumstances, therefore, appeal to our sense of justice, and incline us to afford the relief prayed for if consistent with the well established principles of law. A man's property has been seized for a pretended debt, and sales made without any actual notice to him, until the time had matured for the execution of the deed and it had been executed and delivered.

It is a principle of natural justice that a man must have notice of some character before his property shall be bound by a judicial sentence. Without the existence and enforcement of this principle, the right to possess and enjoy property can not be sustained.

Our attachment law, in accordance with this settled rule, requires notice by publication in some newspaper, when the writ of attachment has been levied upon property or served upon a garnishee, and has been returned not found as to the defendant.

What shall be the proof of publication? It may be made in some other mode than by the certificate of the printer or publisher, but when the latter mode is adopted it must conform to the requirement of the statute, which provides that the certificate of the printer or publisher shall be evidence of publication. R. S. 1845, 47.

Therefore, a certificate of some person which does not show that he was printer or publisher, is not in compliance with the statute. No presumption is to be indulged, but the fact must affirmatively appear. Any other construction would permit any one, without knowledge of the fact of publication, to give the certificate.

There was, then, no sufficient notice of publication, tested by the requirement of the statute, and the court, in its judgment, did not find that notice of any kind had been given.

In determining the presumptions which may aid such a judgment, we must inquire into the character and jurisdiction of the court which rendered it.

The general jurisdiction of the circuit courts is over all matters and suits at common law and in chancery.

When acting within the scope of its general powers, a circuit court is a court of superior jurisdiction. The rule is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so. *Peacock* v. *Bell*, 1 Saund. 69.

But when a superior court exercises a special statutory and extraordinary power, it stands upon the same ground and is governed by the same rules as courts of limited and inferior jurisdiction. The rule then is, that nothing shall be intended to be within the jurisdiction but that which is so expressly alleged. *Peacock* v. *Bell, supra.*

In proceedings by attachment, is the circuit court acting within the scope of its general powers, or is it exercising a special statutory power? It will not be contended that, at common law, this summary and extraordinary remedy could be pursued. It exists and is conferred alone by the statute, and is in derogation of the common law.

An attachment derives all its validity from the statutes, and in all essential particulars must conform to their requirements. *Cariker* v. *Anderson*, 27 Ill. 358; *Rowley* v. *Berrian*, 12 Ill. 198; *Vairin* v. *Edmonson*, 5 Gilm. 270; *Lawrence* v. *Yeatman*, 2 Scam. 15.

Where there is not personal service, the statute requires that there must be notice by publication. This is as essential to jurisdiction as the issue of the writ and the levy upon property.

In this summary proceeding, by which the citizen is deprived of his property without actual notice; without trial, except by an idle form; by which his entire estate may be taken in payment of a feigned indebtedness—a proceeding

entirely *ex parte*—the authority for such remedy should be strictly pursued.

The levy upon property by the writ of attachment gives jurisdiction of the subject matter, but there must also be jurisdiction of the person, in some of the modes required by the statute. If this jurisdiction does not exist, the judgment is void, and its validity may be inquired into collaterally.

In this case there is nothing in the judgment, by recital, to indicate notice, and the only evidence in the record is the defective certificate. The facts, necessary to give jurisdiction, do not appear upon the face of the proceedings. If the facts must affirmatively appear, then the judgment is a nullity; concludes no one; and may be rejected whenever collaterally drawn in question.

That the validity of a judgment may be questioned in a collateral proceeding, has often been decided by this court.

In *Goudy* v. *Hall*, 30 Ill. 109, it was decided that the decree of a county court authorizing the sale of land, was absolutely void if the notice required by the statute had not been given; and that its validity might be inquired into when the record was offered in an ejectment suit.

In *Miller* v. *Handy*, 40 Ill. 448, the court said, if there was not jurisdiction to render the judgment offered in evidence in defense, then all the proceedings were *coram non judice*, and they may be attacked collaterally in an action of ejectment.

In *Campbell* v. *McCahan*, 41 Ill. 45, it is said that there must be jurisdiction of both the subject matter and of the person, to give validity to judgments; and if jurisdiction is not acquired, the judgment is void and may be resisted successfully, either in a direct or collateral proceeding.

To the same effect is the case of *White* v. *Jones*, 38 Ill. 160.

In *Clark* v. *Thompson*, 47 Ill. 26, it was held that the presumption in favor of the jurisdiction, even of a court of general jurisdiction, may be rebutted in all collateral proceedings; and when there is no finding of the court, the presumption will be that it acted upon the summons and return which do appear in the record.

In the case at bar there was no finding by the court, and the inference is that it assumed jurisdiction of the person of appellant by virtue of the defective certificate.

In *Huls* v. *Buntin*, 47 Ill. 396, the suit was ejectment, and the defendant claimed title by virtue of a sale by an administratrix, under a decree of court. It was held that, if the court did not have jurisdiction, the decree was not binding, and could be attacked collaterally.

This court has frequently held that the county courts, though of limited, are not of inferior, jurisdiction, as distinguishing inferior from superior courts. *Propst* v. *Meadows*, 13 Ill. 157; *Clark* v. *Thompson*, *supra*.

We will refer to some authorities in other States which recognize the rule that superior courts, when in the exercise of a special statutory authority, are not entitled to the same presumptions in favor of their judgments as when in the exercise of their general powers.

In an action of ejectment, the record of a court of general jurisdiction was offered in evidence. In making the record, the court exercised a special power created by statute. It was held, that it *must appear by the record* that the statute had been complied with, or the judgment could have no binding effect. *Denning* v. *Corwin*, 11 Wend. 648.

In *Striker* v. *Kelly*, 7 Hill, 10, an action of covenant was brought upon a lease to recover rent. The defense was, that the greater part of the land demised had been charged by an assessment to pay the expense of opening Ninth avenue in the city of New York. By a statute, the Supreme Court appointed commissioners, who assessed the land, and their report was confirmed by the court, and the land was sold. It was held, that the powers conferred were judicial, and were given to the court; but that, in the discharge of the duties imposed, the general powers of the court were not exercised, but only those derived from the statute, and that the proceedings must be treated like those of a court of special and limited jurisdiction.

In *Thatcher* v. *Powell et al.* 6 Wheat. 119, ejectment was brought. The defendants, to support their title, read in evidence the transcript of a record of a court of general jurisdiction, made while in the exercise of a special statutory power.

Amongst other things, the statute required publication. Ch. J. MARSHALL, in delivering the opinion of the court, said: "These publications are indispensable preliminaries. They do not appear to have been made. The judgment was given without it appearing, by recital or otherwise, that the requisitions of the law had been complied with. We think this ought to have appeared in the record.

"In summary proceedings, where a court exercises an extraordinary power under a special statute, prescribing its course, we think that course ought to be exactly observed; and those facts, especially, which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice.*"

The judgment was held to be absolutely invalid.

In *Williamson* v. *Ball,* 8 How. 566, and *Williamson* v. *Berry,* ib. 495, it was held that a court of chancery, under its general powers, had no authority to decree a sale of the real estate of a minor; and that, when acting for such purpose under a special statute, it must pursue, strictly, the enactment, or no title will pass to the vendee thereunder, or to a subsequent *bona fide* purchaser.

As illustrative of the principles of the foregoing authorities, we refer to the following cases: *Latham* v. *Edgerton,* 9 Cow. 227; *Rogers* v. *Dill,* 6 Hill, 415; *Bloom* v. *Burdick,* 1 Hill, 130; *Mills* v. *Martin,* 19 Johns. 7; *Jackson* v. *Esty,* 7 Wend. 148; *Dakin* v. *Hudson,* 6 Cow. 221; *Borden* v. *Fitch,* 15 Johns. 121; *Bigelow* v. *Stearns,* 19 Johns. 39.

The rule, that the exercise of unusual and extraordinary powers will be subjected to the strictest scrutiny, will have a salutary effect. It imposes some restraint upon powers dangerous to the citizen, and which should never be granted or exercised without absolute necessity.

The very security of property requires notice of some kind to the owner before he should be deprived of it. Justice can never be administered, in its true spirit, when either the person or property is condemned without notice.

No case can better illustrate the necessity of legal scrutiny in this class of remedies, than the one under consideration.

Judgment was obtained against a man without any personal notice, and that judgment was based upon a note, either forged or made without any authority, by the co-defendant of appellant, in the attachment, and thus it is attempted to deprive him of a large amount of property.

This was an extraordinary remedy, and the record must state that satisfactory evidence of the notice was heard by the court, or it should contain sufficient evidence itself. *Fayles* v. *Kelso*, 1 Black. 215; *O'Brien* v. *Daniel*, 2 Black. 291; *Leach* v. *Swan*, 8 ib. 68.

No distinction can justly be taken between this case and decrees directing the sale of lands to pay debts, upon the application of administrators.

Yet, this court has invariably held, that if notice of the latter proceeding has not been served or given in the mode required by the statute, the decree to sell lands will be void, and may be questioned in both direct and collateral proceedings. *Clark* v. *Thompson, supra; Schnell* v. *City of Chicago*, 38 Ill. 383; *Morris* v. *Hogle*, 37 Ill. 150.

Counsel for appellees contend that the levy of the writ of attachment conferred jurisdiction over the land, gave power to compel the appearance of appellant, and to render judgment and order a sale of the land, just as much as personal service upon his co-defendant gave jurisdiction to render a personal judgment against the latter.

They further contend, "that the failure to give the notice required by the statute, did not deprive the court of its jurisdiction over the subject matter; nor of its jurisdiction and power to issue the writ; nor of the jurisdiction over the

property acquired by the service of the writ upon it, to give judgment against it."

This argument effectually wipes out the provision of the statute which requires notice; for, if a judgment can be rendered upon the mere attachment of property, there is no necessity for notice in any case.

The statute requires that, upon the return of the writ of attachment, the clerk shall give notice. We are not disposed, if we had the power, to abrogate this wise provision of the law.

The service of the writ only gave jurisdiction over the land, and not over the person. Both must exist prior to the judicial sentence.

The attachment is a lien from the date of the levy only when followed by a judgment, and the latter can never be properly rendered without due notice. *Martin* v. *Dryden*, 1 Gilm. 187; *Jones* v. *Jones*, 16 Ill. 117.

The facts in the cases cited, of *Pierce* v. *Carleton*, 12 Ill. 358, and *Dukes* v. *Rowley*, 24 Ill. 210, are somewhat different from the facts in the case under consideration.

In the case in 12 Ill. the record recited that *due proof of publication* had been made. The court found that the statute had been complied with, and this finding might be the result of parol proof in such a case, but could not if the service had been by summons. The presumption was based upon the finding of the court.

So, in the case in 24 Ill., the judgment showed that due notice by publication had been given; but the court decided against the tax title because the certificate of publication had not been recorded as required by the statute. This effectually disposed of the deed as evidence of title, and the subsequent remarks as to the sufficiency of the certificate were unnecessary and were *obiter dicta*, and were virtually overruled in *Haywood* v. *McCrory*, *supra*.

Any attempt to review the cases cited by appellees, would extend this opinion to an unreasonable length. There is a

conflict between the authorities, and any effort to reconcile them would prove futile.

In the view we have taken, and in the light of the authorities referred to, the judgment of the circuit court of Coles county must be pronounced void.

We propose to consider next the effect of the amended record.

The record shows the following state of facts:

The judgment was rendered at the October term, 1860, of the Coles circuit court. In 1864 a writ of error was prosecuted to this court, and the judgment was reversed and the cause remanded. In July, 1865, the note was withdrawn from the files of the court and a suit prosecuted upon it in the State of New York.

At the October term, 1870, of the Coles circuit court, a motion was made to re-docket the cause, and then the following order was made: "Whereupon plaintiff produces publisher's certificate, and leave is granted to file the same. And from said certificate and evidence of publisher, the court is satisfied as to the proof of publication, etc."

There is no evidence in the record that any notice was given to appellant of the intention to make this motion, and it does not appear that he was present.

The entry was made more than one year after the filing of the bill in this case. The bill sets up the record as it existed before the attempted amendment, assails the judgment as void, and charges that the cause had been abandoned by the plaintiff.

As the record, as then made up, was the chief cause for filing the bill, it is certainly anomalous practice to amend it for the purposes of the trial, and without any notice.

But what does the amendment accomplish? What purpose does it subserve? What benefit is it to any party that there should be a sufficient certificate of publication, if no judgment is rendered?

The apparent judgment of 1860 was not a judgment in 1870; it had been reversed; the reversal was an official declaration that it was false. It was no longer a conclusion of law upon facts found or admitted, or upon default. The amended record, therefore, could have no application to this reversed judgment. It could give neither truth nor vitality to it.

As the effect of the reversal was the annulment of the judgment, it was not revived by the amendment. The proof submitted ten years before had passed from the memory of the court, the note had been taken from the files, and, in fact, there was no record of the judgment remaining in the circuit court. The judgment, wholly reversed on error, would not even have been a defense to a subsequent suit for the same cause of action. *Smock* v. *Graham*, 1 Black. 314.

The proper course, upon a reversal of the judgment, would have been to re-docket the cause in the court below, and by proof upon a trial, or by default, obtain another judgment. Instead of pursuing that course, we think that there was a total abandonment of the cause.

Upon remandment of the cause, appellant was in court by operation of the writ of error sued out and prosecuted by him, and a trial might have been had. *Reaugh* v. *McConnel*, 36 Ill. 373.

This course was not adopted. The cause went off the docket for five years, and appellant was entitled to notice of the motion to reinstate. *Mattoon* v. *Hinckley*, 33 Ill. 208.

The want of notice is not aided in this case by the presumptions implied by law in favor of the regularity of the action of superior courts. At the time of the amendment, the adjudication was in relation to the same subject matter which was under consideration when the reversed judgment was obtained.

The inquiry was as to the jurisdiction of the court in the attachment case. It was, therefore, not in the exercise of its general powers, but of a special statutory authority given by

the attachment law. By virtue of that law alone did the suit commence and progress. The reversal did not change it from a statutory to a common law proceeding. Lapse of time could not do it. Motions, however numerous and varied, could not effect a change. The proceeding had its beginning and termination only by authority of the statute.

The rule, therefore, as to inferior courts, must apply, and the record should show, affirmatively, that notice was given.

Upon the hearing in this case, the deposition of the publisher of the paper was read in evidence to establish the fact of publication.

The adoption of such a rule would destroy every safeguard which the law has thrown around purchasers at judicial sales; make records mere useless things; unsettle titles; and open wide the door to fraud and perjury.

The stability and sanctity of a judicial sentence would then depend, not upon the sure records of the courts, but upon the frail and uncertain memory of witnesses. If defects can thus be supplied, completeness can be pulled down. To-day a purchaser vests his money in land, relying upon an insufficient record as constituting no incumbrance; ten years hence the record is aided by evidence on the trial of an action of ejectment, and he is ousted of his estate. To-day a judgment, in any special proceeding, is no lien, on account of the absence of any notice in the record, or of any finding, and the party who purchases upon the faith of this insufficiency is surprised to learn that the printer of the newspaper, and not the clerk of the court, has been the custodian of the record for ten long years.

The practice would be dangerous, and is unsustained by any principle of law.

Appellant is entitled to the relief prayed for.

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

*Decree reversed.*

Dissenting opinion of JUSTICE SHELDON.

Mr. JUSTICE SHELDON filed the following dissenting opinion:

I find myself unable to concur with the majority of the court in the opinion pronounced in this case.

The judgment of a court of general jurisdiction is here sought to be impeached and held a nullity in a collateral proceeding, for want of jurisdiction over the person of the defendant.

In such case I regard the rule to be, that it is not necessary that the jurisdiction should affirmatively appear, but that it will be presumed until the contrary is shown; that, if jurisdiction do not appear upon the face of the record, the judgment will be reversed on error or appeal, but that it is not a nullity which may be disregarded in a collateral action. *Kemp's Lessee* v. *Kennedy*, 5 Cranch, 173; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Foote* v. *Stevens*, 17 Wend. 483; *Hart* v. *Leixas*, 21 ib. 40; *The Chemung Bank* v. *Judson*, 4 Seld. 254; *Ruckman* v. *Cowell*, 1 Comst. 505; *Brown* v. *Wood*, 17 Mass. 67; *Reynolds* v. *Stansbury*, 20 Ohio, 344.

Such would seem to be the rule, and the distinction, when the question comes up directly upon appeal or by writ of error, or is raised collaterally, heretofore recognized in this State. *Kenney* v. *Greer*, 13 Ill. 432; *Dunbar* v. *Hallowell et al.* 34 Ill. 168; *Pensoneau* v. *Heinrich*, 54 Ill. 271.

The ground upon which the judgment here is declared to be a nullity, is, that it does not appear, by the certificate of publication of notice on file, that W. Harr & Son, whose names are subscribed to it, were the publishers or printers of the newspaper, or what was the date of the last paper which contained the notice. But the presumption of due publication of notice was strengthened by direct proof made on the hearing of this case, that W. Harr & Son were the publishers of the paper, and that the notice was published for the requisite length of time.

Such mode of proof in like cases has received the sanction of this court.

In *Pierce* v. *Carleton et al.*, 12 Ill. 363, the court says: "Waiving any discussion of the question whether the publication of notice is necessary to confer jurisdiction on the court in proceedings by attachment, it is enough for the decision of this case that it sufficiently appears from the record that the requisite notice was given. The record states that the plaintiffs filed proof of publication, and then follows a notice in due form, with a certificate of Houghton & Springer attached, in which they state that the notice was published in the "Northwestern Gazette" for four weeks successively, the first publication being on the 20th of March, 1850. The judgment against the defendant was entered on the 20th of May, so that sixty days intervened between the first insertion of the notice and the date of the judgment. It is true, that Houghton & Springer do not describe themselves in the certificate as publishers or printers of the "Gazette," nor do they state where the paper was published. But it was clearly competent for the plaintiffs to prove, by parol, that the paper was published in the State, and that Houghton & Springer were the publishers thereof. The presumption should be indulged that this was done." The question there came up collaterally.

Again, in *Dukes* v. *Rowley*, 24 Ill. 222, it is said: "It was objected that the certificate of publication was insufficient, as it failed to show that the persons who signed it were publishers of the newspaper in which the tax list was advertised. The evidence on the trial shows that they were the publishers, and the presumption is that the fact was proved to the court at the time the case was heard on the application for a judgment for the taxes. This is certainly true in a collateral proceeding, whatever might be the presumption, if it was questioned on error."

This was in support of a tax deed made under a judgment for taxes, rendered upon such notice. It is true, in this last case, it was recited on the face of the proceedings, "and,

whereas, due notice has been given of the intended application for a judgment against said lands," etc., but no stress whatever is laid upon the fact of such recital in the opinion, it not being even adverted to.

I do not regard this rule of presumption, as to jurisdiction, to be varied in this case, because the suit in which the judgment was rendered was commenced by attachment instead of by summons, or by holding to bail.

That circumstance, as I conceive, did not bring the case within that class of cases where a special statutory authority being conferred upon a court of general jurisdiction, to be exercised without the scope of its general and common law power, in a special and often summary manner, its proceedings in relation thereto are held to stand on the same footing with those of courts of inferior jurisdiction. *Harvey* v. *Tyler*, 2 Wallace, 329, and cases there cited; *Pensoneau* v. *Heinrich*, *supra*, respected a record in a mechanics' lien suit, a proceeding quite as special as the one in question.

I can not but regard the present decision as at variance with the true rule as declared in former adjudications of the court, and that decisions, which form rules of property, should not be lightly disturbed.

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## MONROE HEATH

*v.*

## ISAAC K. HALL *et al.*

1. MORTGAGE—*notes—default—power of sale.* A person gave a series of notes, falling due at different times, and executed a mortgage to secure their payment, and it contained a provision that, if default should be made in the payment of principal or interest on the days when due, the whole of the principal and interest should, at the option of the payee, become immediately due and payable, and it authorized the payee, his heirs, executors, administrators or assigns, after publishing the required notice, to sell the equity of the premises and the redemption, and the mortgagee was authorized to convey to the purchaser.

Statement of the case.

The mortgagor sold the premises, and his grantee also sold them, both subject to the mortgage; and, subsequently, the mortgagee assigned the notes and mortgage to another person, who gave and published the notice of a sale for the payment of all the notes and interest, but two having matured by the efflux of time, and on the day fixed for the sale offered the premises, and they were bid off by another person to whom he conveyed; on a bill filed to set aside the sale because no sale was, in fact, made according to the notice: *Held*, that where the proof preponderated in favor of there having been a sale at the time, place, and in the manner required by the notice and mortgage, the sale would not be disturbed.

Also, that the holder of the notes and mortgage could exercise the option to declare all the notes due, and that such power passed by the assignment.

Also, that the holder, being an assignee, had the right, under the terms of the mortgage, to advertise and make the sale in the manner prescribed in the mortgage, and on the sale being made, he had power to execute a deed of conveyance to the purchaser.

2. BILL IN CHANCERY—*allegations—proofs—relief.* Where a bill proceeds for relief in such a case, upon the ground that there was no sale of the premises at auction, and the proof fails to sustain the bill, the complainant can not change his ground and attack the sale for an irregularity. The allegations and proofs must agree, or relief will be denied. A party can not obtain relief by making one case by his bill, and a different one by his proofs.

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

This was a suit in equity, brought by Monroe Heath, in the Superior Court of Cook county, against Isaac K. Hall, George M. Huntoon and Alexander McDaniels, to redeem from a mortgage executed to secure several promissory notes. The mortgage and notes were assigned and the equity of redemption was conveyed, and all parties in interest were brought before the court. On a hearing in the court below, the relief was denied, and the bill dismissed at the costs of complainant, and he brings the case to this court by appeal and assigns errors on the record, and asks a reversal.

Messrs. WILKINSON, SACKETT & BEAN, for the appellant.

Mr. R. H. FORRESTER, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 13th day of July, 1867, Isaac K. Hall, one of the appellees, being the owner of the premises in question, executed a mortgage on the same to one Edward H. Mulford, to secure the payment of the sum of $900 according to the tenor and effect of five certain promissory notes made to said Mulford, one for $100, payable in one year from date, and the other four for $200 each, payable in two, three, four and five years after date, respectively, with seven per cent interest, payable annually.

The condition of the mortgage was as follows:

"Provided and agreed, that if default be made in the payment of said promissory notes, either of principal or interest, on the days whereon the same shall become due and payable, the whole of said principal and interest, secured by the said notes, shall, thereupon, at the option of the said party of the second part, (Edward H. Mulford,) become immediately due and payable. And this mortgage may be immediately foreclosed to pay the same, by the said party of the second part," etc., "or the said party of the second part, his heirs, executors, administrators or assigns, after publishing a notice in a newspaper published in the city of Chicago, thirty days before the day of such sale, may sell the said premises, and all right and equity of redemption of said Isaac K. Hall, party of the first part, his heirs and assigns therein, at public auction, at the court house door, in the city of Chicago, to the highest bidder for cash, at the time mentioned in such notice. And the said party of the first part hereby specially covenants and agrees, to and with the said party of the second part, to waive his right and equity and redemption, and the said party of the second part to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds for the premises so sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, all the principal and interest due on said notes, and to render the overplus, if any, to said Isaac K. Hall, his heirs or assigns," etc.

On the 30th day of October, 1868, Hall and wife conveyed the premises to Cornelia Rogers by warranty deed, subject to the mortgage.

On the 25th day of January, 1869, Cornelia Rogers and husband conveyed the same premises to appellant, Heath, subject to the mortgage.

On the 9th day of September, 1869, Mulford made an assignment and transfer of the notes and mortgage, and all his interest in the mortgaged premises, to George M. Huntoon.

On the 15th day of September, 1869, Huntoon, professing to act under the power of sale contained in the mortgage, advertised the property for sale at the door of the court house in Chicago, at ten o'clock in the forenoon, on the 20th day of October, 1869. And on the said 20th day of October, Huntoon made and delivered to Alexander McDaniels a mortgagee's deed of the premises, under and in pursuance of an alleged sale at the time and place mentioned in the notice, for the sum of $1100.

On the 15th day of December, 1869, appellant filed his bill in chancery against Hall, Huntoon and McDaniels, setting forth the advertisement of notice of the sale of the mortgaged premises by Huntoon, as to take place on the 20th day of October, 1869, at the hour of ten o'clock in the forenoon; and alleging that, for the purpose of protecting his, appellant's, interest in the mortgaged premises, and bidding at the sale an amount sufficient to pay off what was due on the notes and mortgage, he attended at the time and place of the advertised sale, from the hour of ten o'clock A. M. until after the hour of eleven o'clock A. M. of that day; that the premises, during the time he so attended, were neither sold nor offered for sale at public auction by said Huntoon, nor by any one in his behalf, and that they had not been sold or advertised for sale by Huntoon at any other time or place than that mentioned in said notice.

And the bill charges that Huntoon, confederating with Hall and McDaniels to defraud complainant out of his interest in

the land, falsely and fraudulently claims and pretends that he sold the premises at public auction at the time and place mentioned in said notice, to McDaniels, as the highest bidder at such sale, for the sum of $1100; and that, in pursuance of such fraudulent combination, Huntoon had executed to McDaniels, as a pretended purchaser at such sale, a deed of the mortgaged premises, reciting in it a sale as regularly made under the power contained in the mortgage, at the time and place specified in the notice; that McDaniels never paid any part of the said sum of $1100; that he was not present at the sale, and made no bid thereat; and the bill alleges that no sale, in fact, took place at the time and place mentioned in the notice, or at any other time and place, and prays that the pretended sale, and the pretended deed made thereunder, may be declared null and void, and be canceled, and that the complainant may be allowed to redeem the premises from the mortgage.

There is conflict in the testimony as to whether a sale, in fact, took place at the time and place advertised; and, without reviewing the evidence in detail, we deem it sufficient to say that we regard the decided weight of the testimony to be, that the sale was had.

Four witnesses, who were present and witnessed the sale, testify positively to the fact of its taking place at the time and place specified in the notice; that it was conducted openly, and in the ordinary manner of like sales at public auction; two of them being, Huntoon, who made the sale, and Beveridge, who bid off the land for McDaniels.

The decree, in this respect, is fully sustained by the proofs.

The point is made, that the power to make a deed under the mortgage sale was expressly limited by the terms of the mortgage, to the mortgagee; that Huntoon, as assignee of the notes and mortgage and mortgaged premises, had no authority to make the deed to McDaniels, and that, consequently, no title has yet passed by virtue of the sale; and that, at any time before it has actually passed, by a full compliance with

all the terms of the power of sale, the owner of the equity of redemption has a right to redeem.

The mortgagee, "his heirs, executors, administrators or assigns," were authorized, in case of default of payment, to publish a notice and make sale of the mortgaged premises.

The notes and mortgage were not only assigned to Huntoon, but the mortgaged premises were actually conveyed to him by the mortgagee.

Huntoon, as an assignee, being expressly empowered to publish the notice and make the sale, after having made the same, we must regard him as the proper person to make the deed, he holding the legal title by conveyance from the mortgagee.

The essential things to effect a foreclosure, were the publication of the notice and the making of the sale, and receipt of the purchase price. The making of the deed would follow as a necessary consequence of a regular sale. It should come from the holder of the legal title.

The provision that the mortgagee should execute a deed, must be understood to apply where he held the legal title.

Another objection taken is, that only $300 of the $900—the amount of the first two notes and interest on the others—were due at the time of sale, while the property was advertised to be sold for the purpose of paying the principal and interest "of all said promissory notes, and the costs and expenses of sale;" that there was no power to sell until the whole of the notes became due and payable by expiration of the time for which they were given, or at "the option of the said party of the second part" upon a default being made; and that it does not appear, in any way, that the party of the second part (Mulford) ever exercised his option of declaring the whole of the indebtedness due and payable.

But no such case is made by the bill, and it is inconsistent with the one which is made by the bill.

The bill sets up that no sale, in fact, took place. It does not allege any irregularity in the making of a sale.

Under a bill alleging that no sale, in fact, took place, and fraud in setting up a pretended sale, and claiming relief on that ground, to consider proof of such an objection as is here urged, in the making of an actual sale, would operate as a surprise upon a defendant, and is inadmissible, by the well settled rule.

Allegations and proofs must correspond, and a complainant will not be entitled to relief, although the evidence may establish a clear case in his favor, unless there are averments in the bill to support the case made by the evidence. *McKay* v. *Bissett et al.* 5 Gilm. 499; *Morgan* v. *Smith et al.* 11 Ill. 195, 366; *Fish* v. *Cleland*, 33 Ill. 239; *Carmichael* v. *Reed*, 45 Ill. 108; *Piatt* v. *Vattier et al.* 9 Pet. 405.

The absence of any allegation in the bill in that respect, sufficiently disposes of this objection to the regularity of the sale, as well as other ones which are made, of a like character.

Perceiving no error in the record, the decree of the court below must be affirmed.

*Decree affirmed.*

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## CHARLES McDONNELL

*v.*

## THE CITY OF CHICAGO.

SPECIAL ASSESSMENTS—*in the city of Chicago—of giving the Board of Public Works a discretion.* An ordinance ordered to be constructed, on a certain street, curb walls, and to be rebuilt and repaired "where the same are not now in a good and sound condition," "said work to be done under the superintendency of the Board of Public Works, conformably to the drawings prepared by said Board:" *Held*, the ordinance was void, because it undertook to vest in the Board of Public Works a discretion which should have been exercised by the common council alone.

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

This was an application in the court below for a judgment upon a special assessment warrant, under an ordinance in the city of Chicago. A trial resulted in a judgment in favor of the city, from which the defendant appealed.

Messrs. Spafford, McDaid & Wilson, for the appellant.

Mr. M. F. Tuley, Corporation Counsel, for the appellee.

Per Curiam: The first section of the ordinance on which the assessment was based in this case, is as follows:

"That curb walls be and are hereby ordered constructed on Market street, from the north curb line of Randolph street to the south curb line of Lake street, and rebuilt and repaired in said portion of Market street, where the same are not now in a good and sound condition, and that said Market street, from the north line of Randolph street to the south line of Lake street, be and is hereby ordered filled and paved with wooden blocks. Said work to be done under the superintendency of the Board of Public Works, conformably to the drawings prepared by said Board, and hereto annexed."

An ordinance similar to this was held, in *Foss* v. *City of Chicago*, 56 Ill. 354, to be void. So this must fall, for the same reasons given in that case. It is not distinguishable.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

## STEPHEN F. HANFORD

*v.*

## ISAAC BLESSING.

1. CONVEYANCE—*reconveyance of same property—mortgage.* Where a person having a lease on a piece of ground and a warehouse thereon, sold the same to another person, the grantee assuming the payment of grantor's debts in part and giving his note for the balance, and giving to the grantor a covenant to reconvey the property at the end of five years on being repaid the purchase money and ten per cent interest, the grantor to pay taxes, repairs and improvements, and to pay the grantee one half of the losses which might occur in the grain business to be carried on by them: *Held*, this transaction was in the nature of a mortgage given by the grantor to the grantee to secure the money advanced by him, and that equity, only, can do complete justice between the parties.

2. JUDGMENT—*ad damnum.* Where the verdict and judgment are greater than the *ad damnum* in the declaration, the judgment must be reversed, although the excess may have grown out of interest accrued after suit was brought.

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

Mr. T. P. BONFIELD and Mr. C. A. LAKE, for the appellant.

Mr. JAMES N. ORR, for the appellee.

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

Blessing having a lease of a piece of land belonging to the Illinois Central Railroad Company, and owning a warehouse situate thereon, on the 29th of November, 1864, conveyed the same to Hanford for a consideration, as expressed in the deed, of $3000. Hanford assumed the payment of the debts due from Blessing to other persons, amounting to $2230, which he

subsequently paid, and executed his promissory note to Blessing for $770, the residue of the $3000, payable in five years from date, with ten per cent interest. At the same time he and Blessing executed a contract under seal, by which Blessing covenanted to pay to Hanford $3000 in five years from date, with ten per cent interest; and Hanford covenanted to convey to Blessing, upon the payment of the $3000, the warehouse just conveyed by the latter to Hanford. Blessing also covenanted to pay the taxes on the property, and for all repairs and improvements thereon, and also one half of all losses in the grain business to be carried on by the parties in the warehouse according to the terms of certain articles of agreement already executed by them.

The warehouse was destroyed by fire before the expiration of the five years.

This suit was brought by Blessing on the note for $770 given to him by Hanford, and he recovered a verdict and judgment in the circuit court for the principal and interest of the note, the verdict exceeding the *ad damnum* laid in the declaration.

The defendant pleaded, as a set off, that the sum of $3000 was due to him under the contract above mentioned, for the resale of the property from Hanford to Blessing. This defense was not available, because the payment of the money and the making of the deed were to be simultaneous acts, and Hanford can not recover this sum until he has tendered to Blessing the deed required by the covenants in the contract. We will further remark that, on the face of this record, this transaction has much the appearance of having been designed as a mortgage, from Blessing to Hanford, to secure him for moneys advanced and losses growing out of the partnership, but in that event Hanford must have the equities of the case adjusted by resorting to the chancery side of the court, where complete justice can be administered.

This judgment must be reversed because the judgment exceeds the *ad damnum*. The plaintiff's case is not aided by the

fact that the excess was caused by interest that accrued after the commencement of the suit.

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

*Judgment reversed.*

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## SOLOMON ANDREWS

*v.*

## THE PEOPLE OF THE STATE OF ILLINOIS.

1. EVIDENCE—*guilty knowledge—receiving stolen goods.* Where a second hand retailer of clothing was indicted for receiving stolen goods, and, as tending to prove guilty knowledge, evidence was introduced that he had only paid for the clothing about one third of its value, it is error to refuse to permit accused to prove, that, according to usage, dealers in second hand clothing do not generally pay full prices for clothing, but purchase it at a reduction, and, from the character of the business, they are compelled to sell new clothing for the price of second hand goods, and hence they must purchase out of season and at reduced prices. Such evidence would tend to rebut the inference of guilty knowledge drawn from the fact that accused had purchased the goods at very low rates.

2. SAME—*improper—its exclusion by instruction.* In such a prosecution, it is proper, by instruction, to exclude evidence which has been admitted of a previous conversation between the prosecuting witness and the brother of accused in reference to stolen goods. It is improper to permit such evidence to go to the jury, and when it does, it should be excluded.

3. INSTRUCTION. It is not error to refuse an instruction which professes to determine the weight of evidence, or what it tends to prove. These are questions for the jury.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. FRANCIS ADAMS, for the plaintiff in error.

Mr. CHARLES H. REED, State's Attorney, for the defendant in error.

Opinion of the Court.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Plaintiff in error was indicted in the recorder's court of the city of Chicago for having received stolen goods, consisting of overcoats, dress and business coats, and shirts, the property of Morse, Loomis & Co. On a plea of not guilty, he was, on the second trial, convicted, the first jury to whom the case was submitted having been unable to agree, and the term of his confinement in the penitentiary was fixed at two years.

The goods were stolen by a clerk of Morse, Loomis & Co., and sold to accused. Clark, their salesman, swears that he stole the goods and sold them to plaintiff in error for about one third of their value, sometime in the month of October or November; that he sold him goods thus obtained at various times, at his solicitation; that the first sale was under a threat of being reported to his employers for selling other goods he had previously stolen, which he admits he stole. He says he declined to sell to accused at their first and second interviews, but yielded under the pressure of threats of being exposed for former thefts.

On the trial in the court below, accused offered to prove that those engaged in the second hand clothing trade did not pay full prices for clothing, but purchased them at a reduction; that, from the character of the business, they have to sell new clothing at the price of second hand goods, and for that reason never pay full value; and when purchases are made late in the season, it is at reduced prices. The court below refused to admit this evidence.

One of the facts relied upon by the prosecution, to prove guilty knowledge, was the purchase of the goods at greatly reduced prices. Had this evidence been admitted, it would have tended to rebut that presumption. It would have been for the jury to say how far it tended to rebut the presumption, but still it tended to produce that result. The evidence was pertinent to the issue, and should have been admitted.

Both the witnesses, by whom the offer was made, swear they were acquainted with the clothing trade, both the wholesale and second hand branches; and had their evidence been admitted, the case would have been presented to the jury on all of the facts calculated to shed light on the transaction. It would have shown the usage and necessities of the trade, and the jury would have had this, with the other evidence, from which to determine the motives which operated on accused when he purchased.

At one of the interviews, at which Clark sold the goods in a trunk, he is contradicted by the clerk of plaintiff in error as to the price paid for the coats. He swears he handled the goods, and that no cards were on the coats, as stated by Clark; and the clerk and two other witnesses swear Clark, at that time, represented himself as belonging to a firm in the city, and desired to meet a payment, and would sell the goods at reduced prices for that reason, but, when asked, he declined to give the name of the firm. A large number of witnesses who knew him testified to the good character of plaintiff in error, for many years, for honesty. On the other hand, several persons of the police force testified it was not good.

When the prosecution relied principally on Clark's evidence, who then stood convicted of the larceny of the goods, and who was but slightly, if at all, corroborated by other evidence, as to the guilty knowledge of defendant, and as there was a conflict on other material portions of the evidence, we think that it was error not to permit accused to prove the usage of his business. When there is such a conflict, circumstances, slight in their character, may become highly important in arriving at the truth.

DeBar testified that some of the shirts were exposed publicly to sale, in a window, and one of the overcoats was suspended at the door of the house where the goods were found. Loomis, however, swears that neither of his coats was at the door. He says that there was a coat there, but it was not his.

The conversation detailed by Clark, as having occurred between him and the brother of plaintiff in error, in reference to other stolen goods, was properly excluded from the jury by the instruction given, but the evidence should not have been permitted to go to the jury, as it was calculated to prejudice them against the accused, but it was no doubt inadvertently admitted.

It is urged that the court erred in refusing to give an instruction asked by plaintiff in error. It asserted that, if the jury believed that a part of the goods were exposed in the usual manner, to sale, such fact tended to destroy the presumption that might arise from inadequacy of price. This instruction, although announcing a correct rule of evidence, was calculated to mislead the jury, unless it had further stated that it was for them to say whether, when considered with the other evidence, it did destroy the presumption. When a jury are simply told that certain facts tend to prove a proposition, they may not be able to fully appreciate what weight the court thus intends them to give such evidence. They know that all evidence is admitted because it tends to prove the issue in the case, but when a particular portion is selected upon which to base an instruction, it gives to the mind the impression that the court regards it as particularly important, and there is danger of its receiving more than its proper weight.

There was no error in refusing this instruction, but for the errors indicated, the majority of the court hold the judgment must be reversed, and the cause is remanded for a new trial.

*Judgment reversed.*

JOHN WHEELER

*v.*

HEZEKIAH MCELDOWNEY.

PARTNERSHIP—*proof thereof.* In an action against A and B on a promissory note signed A & Co., the declaration alleged that A and B were partners in business under the firm name of A & Co., and as such made the note sued on. B denied the partnership and his joint liability with A as partner, on the note. The plaintiff introduced in evidence the note, and a bond for a deed for certain mill property, executed by a third person, with the knowledge of B, to "A and B, composing the firm of A & Co.," which bond was duly recorded. It appeared that B made the most, if not all, the payments on the property, and that when reimbursed by A, the property was to be the property of A; that the note was executed for work done in the mill by the plaintiff as miller; that B visited the mill several times after the purchase. A testified that B never had any interest in the mill business; that he alone was interested in that, and assumed the firm name of A & Co. in which to transact business; that the firm was himself and no other; that B never authorized him to use his name, nor did he ever represent to others or to the plaintiff that B had any interest in the mill business; that the interest of the latter only extended to the real estate: *Held*, the evidence was sufficient to charge B upon the note; that the bond for a deed to the mill property, taken with the knowledge and consent of B, in which A and B were described as composing the firm of A & Co., and put on record, was a holding out to the world that they were partners in the mill property and in the business of the mill, though, as between themselves, there may have been no partnership in the mill business.

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

Messrs. ECKELS & KYLE, for the appellant.

Mr. M. KENDALL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit on a promissory note signed "George Faulkner & Co." The declaration alleges that George Faulkner and John Wheeler were partners in business under the firm name of George Faulkner & Co., and as such, made

the note in question. Faulkner was defaulted, and Wheeler pleaded, verifying the plea by affidavit, that he was not a partner of Faulkner, and not jointly liable with him as partner, on the note. A jury was waived and the case tried by the court, who found for the plaintiff, and rendered judgment against both the defendants for the amount of the note and interest.

To reverse this judgment the defendant Wheeler appeals, and the only question is, was Wheeler a partner with Faulkner at the time the note was executed?

To maintain the issue on the part of the plaintiff, he introduced in evidence the note, and a bond for a deed for certain mill property, executed by one E. W. Grosvenor to "George Faulkner and John Wheeler, composing the firm of George Faulkner & Co.," with the knowledge and consent of Wheeler. This bond was duly recorded. Wheeler made the most, if not all, the payments on the property, and, when reimbursed by Faulkner, the property was to be the property of Faulkner.

The note was executed for work done in the mill by the plaintiff as miller. Wheeler visited the mill several times after the purchase.

Faulkner testified that Wheeler never had any interest in the mill business; that he alone was interested in that, and assumed the firm name of George Faulkner & Co., in which to transact business; the firm was himself, and no other; Wheeler never authorized him to use his name, nor did he ever represent to others, or to the plaintiff, that Wheeler had any interest in the mill business; that his interest only extended to the real estate.

It is insisted by appellant that this evidence is not sufficient to charge Wheeler upon the note. We think differently. The bond for a deed to the mill property, taken with the knowledge and consent of Wheeler, in which Faulkner and Wheeler are described as composing the firm of George Faulkner & Co., and put on record, was a holding out to the world that they were partners in the mill property and in the business of the mill, though, as between themselves, there may have been

no partnership in the mill business. This information conveyed to third parties, by recording the bond, enabled the mill to do business, and pay the mortgage for which Wheeler was responsible, or, in other words, had covenanted to discharge, and was notice to such parties dealing with the mill that they had the responsibility of Wheeler to rely upon. The record of the bond, executed as it was with Wheeler's knowledge and consent, was notice to the public there was such a firm as George Faulkner & Co., composed of George Faulkner and appellant, and he must, on principles of public policy and justice, be held responsible as such to the public, whatever may be the true relations between him and Faulkner.

The case of *Fisher et al.* v. *Bowles*, 20 Ill. 396, cited by appellee, covers this case, and, in conformity with it, the judgment must be affirmed.

*Judgment affirmed.*

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## CARTER H. HARRISON

*v.*

## THE CITY OF CHICAGO.

SPECIAL ASSESSMENT—*of a new assessment.* A new special assessment will not be sustained where the record fails to disclose upon what basis it was made.

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

This was an application in the court below for a judgment upon a special assessment warrant issued on a re-assessment, for certain improvements in the city of Chicago. A trial resulting in a judgment in favor of the city, the owner of the property appealed.

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

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Per CURIAM: This judgment must be reversed on the ground that the city collector had no authority to apply for the judgment. The proceedings under the new assessment do not definitely show upon what basis such assessment was made, and, as the case stands, we can not say that they were illegal.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

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## MOSES S. MILES

*v.*

## ALFRED WESTON.

1. NEW TRIAL—*remittitur—conditional order.* Where the court enters an order that unless plaintiff will remit a certain portion of his verdict within a specified time, a new trial will be granted, but the sum is not remitted until after the time has expired, when the court thereupon overruled the motion for a new trial and rendered judgment for the amount remaining after entering the *remittitur*: *Held*, that it was not error to overrule the motion after the time named had expired; that the order, as entered, was a conditional one granting a new trial, and was under the control of the court during the term; that the mere overruling of the motion was not error, and the refusal to grant a new trial could not be questioned unless there were other grounds requiring it to have been allowed.

2. EVIDENCE—*when inadmissible for want of proper averments.* In an action for trespass and false imprisonment, where the court permitted evidence of the kind of food that was furnished to plaintiff, and the character of the prison in which he was confined, and the kind of treatment he received: *Held*, it was error, as there were no facts specially averred authorizing them to be received, and as there was no such averment in the declaration, the admission of such evidence was calculated to surprise the defense, and it should have been rejected.

3. SAME—*justification—mitigation.* Where persons were seen in the night time for a considerable time, in the street near to a person's house, apparently examining it, and would separate when persons passed, and then come together again, and the occupant of the premises found and brought to the place two policemen, who found a person there who, when accosted by them, stated he had been there two hours, and was thereupon arrested by the policemen: *Held*, that such facts should mitigate the damages, if not justify an imprisonment, although the person arrested had but come to the place at the time he was arrested.

4. ARREST. At common law, peace officers were authorized to arrest street walkers, and they were liable to punishment as for a misdemeanor, and the common law is in force in this State as to such offenses.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

Messrs. HOYNE, HORTON & HOYNE, for the plaintiff in error.

Mr. GEORGE F. BAILEY, and Mr. E. H. BEEBE, for the defendant in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an action of trespass to the person, brought by Weston against Miles, in the Superior Court of Chicago. The declaration contains five counts. Plea, not guilty.

The first count would be good, upon general demurrer, as a count in case for malicious prosecution. It alleges that defendant below, without any reasonable or probable cause, made a pretended charge against plaintiff below, of a criminal offense, caused him to be arrested upon such charge, and imprisoned, without any reasonable or probable cause; his acquittal, and the legal termination of the prosecution.

The second and third counts are somewhat similar, and the fourth and fifth are in trespass for assault and battery. Verdict against defendant below of guilty, and damages assessed at $1000. No motion in arrest was made for the misjoinder

of causes of action; but upon a motion for new trial, the court ordered that a new trial be granted, unless plaintiff below, within five days, should remit $500 from the verdict. The *remittitur* was entered after the five days and on the sixth, whereupon the court denied the motion for a new trial and gave judgment for $500, and defendant below brought the case to this court by writ of error, and, amongst other errors, assigns the refusal of the court to grant a new trial, but, in argument, insists that the manner of the refusal was error.

We think that, unless the plaintiff in error can show, from the record, that he was entitled to a new trial, the manner of the refusal is of no consequence. This was but a conditional order for a new trial. Suppose the court had made an absolute order, and then, at the same term, concluding that the order had been made upon a mistaken view of the case, had vacated it. Could this be successfully assigned for error, without showing, from the record, that the party in whose favor the order was made was entitled to a new trial? We think not. So that the question is, did the court err in refusing a new trial? Or, in other words, was plaintiff in error entitled to a new trial?

It is apparent from the record that the counsel for the plaintiff below tried the case as an action of trespass and false imprisonment, while defendant's counsel, misled, perhaps, by the form of the first count of the declaration, defended it as an action on the case for malicious prosecution. All the instructions asked by the latter are appropriate only to the action for malicious prosecution. They contain correct propositions of law, and should have been given, if such were the action.

The evidence allowed by the court, of the abuses to which plaintiff was subject, by plaintiff giving a description of the particular place where he was confined, its bad and unfit character, and the fact that he was not furnished with food, was all inadmissible, under the declaration in this case; and while plaintiff was detailing these abuses, the court said to him, "You can

state, in that connection, that you were not allowed to get witnesses." Upon this suggestion, which was excepted to by defendant's counsel, the plaintiff said: "I was not allowed to get witnesses. I was fined $25." The docket of the justice was not introduced. There was no proper evidence that any cause was pending or tried before the justice, or that any application was made for a continuance or suspension of the trial on account of absent witnesses, and no such damages were stated in the declaration.

The rule is, that "whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not *implied* by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, when the plaintiff offered to give in evidence that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so because the fact was not, as it should have been, stated in his declaration." 1 Chit. Pl. 397.

That he was ill-treated by being put, by the officer, in such place as described, denied food or the privilege of getting his witnesses, subject to oppressive conduct on the part of the magistrate, and fined, were none of them damages which necessarily accrued from the act of the defendant, nor were they damages implied by law; and to prevent surprise on the defendant, such of them as defendant could be held responsible for should have been stated in the declaration. But if the magistrate had jurisdiction, his act of fining plaintiff could not be a proper element of damages in the action for trespass, false imprisonment and assault and battery, though it might be in *case* for malicious prosecution, if stated in the declaration.

It appears, by evidence not contradicted, that, on the night of the arrest of plaintiff below, two men had been walking

the street in front of defendant's house, in Chicago, apparently taking observations; and, when any one approached, they would separate, and come together again, and thus kept lurking around for about an hour and a half, and until late in the evening, when defendant, becoming alarmed at their suspicious conduct, went after and brought two policemen to the place where the two men had been, and there found the plaintiff, who, upon being interrogated as to his purpose, and told that he had been hanging about there for an hour and a half, replied that he had been there two hours. This is testified to by four witnesses besides the defendant, and contradicted only by the plaintiff himself. Giving no account of himself, and admitting his presence there for two hours, one of the policemen arrested him, and, without any directions from the defendant as to what should be done with him after the arrest, he was taken by the officer to the station.

In *Lawrence* v. *Hedger*, 3 Taunt. 14, it was held that watchmen and beadles have authority, at common law, to arrest, and detain in prison for examination, persons walking the streets at night when there is reasonable ground to suspect felony, although there is no proof of a felony having been committed. And it has been said by Hawkins and others, that every private person may, by common law, arrest any suspicious night walker and detain him until he give a good account of himself. 2 Hawkins' Pleas of the Crown, ch. 13, sec. 6, ch. 12, sec. 20. And it has been held that a person may be indicted for being a common night walker, as for a misdemeanor. 2 Hawk. P. C., ch. 12, sec. 20.

Where a person is taken up in the night as a night walker and disorderly person, though by a lawful officer, it has been considered that the arrest would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer. Tooley's Case, 2 Lord Raym. 1296.

The reason why night-walking and lurking about the premises of peaceable inhabitants in the night time, is disorderly

conduct, is because such conduct can not, in general, be for any but a bad purpose, and it tends to the annoyance and discomfort of peaceable citizens, who have a just right to be exempt from such disturbance. What family, in a large city like Chicago, so frequently infested with burglars and other desperate criminals, could retire to their beds and enjoy the quiet and repose due to them, when they were conscious that suspiciously acting persons were lurking about their premises? And will it be said that the law gives no right to have such persons arrested and removed, until a burglary is actually committed or attempted? The right of arrest in such cases, by the proper officer, is supported by the same reasons and necessity to-day, that it was in the earlier history of the common law, and its existence we maintain without hesitation. We do not say that the plaintiff below was guilty of such disorderly conduct; it is not our province to do so; but we do say that, in the facts disclosed by the evidence, lay the materials for a plea of justification. None, however, was interposed. The most the defendant could do was to give them under the general issue in mitigation of damages. This was done.

It is true the plaintiff testified that he had been at the place in question but one or two minutes, yet five witnesses testify that he said, when questioned, that he had been there two hours, which admission was sufficient, under the circumstances, to cause the officer to believe him to be one of the two night walkers who had been observed hovering about defendant's house. But for this statement, he probably would not have been arrested. If his own declaration caused his arrest, surely that circumstance should go far, under the other circumstances of the case, in mitigation of damages, if not to justify the arrest.

But instead of submitting that question to the jury by proper instructions, the question was submitted by several, on behalf of the plaintiff below, whether the defendant used proper diligence in ascertaining whether plaintiff was the right

man, in the face of his own admission that he had been there two hours.

Upon the whole case, we think the defendant did not have a fair trial, and that a new trial should be granted, and the parties have leave to amend their pleadings.

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

*Judgment reversed.*

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## RODNEY HOUSE

*v.*

## PHILLIP DAVIS.

1. PROMISSORY NOTE—*assignment of before due.* The law favors the use of commercial paper, and courts should not permit weak and uncertain evidence to impede or restrain its free circulation.

2. BILL IN EQUITY—*its frame—relief.* Where the theory of the bill is, that promissory notes, upon which judgment had been rendered, were usurious, and that the assignee, who obtained the judgment, had colluded with the payee to hold the notes in trust for him, and the proof fails to sustain the bill, it is erroneous for the court, under such a bill, to require the payee to bring the amount of usury into court to be paid to the assignee, and to require that the maker bring the balance of the judgment into court to be paid to the assignee.

3. EVIDENCE—*under the bill.* The evidence must be in support of the theory of the bill, and if not, although a case may be made by the evidence, the party is not entitled to relief, and it must not be variant from the case the party is called upon by the bill to defend.

4. PROMISSORY NOTES—*renewal—usury.* Where promissory notes are tainted with usury, their renewal, and adding the usury into the new ones, will not free them from the usury. The renewal does not change the nature of the indebtedness, but is evidence, simply, of the debt. Had the assignee known of the usury and the several renewals of the notes, the defense could have been made in his hands. The rule is, that so long as any portion of the debt remains, the usury may be pleaded whilst in the hands of the original payee, or an assignee, with notice.

5. INTEREST—*where there is usury.* Interest should be computed at the rate of six per cent on the balance of the debt, after deducting the usury.

6. PRACTICE. It is error, where the bill is dismissed as to such an assignee, to require money to be brought into court to be paid to him, as the court had no control over him after dismissing the bill as to him. If the bill had been properly framed, it would have been proper to retain jurisdiction of all the parties until exact justice should have been done.

7. On a bill properly framed in such a case as this, the maker should bring the money to pay off the judgment, into court, and then he would be entitled to recover the usury and have a decree therefor.

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

Mr. GEORGE S. HOUSE, for the appellant.

Messrs. RANDALL & FULLER, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The bill was filed in this case to enjoin the collection of a judgment at law, and charging usury in the notes upon which the judgment was founded.

The consideration of the notes consisted of money borrowed and property purchased, of House, and he sold the notes to one Phileo. It is alleged that usury forms a large portion of the amount of the notes.

The usury was abundantly proved, and is indeed conceded by both parties. The bill charged that Phileo, the assignee, before the maturity of the notes, had notice of the usury, and confederated with House to cover it up. The evidence is too slight to sustain the charge. The remark of Davis to Phileo, upon the day on which the notes were renewed and made payable to the latter, must have been subsequent to the transfer of the notes and the payment of the money to House.

The only other proof to support the charge, was to the effect that five or six years before the purchase of the notes, Davis stated, in the presence of Phileo, that he was paying House, upon notes for money, twenty per cent. Phileo may

have heard the remark, and he may not; and if he did, he may have forgotten it.

Such testimony is too unreliable to warrant the conclusion of notice of usury in the notes purchased. If the purchaser had any recollection of the remark, he might well suppose that the notes referred to had long been paid. We must presume that Phileo held the notes for value, and without any notice of facts which might impeach their validity between the antecedent parties.

The law encourages the use of commercial paper, and courts should not permit such weak and uncertain evidence to impede or restrain its free circulation.

We are of opinion that the court below decided correctly, that Phileo was a *bona fide* holder.

After the dismissal of the bill as to Phileo, the court rendered a decree, and found that he was entitled to receive the full amount of his judgment founded upon the notes assigned to him before maturity, and directed that appellant, the payee of the original notes assigned, bring into court the amount of the usury, and that the maker of the notes bring into court the balance of the judgment, by a day named.

The distinct theory of the bill is, that the purchaser of the notes had notice of the usury, and that he colluded with the payee to hold the notes in trust for him. These allegations, as we have seen, are not sustained.

The case of *Woodworth* v. *Huntoon*, 40 Ill. 131, is exactly in point, and is decisive against the relief granted.

In that case, the bill was filed against an assignee before maturity, for value, and a second assignee after maturity. The bill charged usury; notice of it on the part of the assignee; and that the assignment was colorable merely. The usury was admitted, but the court found that the first assignee was a *bona fide* holder before maturity, and that the remote assignee was protected through the prior innocent holder, and the bill was dismissed without prejudice because the allegations were not supported by the proof.

The complainant must recover on the case made by the bill. The proof must support, and not be inconsistent with, the theory of the bill. Though a good case may be made by the evidence, it must not be variant from the one which the party is called upon to defend.

As the cause may again be tried, it is proper to remark that the evidence shows conclusively that the Shoemaker note had been paid, and it should not be considered in making any computation.

The renewal of the notes, according to the proof, should not be regarded as such an independent transaction as would make payment and satisfaction of the prior notes, so as to remove the taint of usury, so far as the payee is concerned. The notes had frequently been renewed while in the hands of the payee, and usury computed at each renewal; and if the assignee had notice of the usury, the defense could be made as to him. The notes, upon renewal, were not a satisfaction of the former notes, but only evidence of the pre-existing indebtedness.

The rule to be deduced from the decisions of this court is, that so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of the usury from the part remaining unpaid. *Hadden* v. *Innes*, 24 Ill. 381; *Farwell* v. *Meyer*, 35 Ill. 41; *Saylor* v. *Daniels*, 37 Ill. 331.

As to the rate of interest to be computed upon the balance of the debt, after the deduction of the usury, six per cent only should be reckoned. *Woodworth* v. *Huntoon*, *supra*.

The court dismissed the bill as to the assignee, and yet required the payment of money into court for the satisfaction of his judgment, when no control could be exercised over him.

If the bill was amended so that the allegations and proofs were consistent, jurisdiction of all the parties should be retained so that exact justice could be done.

The maker of the notes has never paid, and may never pay, the usury; and as all the parties interested are before the court, the bill should be amended to correspond with the

facts. The maker of the notes should be permitted to bring the amount of the judgment, and interest thereon, into court, for the benefit of the *bona fide* holder, and then he would be entitled to recover the usury against the payee.

The court erred in the amount of usury found, but as counsel differ so slightly as to the amount, this can easily be ascertained upon a second hearing.

The decree is reversed and the cause remanded, with leave to amend the bill.

*Decree reversed.*

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## THE PRINCETON LOAN AND TRUST CO. *et al.*

*v.*

## PARNELL MUNSON.

1. TRUST DEED—*sale by trustee—notice.* Where a person borrowed money and gave a trust deed on real estate to secure its payment in three years, with interest payable annually, and the deed provided that if the interest remained due and unpaid thirty days, the holder of the claim might require the trustee to sell the property, after giving notice as required by the deed, and to apply the money as therein specified; and it was therein agreed that, on default in the payment of any instalment of principal or interest for thirty days after its maturity, the whole debt, principal and interest, should, at the option of the holder, become due and payable, and the property be sold as though the debt had become due by lapse of time: *Held*, under such a deed, that the trustee was only bound to give the notice required by its terms, and as the deed did not provide for it, he was not required to give notice to the debtor, nor was the holder bound to give notice of his election to treat the whole debt as due.

2. TRUSTEE—*sale of trust property.* In such a case, it is not fraud, or ground for setting aside the sale made by the trustee, because he informed the person who became the purchaser, of the amount of the debt previous to the sale; nor did the fact that the trustee said to the person who afterwards became the purchaser of the trust property, that if the money was not paid before the time fixed for the sale, it would be sold, and that he had no expectation it would be paid. This was not fraud, nor did it work injury to the debtor.

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

Mr. FARLIN Q. BALL and Mr. GEORGE SCOVILLE, for the appellants.

Mr. JOHN LYLE KING, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 13th day of May, 1869, James G. Blunt executed a trust deed upon a certain lot of ground, in the city of Chicago, to George Scoville, as trustee, to secure the payment of the sum of $5500, in three years, with ten per cent interest payable semi-annually.

It was a loan of money by one Mrs. Gurley, made through the agency of Wright & Tyrrell on her part, and of A. C. Ellithorpe on the part of Blunt.

The November interest was paid, but not promptly: $250 of it on the 23d of the month, and $25 in January. The second instalment of interest, falling due May 13, 1870, not having been paid, on the 29th day of June, 1870, the trustee made sale of the property under the deed of trust, and it was bid in by the Princeton Loan and Trust Company, which, on the morning of the day of sale, had purchased the bonds for the money secured by the trust deed from Mrs. Gurley, at their face and interest. It bid upon the property precisely the amount of the bonds and interest and costs of sale, making in all $6000.

After the giving of the trust deed, Blunt sold the property to the appellee, Munson, who was to assume the mortgage upon it, excepting the instalment of interest to fall due in May, which was to be paid by Blunt.

This bill was filed by Munson to set aside the sale.

It alleges that, a short time before the second instalment of interest fell due, on the 13th of May, 1870, Ellithorpe, the agent of Blunt, made with Wright & Tyrrell, as the agents of

Mrs. Gurley, an agreement for the extension of the time of its payment until the middle of July.

We are favored in the case with a written opinion of the judge who heard the cause below, which finds that this agreement for extension of time was not proven, and no claim is made, on the part of the appellee, that it was. We have examined the testimony on this point, and, without entering into the review of it, we will say that we are satisfied with the finding of the court on this question of fact.

The other grounds of complaint set up are, misconduct on the part of the trustee, and fraud between the parties to the sale.

The deed of trust contains the following provisions:

"In trust, that in case of default in the payment of any of the said bonds or any part thereof, or of the said coupons, or either of them, or any part thereof, or in case of a breach of any of the covenants or stipulations herein contained, and if such default or breach shall continue for thirty days, then at any time after the expiration of that period of time, the trustee, on application of the holder of any of said bonds or coupons which may then be due, may sell said premises, or any part thereof, and all right of redemption of said parties of the first part, at public auction, at the north door of the court house, in Chicago, for cash, ten days' public notice having been previously given of the time and place of such sale by advertisement in one of the newspapers published in Chicago, and make a deed to the purchaser; and out of the proceeds of sale, after paying costs of advertising, sale, commissions, and all other expenses of this trust, then to pay the said bonds and coupons, and any additional interest that may have accrued thereon, to the legal holder or holders thereof, rendering the overplus (if any) unto the party of the first part.

"It is stipulated and agreed that, in case of default in any of said payments of principal or interest, or of a breach in any of the covenants and agreements herein, or in any of said

bonds contained, and if said default or breach shall continue for thirty days, then, at expiration of that time, the whole of said principal sums and the interest thereon to the time of sale, shall, at the option of the legal holder or holders of any of the said bonds or coupons, thereupon, or at any time thereafter, as he, she, or they may elect, become due and payable, and the said premises be sold in like manner as if the said indebtedness had matured. And it shall not be necessary for the holder or holders of any of said bonds to give any notice of his, her or their election in declaring said indebtedness due and payable to said party of the first part; but notice to said party of the second part, his heirs, successor or successors, to this trust then acting by virtue hereof, shall be sufficient."

The specific acts of violation of duty on the part of the trustee, insisted upon in argument by the appellee's counsel, and upon which the opinion of the court rests its decree setting aside the sale, are, the not giving personal notice to Blunt, or his agent, Ellithorpe, of the intended sale, or of the fact that the holder of the indebtedness had exercised her option to make the whole debt due, and that the trustee informed the agent of the Princeton Loan and Trust Company of the amount of the debt, and that unless the parties came in and paid the claim, the sale would be made the next day; and that he thought they would not do so.

The maker of this trust deed, by his own voluntary agreement, provided this mode of sale, instead of a judicial one, for realizing from the security the money to pay his debt. Had the sale been a judicial one, the time of its taking place might have been subject to as much uncertainty as the one which here took place; but no actual personal notice to the debtor of the sale would have been necessary; only the public notice required by law would have been requisite. The debtor himself here prescribed the kind of notice which should be given

in case of sale—it was not personal notice, but notice by advertisement in a newspaper. To say that a further personal notice was required by implication, would be to annex a condition to the power of sale, which the maker of the power did not see fit to provide, and the court would be making a contract for the parties, instead of enforcing the one made by themselves.

The deed of trust did not require any notice to be given to the debtor himself, by the trustee or any one else, of the exercise of the option to make the whole indebtedness due; at the most, it only contemplated that such notice should be given to the trustee.

The maker of the deed of trust knew that such a contingency was liable to occur at any time during a default of payment; and if he had wished personal notice of it to himself to be a condition precedent to the exercise of the power of sale, he should have so provided by his deed.

To add to the power, by implication, such a condition, might wrongfully disappoint the expectation of the creditor. The creditor, as well as the debtor, had an interest in the execution of the power of sale. The terms and conditions upon which it should be exercised, were arranged by their mutual agreement. According to the contract made by the parties, the creditor was not to be subjected to a longer delay than forty days before he could realize from the security any arrear of payment. To require a personal notice to the debtor, who, at the time, might be in distant or unknown parts, might create a very inconvenient delay in the collection of a claim evidently intended by the parties to be speedy; and the creditor might well have refused to accept a security trammeled with such a condition.

However proper the giving of personal notice by the trustee to the debtor, of the sale, or of an exercise of the option to made the whole indebtedness due, might have been, we could not hold it to be a condition precedent, to be complied with, in order to a valid exercise of the power of sale.

We do not perceive the force of the objection, that the trustee informed Reed, the agent of the company, of the amount of the indebtedness upon the property. The complaint is not that the information was, in any respect, false or misleading, but it is insisted that such information should not have been given at all. Surely the statement of the amount of the debt to the public, in the published notice of sale, would not be held to affect the validity of the sale. Why, any more, should the statement of the same by the trustee to an individual inquirer? We do not see the propriety, or the advantage, of any concealment in such matter. Were there any breach of duty involved, it would seem to be in withholding, rather than in giving, such asked for information. That such conduct, as is said, amounts in substance to a bargain between the trustee and the purchaser, that if he would bid so much he could take the property, we fail entirely to see.

Nor do we regard the statement of the trustee, that unless the parties came in and paid the claim, which he did not think they would do, the sale would be made the following day, as any more a violation of his duty than the statement as to the amount of the debt.

The charge of fraud in this case is not sustained by proof.

It appears, from the evidence, that when Wright & Tyrrell, the agents of Mrs. Gurley, applied to Scoville to proceed and make sale of the property, they informed him they had had trouble in collecting interest, and wished the property could be sold to some person, so they could get the money, and not be obliged to bid in the property. Some days previous, Scoville had been applied to by one Henry C. Reed, of Princeton, a person connected with the Princeton Loan and Trust Company, for information in regard to the investment of several thousand dollars the company wished to make, either by the purchase of property or securities, and was requested, if he found any such opportunity, to inform W. K. Reed, who would be in Chicago; and it was on that account Scoville spoke to W. K. Reed, who was the president of the company, about

the property and the sale. Mr. Reed doubting whether, under their charter, the company could purchase the property, except in payment of a debt, concluded to purchase the securities, and did so, for their face and interest, for the company, and bid in the property for the company, for the full amount of the claim and costs.

Wright & Tyrrell seem to have had no other end in view, than the faithful collection of the interest due to their principal, for whom they were acting.

The purpose, on the part of Reed, appears to have been none other than the making of an investment in good faith for the exclusive benefit of the company of which he was an officer, which he did, by a fair purchase of the securities, and fairly bidding off the property at a public sale.

The trustee, in calling the attention of Reed to the approaching sale, acted rather in the interest of the owner of the property than otherwise, in inducing attendance at the sale, and he had also called the attention of one or more other persons to it; and although he might, perhaps, with much propriety, have done more than he did, to bring home to the owner actual notice of the sale, he gave all the notice he was required to give, by the terms of the trust confided to him.

The circumstance, that, after the sale, one of the legal firm of which Mr. Scoville was a member, was employed to obtain possession of the property for the company and collect rents, is entitled to very little weight as showing that Scoville had any interest in the subject of the purchase.

The decree of the court below setting aside the sale must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

*Decree reversed.*

## WILLIAM B. JARVIS

*v.*

## JOSEPH W. SHACKLOCK *et al.*

1. CONTINUANCE—*absent witness.* It is not error to refuse a continuance where the affidavit fails to state that the party has no other than the absent witness by whom he could prove the facts relied on by the party.

2. SAME—*illness of counsel.* Where a case was called, and passed because of the illness of counsel, and nearly three weeks afterwards the case was again called for trial and a motion was made for a continuance by defendant because his counsel was sick, and the court can see that a fair trial would be prevented by illness of counsel, the case should be continued; but where there are no questions of law, but simply a question of fact, and the evidence is in a small compass, and another attorney could be readily informed of the character of the case, and the defendant was himself an attorney, it is not error to refuse a continuance.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. J. P. ATWOOD, for the plaintiff in error.

Messrs. JOHNSTON & ROGERS, for the defendants in error.

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

We are asked to reverse the judgment in this case, because the motion for a continuance and the subsequent motion for a new trial were both overruled. The continuance was asked on two grounds: the absence of a witness and the illness of defendant's counsel. As to the first, it is only necessary to say that the affidavit does not state the defendant had no other witness by whom he could prove the facts stated in his affidavit as completely as by the absent witness. As to the illness of counsel, it appears that the case was first called on the 25th

of November, and then passed because of the illness of defendant's counsel; that it stood over until the 12th of December, when defendant was notified by plaintiff's counsel that the cause would be called the next day, and the application for continuance was then made.

Illness of counsel would certainly be a good cause for continuance where the court can see that a fair trial is likely to be prevented by such illness, and the party moving for a continuance has shown no unreasonable carelessness. But this suit is of the simplest character. Its trial involved no question of law, and but one of fact, to wit: whether certain property had been sold through the agency of the plaintiffs. The evidence is in a small compass, and a few minutes' conversation between the defendant and counsel would have enabled any practicing lawyer to try the case as well as if he had been engaged in it from the beginning. The defendant, as appears by the record, is himself a lawyer, and must have perfectly understood that no preparation would be necessary to try a case of this character for any lawyer competent to practice at all.

The motion for a continuance was properly overruled.

The only ground urged in this court in support of the motion for a new trial is, that the verdict is against the evidence. As to that, it is only necessary to say that the evidence is conflicting, and the verdict is not so clearly against its weight as to justify us in reversing the judgment on that ground.

*Judgment affirmed.*

## LEWIS C. HARE

*v.*

## FREDERICK STEGALL.

1. PAYMENTS—*how applied.* Where a debtor owes a creditor several debts, and makes payments, he has the right to direct their application to any one or more of the debts he may choose; but if he makes payments and gives no directions, then the creditor may apply them as he may choose; and when such payments are made, and neither party makes the application, the law will apply them in the manner most advantagous to the creditor, as it will be presumed he would, had he made an election, have so applied them.

2. Where a creditor holds two debts against another, and one is secured and the other is not, and payments have been made by the debtor, and there is no evidence that he directed their application, and no evidence of how they were applied, it will be presumed that they were credited on the debt for which he held no security.

3. RENT—*distress—abandonment of premises.* Where a tenant removes from or abandons the leased premises, the statute gives the landlord the right to distrain for rent due, and also for that to become due. Nor will it affect the landlord's right if the tenant gives notice that he intends to leave. He can not, by such means, deprive the landlord of his right to distrain.

4. REPLEVIN—*distress for rent.* The action of replevin may be brought to try the legality of a distress for rent, provided there is no sum whatever due for rent; but if any sum, however small, is due, and the distress is for a greater sum, or is excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by case.

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

Mr. T. G. FROST, for the appellant.

Messrs. MCCOY & CLOKEY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of replevin to recover the possession of personal property taken under a distress warrant for rent. The declaration is in the usual form, to which the defendant

pleaded *non detinet*, a plea of property in the defendant, and a plea of justification under a distress warrant for rent due to Joseph H. Bloomfield, issued to appellant to execute, against appellee, and which was levied on the property in controversy. To these special pleas replications were filed, traversing the defense set up therein, and a further replication that appellee was expelled from the premises by the landlord. Issues of fact were formed, and a trial had by the court and a jury, and the issues were found for the plaintiff. A motion for a new trial being overruled, judgment was rendered on the verdict, and the record is brought to this court on appeal.

From the evidence, we entertain no doubt that there was due the landlord some rent. Whether the last installment was due or not, it satisfactorily appears that a portion, perhaps not less than $100, was unpaid on the first installment. It is contended that this may have been a balance on the purchase of property, and not for rent. Appellant swears that a portion of what was paid was applied to that account, and if specific directions were not given when the payments were made, as to the manner it should be applied, the creditor had a right to appropriate it to whichever debt he chose. Appellee did not pretend that he directed the payments to be applied to the debt for articles purchased. It is natural the landlord, having security for the rent by lien on crops and other property, would, unless otherwise directed, apply payments to the debt not secured, until it was extinguished. And if no appropriation was made by the parties, the law would apply it to the debt not secured, on the ground that, in the absence of any direction, the presumption would be that the creditor, having a right to choose to which it should be applied, would appropriate it in the mode most advantageous to him.

Again, when the writ was served, appellee admitted to the officer that he owed Bloomfield, but insisted only that the amount was too large. He also made this admission to several other persons. He knew whether the money was due for rent, and that the distress was made for it as rent. He then

made no pretense that it was not due. He must have known that the landlord could only distrain for rent, and had the sum been due on some other account he would no doubt have said what he owed was not for rent, and the distress was wrongful. But he did not place it on such grounds, but simply that the distress was for too much.

If, however, in this we should be wrong, appellee had abandoned the premises, and under the 9th section of chapter 40, Revised Statutes, the landlord had the right to distrain for the remainder of the rent, whether it was, or not, due. We think, from the entire evidence, it was due on the 1st of January, and the distress for all of the rent unpaid was properly made upon the ground that it was due. That section of the statute declares that, "In case of the removal or abandonment of the premises or any part thereof, by such tenant, all grain or vegetables grown or growing upon any part of the premises so abandoned, may be seized by such landlord, his agent or attorney, before the rent is due." It further provides that the landlord may cultivate growing crops or vegetables until matured, and hold the property thus seized until the rent shall become due, when it may be sold as in other cases of distress. This section manifestly gave the landlord the right to distrain, after appellee abandoned the premises, for any rent due or to become due. This section authorizes the seizure of matured crops or vegetables, as well as those that are still growing. Nor would it deprive the landlord of this right by being informed that appellee intended to remove. No inference can be drawn, from such knowledge, that the landlord loses his lien and right to distrain. Nor did the mere fact that the landlord's cattle may have trespassed upon him, absolve him from the payment of rent. It may be that it gave him the right to maintain trespass, but it did not amount to such an ouster or dispossession of appellee as would release him from payment of rent.

It is said in Chitty's Pleadings, Vol. 1, p. 188, 6th Am. Ed., that replevin "may be brought to try the legality of a distress

for rent, provided there were no sum whatever in arrear; but if any sum, however small, were due, and the distress were for a greater sum, or excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by action on the case." We have seen that there was some rent due, and if so, this rule of law is conclusive of the action of replevin. Appellee has misconceived his remedy, and inasmuch as there was rent due, this action could not be maintained, and the judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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## THE CITY OF CHICAGO

*v.*

## JOHN JONEY.

1. EMPLOYERS—*liability of, for acts of servants and contractors.* The city of Chicago, having contracted with parties for deepening the Illinois and Michigan canal under the supervision of its own engineer, and subject to his orders, is liable for damages caused by the negligence of its contractors. In such case, the doctrine of *respondeat superior* applies.

2. CORPORATION—*official acts.* Though the act required the assent of the board of trustees of the canal to the work proposed by the city of Chicago, no formal meeting of the board, in its corporate capacity, was necessary. The written or verbal assent, or mere acquiescence of its members, was sufficient to the purpose of charging the city with consequences growing out of possession.

APPEAL from the Criminal Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. M. F. TULEY, I. N. STILES and JOHN LEWIS, for the appellant.

Mr. T. R. MORAN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case against the city of Chicago, in which the defendant was found guilty and the damages assessed at fifteen hundred dollars, for which judgment was rendered.

The declaration charges that the defendant was lawfully engaged in the work of deepening the Summit division of the Illinois and Michigan Canal, and performed the work so negligently and unskillfully as to create obstructions of stone and earth in the canal; and while plaintiff was lawfully navigating the Summit division with his canal boat "Hiawatha," through the negligence of the defendant in causing such obstructions, the plaintiff's boat was injured and sunk, and he damaged to the extent of three thousand dollars.

Appellant admits the plaintiff was damaged in the manner alleged in the declaration, and to the extent found by the jury —fifteen hundred dollars—but denies the damage was occasioned by the negligence or default of the defendant. This is the only question in the case: Was the injury to plaintiff's boat caused by the negligence of appellant?

Appellee places the liability of appellant on the act of the general assembly of this State, approved February 16, 1865, entitled "An act to provide for the completion of the Illinois and Michigan Canal upon the plan adopted by the State in 1836."

The preamble to this act discloses its object and purpose, which was for the special benefit of the city of Chicago by feeding the canal from Lake Michigan, and thereby producing a current of water strong enough to purify and cleanse the Chicago river. The first section of the act provides that, to secure the completion of the Summit division of the Illinois and Michigan Canal upon the original "deep cut" plan, with such modifications and changes of line, if necessary, as will most effectually secure the thorough cleansing or purification of the Chicago river, and facilitate the execution of the

work, the city of Chicago, through its constituted authorities, may at once enter into an arrangement with the board of trustees of said canal, with a view to the speedy accomplishment of the work. Laws of 1865, sec. 1, page 83.

It is clear, the central object of this legislation was the benefit to accrue to the city of Chicago; all else was subsidiary to that. It was a Chicago enterprise, to be carried out if an arrangement could be made with the board of trustees of the canal, in whose care and control it had been placed by the act of 1843, and to hold and manage the same in the interest of those parties who had advanced to the State their money for the completion of the canal on the "shallow cut" plan, and who held the bonds of the State as evidences of indebtedness therefor. It was necessary they should be consulted as holders of this security, and some satisfactory arrangement made with them before the canal could be entered upon.

The case turns on the question, was any valid arrangement made with this board? Appellant denies there was any such arrangement.

It appears that, soon after the passage of this act, the common council of the city of Chicago, on the 5th day of June, 1865, passed an ordinance entitled "An ordinance for cleansing the Chicago river," appropriating bonds therefor, and authorizing the board of public works to arrange for widening and deepening the canal.

On the 29th of August following, the board of public works of Chicago, at a meeting of the board, passed a resolution requesting the board of trustees to permit the city, through its board of public works, to deepen the canal between the Chicago river and Lockport, according to an indicated plan.

This request was met in a friendly spirit by the trustees individually, who separately, and a majority of them, out of the jurisdiction of this State, gave their assent, on the 4th day of September, 1865, to the proposed enlargement, upon certain conditions not material to the present inquiry. This assent

was in writing, signed by the trustees, and spread upon the records of the board.

The question is, was this such an arrangement as justified or authorized the city to enter upon this work?

Appellant insists, as the board of trustees were constituted by law a body corporate, they could not act individually, but only as a board at a legal sitting. This may be true in regard to many acts that board might be called upon to perform, but this was not one. The act cited does not require the board of trustees to hold a meeting in order that their consent might be expressed, but it simply requires an arrangement should be entered into with them by the city. A mere verbal assent on the part of the trustees would suffice. They are not complaining of any infringement on their rights. It is sufficient to show the city were not trespassers in entering upon the canal; that they entered by the permission of those having the care and control of it. The act of the legislature gave the city full power to enter with the consent of the board of trustees. Even if it should be thought the separate signing of the assent by the individual members of the board was not sufficient, it might be replied, to obviate the charge, the city was a trespasser; that the assent of the board might be implied from the character of the entry and the notorious object and purpose for which the entry was made, the board making no objection thereto, but acquiescing therein for several years. We are of opinion appellant had legal possession of the canal in virtue of the act cited, for the purposes contemplated by that act.

Consequent on the passage of this act and the assent so given, or "arrangement" so made with the board of trustees, the city entered into a contract on the 1st of September, 1868, with certain parties for deepening several sections of the Summit division, among which was section 21, where the injury happened to plaintiff's boat.

It is insisted by appellants, and it is their second point, that under this contract the contractors were not servants of the

city, but independent contractors, and alone liable for damage occasioned by the manner in which the work was done.

Were Fox, Howard and Walker independent contractors, and not the mere servants of the city?

Portions of the contract are found in the record, in which it appears the city retained a supervisory control over the work, and had power to dismiss any person employed by the contractors on the work, and the dismissions of the board of public works, who represented the city, were final and conclusive in every case that might arise under the contract. Here was dependence—serviency in the contractors, and for their negligence the doctrine of *respondeat superior* must apply.

By the contract, the entire work was to be under the immediate direction and superintendence of the city, through the board of public works. The principle is well settled, when a contractor is under the direction and control of his employer, the employer is liable for the negligence of the contractor. Without multiplying the citation of authorities on this point, it is sufficient to refer to *Schwartz* v. *Gilmore*, 45 Ill. 456, and *Chi., St. Paul & Fond du Lac Railroad Co.* v. *McCarthy*, 20 ib. 385.

The proof shows that the canal was dredged at the point where the accident occurred, at the very time and in the manner that appellant directed it should be done.

That dredging was so negligently done as to form a reef of earth and stone, on which appellee's boat struck and was damaged.

The third point raised by appellant is, that the city, in this work, was acting as agent of the State in executing a public work for the public benefit, and can not, therefore, be liable in this action.

The facts stated in the preamble to the act of 1865, show conclusively that this enlargement of the canal was a suggestion of the city of Chicago, and recommended for the only purpose of cleansing their river, which had become, by reason of having no current, a nuisance. The act of 1865 bears on

its face the impress of benefit to Chicago, and nothing more. That was the moving cause, as we infer, for the passage of the act. The city was in no sense the agent of the State.

We think the finding and judgment right, and affirm the same.

*Judgment affirmed.*

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JOHN A. RICE

*v.*

THE CITY OF CHICAGO.

SPECIAL ASSESSMENTS *in the city of Chicago—of the certificate of publication.* Certificates of publication of notices of the meeting of the commissioners to make a special assessment, and of the application to the common council for confirmation, stated that the notices had been published six days consecutively, Sundays and holidays excepted, giving the date of the first but not of the last publication: *Held*, the certificates were within the case of *Rich et al.* v. *The City of Chicago*, 59 Ill. 286, and were insufficient.

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

This was an application for judgment upon a special assessment warrant, in the city of Chicago.

The certificate of the printer, of publication of the notice by the commissioners of their meeting to make the assessment, was as follows:

"This certifies that the appended corporation notice has been published in the Chicago 'Republican,' the corporation newspaper of the city of Chicago, county of Cook and State of Illinois, six days consecutively (excepting Sundays and holidays) commencing on the 21st day of July, A. D. 1869. Chicago, August 27, 1869.

GEO. D. WILLISTON,

*Publisher and Secretary of the Chicago Republican Co.,*

with seal of said Company hereto affixed."

Notice of application for confirmation states that commissioners will apply to the common council at its next regular meeting to be held on the 6th day of September, 1869. Certificate of publication of said notice states that the same was published * * "six days consecutively, excepting Sundays and holidays, commencing with August 28, 1869. Signed by "Geo. D. Williston, publisher and Secretary of the Chicago Republican Co., with seal of said Co. hereto affixed."

Objections to the sufficiency of these notices were overruled, and judgment rendered in favor of the city, from which the defendant appealed.

Messrs. BARKER & WAITE, and Mr. WM. HOPKINS, for the appellant.

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Per CURIAM: This is an appeal from the judgment of the Superior Court, of the March term, 1871, rendered upon a special assessment warrant, on the application of the collector of the city of Chicago. The assessment was for the extension of Franklin street, from Madison to Adams.

This record presents but two points worthy of consideration, and they are fatal to the judgment. These are, that the city collector was not authorized to apply for judgment, and that the certificate of the printer, of publication of the notice by commissioners of their meeting to make the assessment, and of application for confirmation, was insufficient. These certificates are in the precise form as in the case of *Rich et al.* v. *City of Chicago*, 59 Ill. 286.

The judgment is reversed and the cause remanded

*Judgment reversed.*

Syllabus.

## THE PEOPLE OF THE STATE OF ILLINOIS

*v.*

## TIMOTHY BRADLEY.

1. HABEAS CORPUS—*service of the writ.* Where a writ of *habeas corpus* is applied for and issued in open court, in the presence of the person to whom it is directed, having custody of the prisoner, and the fact was known to him, and the writ could have been handed to him had he desired it, that he might make his return: *Held*, this amounted to an acceptance of the service, and a waiver of a delivery of the writ to him.

2. SAME—*void writ.* It may be conceded that, if a court has no jurisdiction to issue a writ of *habeas corpus ad subjiciendum* in any case, the writ would be void, and the person to whom it is directed would not be bound to obey it, and would not be in contempt by refusing so to do.

3. JURISDICTION. The criminal court of Cook county is but the continuation of the recorder's court of the city of Chicago, with extended territorial jurisdiction and enlarged criminal jurisdiction, but with its civil jurisdiction between citizen and citizen taken away.

4. SAME—*constitutional jurisdiction.* The 26 sec. Art. VI of the constitution of 1870 provides that, the recorder's court of the city of Chicago shall be continued and called the "Criminal Court of Cook county," and shall have jurisdiction in all cases of criminal and *quasi* criminal matters arising in the county of Cook, or which may be brought before it pursuant to law; but it shall have no jurisdiction in civil cases, except those on behalf of the people: *Held*, that this provision of the constitution is self-executing, and operated on the court as soon as adopted.

5. When the constitution declared that the recorder's court shall be continued, it was intended that it should be with all of its powers, authority and jurisdiction, except in purely civil cases between citizen and citizen, which was thereby taken away; and the statute fixing its terms, providing for selecting jurors, etc., still remained in force.

6. SAME—*habeas corpus.* The recorder's court had jurisdiction of the writ of *habeas corpus ad subjiciendum*, being a prerogative writ, and essential to the liberty of the citizen, and secured by constitutional and legislative enactment, and as where a prerogative writ is given by the common law to the courts, amendments of the constitution continuing such courts will not be deemed to take away such writs, unless the intention to do so at least fairly appears.

7. It has been held in English courts, that the prerogative writ of *certiorari* will not be deemed taken from the court unless expressly mentioned; and the same rule has been applied to the writ of *habeas corpus.*

Syllabus.

8. SAME—*constitution.* There is nothing in that section of the constitution which amounts to a limitation of the general power of the court to issue the writ.

9. HABEAS CORPUS—*its nature.* The writ of *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed a prerogative writ, and as to the subject, it is deemed a writ of right, that is, such an one as he is entitled to *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment. The prerogatives of the crown of England are here vested in the people, and they have, as he has, the right to know through it why the liberty of any citizen is restrained, and for what he is confined. For this reason it is sued out in the name of the State or the people. In legal contemplation, the people, in all cases of wrongful detention, are concerned in having justice done. It is an inquisition by the government at the suggestion and instance of an individual, but still it is done in the name and capacity of the sovereign. It follows that such a case is within the very exception, limiting the jurisdiction of the criminal court in civil cases.

10. The writ is of undoubted common law origin, and the King's Bench having general, civil and criminal jurisdiction, had jurisdiction of the writ in all cases, but other courts having only civil jurisdiction until the adoption of the act of 16 Car. II, were supposed to have but a partial jurisdiction of it, as in the case of an officer or suitor, etc., in that court, but if he were committed in a criminal matter, these courts could only have remanded him or taken bail for his appearance in the court of King's Bench.

11. CIRCUIT COURTS—*jurisdiction.* The circuit courts of this State possess an original common law jurisdiction in criminal cases answering to that of the King's Bench, and they would have had jurisdiction of the writ had our *habeas corpus* act never been passed, and all of that jurisdiction is expressly conferred, by the constitution of 1870, upon the criminal court of Cook county; and the person whom relator held in confinement was under a criminal charge, and the court had jurisdiction to issue the writ, as he was charged with an offense bailable under our statute; nor does it make any difference that the crime was charged to have been committed in another State, as the cause was brought before the criminal court within the language of the constitution.

12. PROCESS—*service.* The statute provides that any process which may be issued by the clerks of the circuit courts of the State, or any judge thereof, in pursuance of law, shall be executed by the officers or persons to whom directed; and the circuit courts shall have power to punish all contempts offered to them when sitting as such, and for disobeying any of its process, rules or orders issued or made conformably to law, and there is undoubted common law authority to punish as a contempt for disobedience of the writ of *habeas corpus.*

Statement of the case.

13. COURT—*jurisdiction.* The court having jurisdiction of both the *habeas corpus* and the attachment, and having heard evidence as to the service of the writ of *habeas corpus* and disobedience of its command, the determination of the criminal court on these matters is conclusive. The evidence heard below can not be properly brought before this court in such a case. In its absence it will be presumed that it showed a service of the writ, and such a wilful disregard or evasion of the writ as amounted to a contempt of court.

This was an application to this court in term time for a writ of *habeas corpus*, by the relator, M. C. Hickey, in the name of the people, to be discharged from imprisonment. It appears that a warrant was issued by a justice of the peace of Cook county, for the arrest of one Eli Brown, on a charge of having committed burglary in the State of Indiana. The proceeding was under our extradition statute.

Brown was arrested by relator, and whilst in his custody, Brown, on the 15th day of August, 1871, applied to the criminal court of Cook county for, and obtained, a writ of *habeas corpus*, which was served by delivering him a copy of the same. Hickey, on the 17th of the same month, produced Brown in court as commanded by the writ, and the proceeding was dismissed. Brown at once applied for a new writ, which was ordered to issue by the court, which was done, and Hickey was ordered by the court to remain with the prisoner until a new writ could be issued. He did not leave until the writ was issued and read to him by counsel for Brown; the court thereupon adjourned until half past two o'clock in the afternoon of that day, and upon the court coming in, Hickey did not at that time produce the body of Brown when the court met, but filed exceptions to the writ, which were overruled by the court. Relator states, in his petition, that about fifteen minutes after the court met, Brown was arrested by one Lanigan, under a warrant issued by a United States commissioner. He also alleges that the arrest by Lanigan was not by his connivance, privity or procurement.

On being required to make return to the writ of *habeas corpus*, Hickey protested that he had not been served with the

writ, but returned that Brown had been forcibly taken from his custody by Lanigan under a writ issued by the commissioner.

The court thereupon entered an order against Hickey to show cause why he should not be punished for a contempt of court in failing to obey the writ of *habeas corpus*. He appeared and entered a motion to set aside and quash the order, but the motion was overruled. He then filed a return and affidavits in answer of the rule, but the return was not received by the court as a discharge of the rule, but, after hearing the evidence, ordered an attachment to issue against Hickey. The writ was issued, directed to the sheriff of Cook county, who arrested him, and this petition was filed to procure this writ to release him from custody.

The case was heard by the court on the foregoing facts, which appear from the petition, return and exhibits filed therewith.

Mr. EMERY A. STORRS, for the relator.

Mr. JOHN LYLE KING, for the respondent.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is a proceeding upon *habeas corpus* issued out of this court upon the application of Michael C. Hickey, alleging that he was unlawfully imprisoned by the sheriff of Cook county. The sheriff has returned, as the cause of the caption and detention of the relator, an attachment issued by the criminal court of Cook county against him for a contempt in failing to produce the body of Eli Brown upon a writ of *habeas corpus*.

The illegality of relator's imprisonment is based upon two grounds: 1st. That the criminal court had no jurisdiction to issue the writ of *habeas corpus;* that it was wholly void, and

therefore he could not be in contempt for not obeying it. 2d. That the writ was not delivered to him, so that there was no such service as bound him to obey it.

We think the circumstances preclude him from objecting to the service. The writ was applied for and issued in open court, while he was present with the prisoner, and then read to relator. The court then took a recess, and was to convene in the afternoon for the purpose of proceeding with the case. All this he well knew, and if he had asked for the writ, to make his return, it is to be presumed that it would have been given to him. But failing to do so, when he was fully cognizant of all the proceedings, will be deemed, under the circumstances disclosed by his petition and the exhibits, an acceptance of service and a waiver of the act of delivering the writ to him.

It may be conceded that, if the court had no jurisdiction to issue the writ of *habeas corpus ad subjiciendum* in any case, the writ in question was simply void, and the person to whom it was directed could not be chargeable with contempt in refusing to obey it. The question of jurisdiction is, therefore, the only one we are called upon to decide in this case.

The criminal court of Cook county is but the continuation of the recorder's court of the city of Chicago, with its territorial jurisdiction extended from the boundaries of the city of Chicago to those of the county of Cook, its criminal jurisdiction enlarged to the inclusion of treason and murder, but its purely civil jurisdiction in all cases between citizen and citizen is taken away.

The first section of the act creating the recorder's court (Scates' Stat. 661) declared that there should be established in the city of Chicago an inferior court of civil and criminal jurisdiction, which should be a court of record, by the name of the Recorder's Court of the city of Chicago, and should have concurrent jurisdiction within said city with the circuit court in all criminal cases, except treason and murder, and of civil cases where the amount in controversy should not exceed

$100. "Said court and the judge and clerk thereof shall respectively have the like power, authority and jurisdiction, and perform the like duties as the circuit court and the judge and clerk thereof, in relation to all matters, suits, prosecutions and proceedings within the city of Chicago, so far as the same are not otherwise limited by this act." The section then proceeds to provide for the election of the judge and clerk, and prescribe their term of office.

The third section declared that the court should have a seal to be provided by the city of Chicago; that it should be held in such place as should be provided by said city.

The ninth section prescribes the qualification of jurors, and the manner of their selection. The tenth section for changes of venue, and the twelfth section for the regular terms of the court.

By a subsequent act (Scates' Stat. 671) it was declared that the inferior courts, which were then or might thereafter be established in the cities in this State, should have concurrent jurisdiction with the circuit courts in all civil and criminal cases, except in cases of murder and treason, any law then in force to the contrary notwithstanding; and that the rules of practice in such inferior courts should conform as near as might be to the rules of practice in the circuit court of the county in which the particular inferior court might be established.

These were some of the statutory provisions relating to the recorder's court at the time of the adoption of the constitution of 1870.

The 26th section of Article VI of that instrument is as follows: "The recorder's court of the city of Chicago shall be continued, and shall be called the 'Criminal Court of Cook county.' It shall have the jurisdiction of a circuit court in all cases of criminal and *quasi* criminal nature arising in the county of Cook, or that may be brought before said court pursuant to law; and all recognizances and appeals taken in said county in criminal and *quasi* criminal cases shall be returnable and taken to said court. It shall have no jurisdiction in civil

cases, except in those on behalf of the people, and incident to such criminal or *quasi* criminal matters, and to dispose of unfinished business. The terms of said criminal court of Cook county shall be held by one or more of the judges of the circuit or superior court of Cook county, as nearly as may be in alternation, as may be determined by said judges, or provided by law. Said judges shall be *ex officio* judges of said court."

This provision, as clearly appears from the context, was intended to be self-executing, and operated upon the court in question immediately upon the constitution being adopted.

The declaration that the recorder's court shall be continued, is to be read in connection with the other parts of the section. When so read, the meaning is apparent. It is continued with all its powers, authority and jurisdiction, except its jurisdiction in purely civil cases between citizen and citizen is taken away. The provisions of the statute fixing its terms, providing for the selection of juries, the attendance of State's attorney and sheriff, and their duties in relation thereto, are still in force. In short, all the machinery through which the functions of the criminal court are exercised, is afforded by the statute creating the recorder's court, or else such functions must be considered as dormant, until the means for their exercise shall be provided by legislation.

That the recorder's court had jurisdiction of the writ of *habeas corpus ad subjiciendum*, there can be no doubt. It is a prerogative writ, great and efficacious in the protection of the citizen in one of the most essential of all his personal rights—his right to liberty. When independence was achieved, all of the prerogatives of the crown of England devolved upon the people of the States, and are usually, though not always, exercised through statutory and constitutional enactments, and where jurisdiction over any of the writs recognized as prerogative has been given by the common law, or conferred by statute, upon any of the courts of the State, amendments of the constitution continuing such courts will not be deemed to take

away the writs, unless the intention so to do at least fairly appears.

It has been repeatedly held, in England, that the prerogative writ of *certiorari* will not be deemed taken from the crown unless expressly mentioned. *Rex* v. *Davis*, 5 Term R. 626; *Rex* v. *Tindal*, 15 East, 339 n. Nor is the rule limited to cases where the crown has an actual interest, but extends to all prosecutions in the name of the king. *Rex* v. *Boultbee*, 6 N. & M. 26, 4 A. & E. 498, 1 H. & W. 713. This rule is one of the many of that great system, the common law, affording the strongest guarantees of the rights of liberty, and from which system we have borrowed much, and to which have really added but little, by means of either bills of rights, or the development of new principles, except in respect to the abolition of imprisonment for debt.

In Crowley's case, 2 Swanston R. 71, Lord ELDON applied the same rule to the writ of *habeas corpus* in the following forcible language: "It is then contended," he says, "that the statute, 31 Car. 2, contains an implied negative of the general power of the court of chancery to issue the writ because it expressly confers that power in particular cases. Be it so; but if the power existed before that statute, a power vesting a very high prerogative in the king, I say that it could not be taken away in any case, by inference, from an enactment which enforced it in some cases. I go farther: if the prerogative of the king can not be affected by general words in a statute, will a British court of justice permit it to be said that a statute designed to enforce, in particular instances, the prerogative in favor of the liberty of the subject, shall deprive the subject of that liberty, in any case?"

But there is nothing in the limitation of the section of the constitution which amounts to a negative of the general power of the recorder's court to issue the writ. "It (the criminal court) shall have no jurisdiction in civil cases, except in those on behalf of the people, and incident to such criminal or *quasi* criminal matters."

Blackstone, in speaking of the writ of *habeas corpus ad subjiciendum*, says: "This is a high prerogative writ, and therefore, by the common law, issuing out of the court of king's bench, not only in term time, but also during the vacation, by a *fiat* from the chief justice, or any other of the judges, and running into all parts of the king's dominions, for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." 2 Bl. Com. 131.

"The *habeas corpus ad subjiciendum* is that which issues *in criminal cases*, and is deemed a prerogative writ which the king may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also, in regard to the subject, deemed a writ of right, that is, such an one as he is entitled to *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption and cause of detention to be returned." 4 Bac. Abr. 564.

"The *habeas corpus ad subjiciendum* (so termed from the language of the writ, to undergo and receive all such things as the court shall consider of the party in that behalf,) issues *in criminal cases*, and is deemed a prerogative writ which the king may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reason he is confined. It is also, in regard to the subject, deemed his writ of right, to which he is entitled *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption and the cause of detention to be returned." 1 Chit. Crim. Law, 120; 2 Tomlin's Law Dict. 63-64.

The prerogatives of the crown of England being here invested in the people, they, in the place of the crown, are entitled to have an account why the liberty of any citizen is restrained, or, in other words, to be informed of the state and condition of the prisoner, and for what reason he is confined.

Upon this ground the writ always runs in the name of the State or the people. The State, in all cases of wrongful detention, is, in legal presumption, concerned in having justice done, and therefore must be a party to the proceeding to remove it. *Wade* v. *Judge*, 5 Ala. 130.

The proceeding in *habeas corpus*, says Mr. Justice Betts, "is an inquisition by the government at the suggestion and instance of an individual, but still in the name and capacity of the sovereign." *Barry* v. *Mercein*, 5 How. 108.

Such being the right of the sovereign, in England, of the people of the States here, and the nature of the writ, it is a case which falls within the very exception contained in the clause limiting the jurisdiction of the criminal court in civil cases. It is substantially a case on behalf of the people, and incident to criminal or *quasi* criminal matters.

The writ is unquestionably of common law origin. 2 Inst. 55, 4 Inst. 290; 2 Hale P. C. 144, 2 Vent. 22; and in Crowley's case, 2 Swanst. *supra*, its origin and the jurisdiction of the high courts of England were discussed by a great and accomplished judge. From that case, and the authorities cited, it appears that the courts of Westminster Hall had a full or partial jurisdiction over the writ, according to the nature of their respective jurisdictions, as respects civil and criminal cases. Hence, the King's Bench, being a court of the highest original jurisdiction in civil and criminal cases, had full and undisputed cognizance of the writ in all cases. The Common Pleas, being a court of civil jurisdiction only, was supposed, prior to the statute 16 Car. 2, to have but a partial jurisdiction of it. If a party were privileged in that court as being, or supposed to be, an officer or suitor of the court, the writ might, at common law, have been awarded from that court. So with the Exchequer. But if he were committed for any criminal matter, those courts could only have remanded him or taken bail for his appearance in the court of King's Bench.

In Jones' case, 2 Mod. 198, an application for the writ was made to the Common Pleas for Jones, who was committed to

prison by warrant from a justice of the peace. "The chief justice doubted that a writ of *habeas corpus* could not be granted in this case, because it was in a criminal cause, of which the court of Common Pleas hath no jurisdiction," and the writ was refused.

In Woods' case, 3 Wils. 172, where the party was in custody under color of civil process, and was a case between subject and subject, the writ was awarded.

If the writ issued out of chancery, and on return thereof the lord chancellor found that the party was illegally restrained of his liberty, he might discharge him; or if he found it doubtful, he might bail him; but then it should be to appear in the King's Bench, for the chancellor had no power in criminal cases. 2 Toml. Law Dict. 64; Crowley's case, *supra.*

The Common Pleas having jurisdiction of the writ so far as concerned its civil jurisdiction, in many cases awarded it, and if it appeared, by the return, that the party was illegally imprisoned, it was held that the court should discharge him, although imprisoned for a supposed criminal matter, because the court could not *salvo juramento suo* remand him to that unjust imprisonment, or, in other words, could not refuse to discharge him. Bushell's case, Vaughan, 155.

This distinction, that the authority of the court over the writ depends upon the nature of the jurisdiction of the court itself in respect to criminal cases, and the nature of the cause of the detention of the person on whose behalf the application is made, is fully recognized in *Ex parte Tobias Watkins,* 3 Peters (U. S.) R. 193. Mr. Chief Justice MARSHALL says: "This application is made to a court which has no jurisdiction in criminal cases; 3 Cranch, 169, which could not revise this judgment; could not reverse or affirm it were the record brought up directly by writ of error." * * "The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the

nature of a writ of error to examine the legality of the commitment." * * "We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control."

The circuit courts of this State possess an original common law jurisdiction in criminal cases answering to that of the King's Bench. Consequently, if our *habeas corpus* act had never been passed, jurisdiction of the writ would have devolved upon the circuit courts by the common law. All of that jurisdiction is expressly conferred by the constitution of 1870 upon the criminal court of Cook county; so that it possesses all of the authority over the writ given by the common law, and the first section of the *habeas corpus* act, R. S. 269.

There can be no doubt but Brown, on whose application the writ was issued in the criminal court, was committed and detained upon a supposed criminal matter. He had been arrested and was detained under a warrant issued on the 14th day of August, 1871, by a justice of the peace, on the oath and complaint of relator, Hickey, charging him with the commission of burglary in the State of Indiana, and with being a fugitive from justice. This was under the statute concerning fugitives from justice, R. S. 262. The 4th section of that statute declares that, whenever any person in this State shall be charged, upon the oath or affirmation of any credible witness, before any judge or justice of the peace, with the commission of any murder, rape, robbery, burglary, arson, larceny, forgery or counterfeiting, in any other State or territory of the United States, and that said person hath fled from justice, it shall be lawful for the said judge or justice to issue his warrant for the apprehension of said person. If, upon examination, it shall appear to the satisfaction of such judge or justice that the said person is guilty of the offense alleged against him, it shall be the duty of such judge or justice to commit him to the jail of the county; or if the offense is bailable, according

to the laws of this State, to take bail for his appearance at the next circuit court holden in that county.

The offense with which Brown was charged was burglary, and which is bailable according to the laws of this State. If bail had been taken, and to give which might have been the object of the writ he sued out, such bail would be required by the very clause of the constitution extending the criminal jurisdiction of the recorder's court, to be taken to the criminal court.

Nor does it affect the question of jurisdiction that the crime with which he was charged was committed in another State. The case for his arrest arose in Cook county. The courts or magistrates here have authority to deal with the person so charged only to a certain extent. Not to try and punish him, but to secure him for extradition. But he is committed and detained for a criminal or supposed criminal matter, within the meaning of the first section of the *habeas corpus* act. The criminal court, says the constitution, "shall have the jurisdiction of a circuit court in all cases of a criminal or *quasi* criminal nature arising in the county of Cook, or that may be brought before said court pursuant to law." The word *quasi* "is a latin word, in frequent use in the civil law, signifying *as if almost.* It marks the resemblance, and supposes a little difference between two objects." 2 Bouv. Law Dict. 411. The word "criminal," as here used to define the nature of the cases of which the court has cognizance, means relating to or having the character of crime. The jurisdiction conferred, therefore, includes every species of case relating to crime, and also such as are regarded by the law *as if* a crime, though a little different, like cases of bastardy. Any such cases, therefore, arising within the county of Cook, or that may be brought before said court pursuant to law, are within its jurisdiction. Besides, it also has appellate jurisdiction over all inferior courts in the county in every case of the nature indicated, wherein an appeal is given by law.

The objection made, that there was no jurisdiction because the crime with which Brown was charged did not arise in Cook county, is untenable. The true questions are: was it a case of a criminal nature, and was it brought before the court pursuant to law? That it was of a criminal nature is beyond doubt, and if the court had jurisdiction of the writ of *habeas corpus*, and one was properly issued and served, then it was brought before the court pursuant to law.

Suppose that, instead of charging Brown with having committed burglary in one of the States or territories of the United States, relator had charged him with having committed such offense in one of the Canadas, and the justice, upon examination, had committed him to jail. That would have been an excess of jurisdiction, and entitled Brown to a discharge upon *habeas corpus*. But would it not have been a case arising in Cook county, and of a criminal nature?

The statute, as we said above, does not purport to provide for the trial and punishment of an offense committed in another State or territory, but only the means of securing the offender. Whatever is done to that end constitutes the case, and it arises where the party is found and proceeded against.

We are clearly of the opinion that the criminal court had authority to issue the writ of *habeas corpus*.

It is declared by statute that, "any process which may be issued by any of the clerks of the said circuit courts, or any judge thereof, in pursuance of law, shall be executed by the officer or person to whom the same shall be directed, in any county or place in this State, in the same manner that process usually is or may be required to be executed and returned; and the said circuit courts shall respectively have power to punish all contempts offered by any person or persons to them while sitting as such, at any regular or special term aforesaid, and for disobeying any of its process, rules or orders issued or made conformably to law." (Gross' Stat. 177.)

There is also undoubted authority at common law to punish as a contempt, for disobedience of the writ of *habeas corpus*. Crowley's case, 2 Swanst. *supra*.

The court below having jurisdiction of both the writ of *habeas corpus* and the attachment, and having heard evidence, both as to the service of the writ of *habeas corpus* and disobedience of its command, the determination of the court below on those matters is conclusive. What that evidence was is not before us and can not be properly brought here in this proceeding. We must presume, in its absence, that it showed a service of the writ, and such a wilful disobedience or evasion of the writ as amounted to a contempt of the authority of the court.

For these reasons the relator must be remanded.

*Remanded.*

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## GEORGE C. HAMMOND *et al.*

*v.*

## HENRY WILL.

1. JUDGMENT—*probable cause.* The judgment of a justice of the peace against the landlord in case of a distress for rent, on the ground that a check had been drawn for more than the sum due, and delivered to, and was still held by, the landlord's agent, but had been offered to be returned to the drawer, and refused, cancelled the rent, is not conclusive of the want of probable cause for distraining.

2. SAME—*as evidence.* A judgment against the landlord, in such a case, is only *prima facie* evidence of probable cause, which may be rebutted.

3. In such a case, where the tenant had abandoned the premises of his own accord and drew a check for a few dollars more than was due for a month's rent, and sent it to the agent of the landlord, with a view of terminating the lease by having it received as the amount due to a date after the month's rent was due, and to thus estop the landlord from claiming rent for the balance of the term, but the agent refused to accept it and offered to return it, and never presented it for payment: *Held*, that these

facts showed probable cause for distraining for the month's rent which was due, and that there were not grounds for maintaining an action for maliciously, and without probable cause, suing out and levying a distress warrant for rent due.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. JONES & GARDNER, for the appellants.

Messrs. HELM & HAWES, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This action was brought to recover damages for maliciously, and without any probable cause, suing out a distress warrant, by virtue of which the goods of the plaintiff were seized.

The jury found a verdict for $800, upon which judgment was rendered.

Cole & Son were agents of Hammond, and rented to Will a house belonging to Hammond. The term did not expire until the 1st of May, 1871.

On the 3d of October, 1870, Will removed from the house, but had given no intimation of it to his landlord or the agents, prior to removal.

On the 10th of October, the agents sent a note to Will, requesting a check in payment of the rent for the month of September. The rent was $45 per month.

Will, in reply, sent the following check:

"*Chicago, Oct.* 12, 1870.

"MERCHANTS' NATIONAL BANK OF CHICAGO,

Pay D. Cole & Son, or order, (for rent due to October 3d, 1870,) forty-nine dollars and fifty cents ($49.50.)

HENRY WILL."

A few days afterwards Cole saw Will, offered to return the check, and demanded one for $45 for the rent of September, but Will refused to do anything more about the matter.

This check was not, in fact, accepted; was never presented at the bank, but was retained by Cole & Son until the trial before the justice of the peace.

The foregoing occurred before the issue of the distress warrant.

Will admitted in his testimony that, when he wrote the check, he had abandoned the house, and that his object was to stop the payment of the rent on the 3d day of October.

The other party surmised this purpose and refused to accept the check in payment, and thus recognize the intended termination of the tenancy.

The fact that Will paid the rent of the premises up to the 1st of May, 1871, corroborates the statement of Cole that the tenancy existed until that time.

All negotiations having failed for settlement of the rent for September, except by the check for $49.50, the distress warrant was issued, and some carpets of the tenant were seized. They were not injured, and were returned by the constable in a few days after the seizure.

Upon the return of an inventory of the property distrained, a summons was issued and served, and a trial was had, and a judgment was given for the defendant, Will.

By this time the rent for October was due, and the tenant paid $40.50, which, with the check for $49.50, completed the payment of rent for the months of September and October.

Was the judgment, rendered by the justice of the peace, conclusive upon the question of probable cause?

This is the position assumed, but no authority is furnished in support of it.

No record of the judgment of the justice was produced, but he was permitted to state that the matter in controversy was the rent for September; and that he decided in favor of the defendant in the suit before him, because a check had been sent for an amount greater than the rent; and as the money might have been obtained, there was no cause of action.

The plaintiff, upon the trial below, did not rely upon the conclusiveness of the judgment of the justice. He introduced all the evidence which had been produced before the justice.

The questions as to the effect of the check as payment, the amount of the rent, and the character and term of the tenancy, were as fully presented on the trial in the circuit court, as before the justice.

The court also, without objection on the part of the plaintiff, instructed the jury that, if the plaintiff abandoned the premises before the termination of the lease, and gave the check in question for the purpose of securing the termination of the tenancy and estopping the defendants from the collection of any further rent, they were not bound to accept such check as payment; and if they did not accept it in payment, they might lawfully pursue their legal remedy for the unpaid rent.

In this case, it would be most unjust and unreasonable to hold that the judgment was conclusive as to the question of rent and the effect of the check. The *gravamen* of the action, in all the counts, is the unlawful and malicious distress of the goods of the plaintiff. This grievance had been committed before the issuance of the summons, and the substantial cause of action, if any existed, was complete without any reference to the trial.

The question therefore is, was there probable cause for the issue of the distress warrant? We are not concluded by the judgment of the justice. At most, it could only be *prima facie* evidence of want of probable cause, and the consequent malice implied by law.

The actions for malicious arrest and malicious prosecution are analogous. The probable cause of action arises in both cases. In malicious civil suits, the discontinuance of the former suit has been held only *prima facie* evidence of want of probable cause.

This was so ruled in *Nicholson* v. *Coghill*, 4 Barn. & Cress. 21, and that the *onus* was thus thrown upon the party who directed the arrest.

In *Webb* v. *Hill*, 3 Car. & Payne, 485, case was brought for malicious arrest, and the discontinuance of the suit was held

to be only *prima facie* evidence of the want of probable cause, because it was the act of the party.

In *Bristow* v. *Heywood*, 1 Starkie, 48, the discontinuance, upon payment of costs, was decided not to be conclusive of want of probable cause, and that its existence was not thereby excluded.

In *Gorton* v. *DeAngelis*, 6 Wend. 418, the court held that want of probable cause must be shown affirmatively, and will not be inferred from the mere neglect to prosecute a suit commenced. See, also, *Sinclair* v. *Eldred*, 4 Taunt. 7.

In *Burhaus* v. *Sandford*, 19 Wend. 417, it was held that the voluntary discontinuance of the suit complained of merely changed the *onus*, and that the defendant had the right still to show probable cause.

Was there probable cause for the distress in this case? If the facts and circumstances are such as to induce the inference that the party was actuated by an honest and reasonable conviction of the right to issue the warrant, then there was probable cause.

It is conclusive, from the testimony, that the lease had not terminated when the check was given; that the rent for September was then due; that the check was not accepted as payment, but was offered to be returned to the drawer, and the proper amount of rent demanded.

The particular language of the check, coupled with the prior and subsequent conduct of the tenant, indicate, unmistakably, an intention, by a trick, and without the consent of the landlord, to terminate the tenancy and prevent the collection of rent in the future.

Under the facts proved, there was probable cause for the issue of the distress warrant, and the plaintiff is not entitled to recover.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

Syllabus. Opinion of the Court.

## SAMUEL S. HAYES
*v.*
## JOHANNA MOYNIHAN.

1. DAMAGES—*excessive.* Where it appeared that a person, desiring to erect a building adjoining the brick house of another, and obtained permission to sink his foundation wall below and partly under the wall of the house, and agreed to pay for all damages the house might thereby sustain, and on putting in his foundation damage was done to the building, in a suit to recover damages for the injury, the evidence being very conflicting on the question of the extent of the damages, the judgment will not be reversed because the damages are excessive, although they may appear to be large.

2. STATUTE OF FRAUDS—*parol promise.* In such a case, the verbal promise does not relate to such an interest in land as brings it within the statute of frauds and perjuries. The promise bound the party making it no farther than did the law, to make compensation for any damage that resulted from laying the foundation of his building as he did.

3. DEMAND—*before suit brought.* In such a case, it is not necessary to maintain an action that an estimate of the damages should have been made and presented to the defendant and payment demanded; it was sufficient that he was notified that the house had been damaged, and requested to pay therefor.

4. INSTRUCTION—*refusal to give.* In such a claim, an item was insisted upon for "risk" in making repairs of the damaged building, and although it should not have been allowed, the judgment will not be reversed because the court refused to so instruct the jury, when the evidence of a number of witnesses place the damages at a larger amount than was found by the jury. The court could only have instructed that the jury should not allow the item unless the evidence showed it to have been a usual and customary charge in making such repairs.

APPEAL from the Superior Court of Cook county; the Hon. WM. A. PORTER, Judge, presiding.

Messrs. ADAMS & BRACKETT, for the appellant.

Messrs. E. & A. VAN BUREN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This case was once before this court, *Hayes* v. *Moynihan*, 52 Ill. 423, where the judgment was reversed for excessive damages.

The cause has since been tried again, with the result of a verdict and judgment $10 less in amount than before.

The action was brought upon an alleged promise of appellant to pay all damages which might be caused to a certain brick building of the appellee, by reason of excavating on her land beneath the foundation wall of her building, and placing thereunder, on her land, the dimension stone of the wall of a brick store appellant was erecting on his adjoining lot.

It is again assigned for error, that the damages are excessive. On the second trial, the testimony presented the case in quite a different aspect from what it did on the former one. The witnesses for the appellee materially enlarged their estimate of the damages, and on their testimony the verdict may be supported; whereas, in the first case, the verdict was not sustained, even by the highest estimate of damages made by any witness. We have carefully examined the evidence in the present record and find it widely conflicting, and that it leaves the extent of the damages done to the building of appellee in much uncertainty; and while we would have been better satisfied with a verdict less in amount, as being a more just one in view of the whole testimony, we hardly think it to be a case which calls for our interference to set aside the verdict of the jury a second time, on the ground of the damages being excessive.

There was no error, as complained of, in refusing to give the first and third instructions asked by appellant, as they were embraced in the ninth instruction which was given for him.

The refusal of the second, fourth, fifth, sixth, tenth and eleventh instructions, asked by the appellant, is assigned as error.

The purport of these instructions was, that the action could not be maintained because the agreement sued on was not in writing.

It is claimed that the agreement respects an interest in land, and is void by the statute of frauds.

It is said the appellant, to be bound by the agreement to pay for damages to the building, must have acquired by it a right that he could enforce to the permanent occupancy of the portion of appellee's land covered by this dimension stone on which the wall of his building rests; that the agreement by parol gave no such right, and so the appellant's promise was without consideration. It is unnecessary to discuss the nature of the interest appellant obtained.

We conceive the statute of frauds has no application here.

Appellee gave appellant permission to lay his dimension stone so as to extend over upon her land, and appellant agreed to pay her whatever damages she might sustain thereby.

He so laid the stone, erected the wall of his building upon it, and has been, and is now, in the enjoyment of its use. He promised to do no more than the law would have compelled him to do if no permission had been given. If he had acted without the license, he would have been liable to an action of trespass for the damage appellee sustained. By force of the agreement, the appellant is liable to pay the damages in an action of assumpsit, instead of an action of trespass. There was ample consideration for the promise, both benefit to promisor, and detriment to promisee.

Appellant's seventh instruction, the refusal of which is assigned as error, was, in substance, that an estimate of the damages should have been made out and presented to appellant, and their payment requested, previous to the commencement of the suit.

We do not regard such previous presenting of an estimate of the damages, as necessary.

Enough appears from the evidence to show that, before suit, appellant was notified of the damage and requested to pay the same. This we deem sufficient in this respect.

It is also assigned for error, the refusal to give the eighth and ninth instructions asked by the appellant, which were to the effect that the jury should not take into account the item of charge for "risk."

Two of the witnesses for appellee, Garnsey and Barrows, gave detailed estimates of the cost of repairing the building of appellee. In Garnsey's estimate is an item, "Risk of $300;" in Barrows' is one, "Contractor's risk, $290." Being called upon to explain this item of "risk" in their estimates, Garnsey says: "Well, it might injure the front wall; there is a certain amount of risk a contractor has to take." Barrows says, "In taking the job I would want something for risk in doing this work. I wouldn't take it at what I thought it would cost actually to do the work; I want something to pay me for the risking of taking that work; I have done a good many such jobs, and I find I get more or less damage on them." In reply to the question, "Is that the usual charge in such cases?" he says: "Yes sir, $290." This is substantially all the testimony in favor of the propriety of such a charge.

There is, in each of the estimates of these witnesses, in addition to the item of "risk," another item of fifteen per cent, contractor's profits.

There was much counter testimony, to the effect that such a charge was not a proper or usual one. It can hardly be said there was no evidence tending to show that this charge of "risk" was not a proper item of the expenses of the repair of the building, and so long as there was any such evidence, although it might be weak, it was for the jury to consider and weigh it, and we can not say that the court erred in refusing to entirely exclude it from the consideration of the jury. The court could not have been required to do more than to say to the jury, that they should not make any allowance on account of that item unless they believed, from the evidence, that it was a usual and customary charge in the making of such repairs.

This charge should not have been allowed as an item of damages, under the evidence.

But there were four witnesses on the part of the appellee, each one of whose estimate of the damages, exclusive of that item, exceeded the amount of the verdict, so that we can not

say that that charge must have entered into the verdict and formed a part of it.

The judgment must be affirmed.

*Judgment affirmed.*

Mr. JUSTICE SCOTT: Being of opinion that the item for "risk" may have been included in the amount found to be due by the verdict, I can not concur in the conclusion reached by the majority of the court.

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## THE CITY OF CHICAGO

*v.*

## DANIEL O'HARA.

1. MANDAMUS—*clerks' fees in criminal cases.* Under statutory provisions, the clerk of the criminal court of Cook county may compel the city of Chicago to pay him his fees in all cases of convictions in that court, and on a refusal, may maintain a writ of *mandamus* to compel their payment.

2. The act of 1865, rendering certain counties liable for such fees, does not embrace Cook county, and that act being special does not apply to fees in the criminal court of Cook county, and the county is not liable for such fees, but the city is, under previous legislation.

3. CONSTITUTION. The constitution of 1870 did not affect the tenure of office of the clerk of the criminal court of Cook county, but when the recorder's court was changed to the criminal court, the clerk was retained in office until the expiration of his term.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. M. F. TULEY, Corporation Counsel, for the appellant.

Mr. JOHN LYLE KING, for the appellee.

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

This was an application for a *mandamus* by the clerk of the criminal court of Cook county against the city of Chicago, to compel the payment of certain fees due to him as such clerk. The act of 1853, creating the recorder's court of that city, provided that the fees of the sheriff and clerk in criminal convictions, where they could not be collected from the defendant, should be paid out of the city treasury. Under that law the jurisdiction of the court was confined to the city, and hence this provision was not unreasonable. The new constitution expressly continues the existence of the court, but extends its jurisdiction over the county. It is now the only tribunal of general jurisdiction for the administration of criminal justice in the county. Under these circumstances, the city claims that the fees which were willingly paid by her when the court was exclusively a city court, should now be paid by the county, the court having become a county court. In this view, it is insisted that the clerk should have sought his remedy against the county.

If there were a general statute requiring counties to pay fees in criminal convictions where they can not be collected from the criminals themselves, there would be some plausibility in the claim that this petitioner should look, in the first instance, to the county. The counsel for the city, in his brief, states this to be the general law of the State, but we know of no such statute. There is a special act, passed in 1865, establishing this rule in certain counties, and by subsequent acts some other counties have been added to the list, but Cook county is not one of them.

There being no general law making counties liable for fees of this character, this petitioner has no legal claim against Cook county, and he must be permitted still to collect his fees from the city, unless the framers of the new constitution intended to leave the clerk to his remedy against convicted

criminals, as is done in all counties in the State except those named in the special acts above mentioned. But this can not be supposed, for it might endanger the very existence of the court by rendering the office of clerk of such little pecuniary value that no competent person would undertake its responsible duties. Outside of Cook county, the collection of fees in criminal cases is of less importance, as the clerks of the circuit court depend chiefly upon fees in civil business. But under the new constitution, the criminal court of Cook county can exercise no civil jurisdiction, and it is well known that in a very large proportion of criminal convictions, costs can not be collected from the defendants. We can not suppose the makers of the constitution intended either to deny to the clerk of this important court a reasonable compensation, or to render it as precarious as it would be if solely depending on fees to be collected from convicted criminals. They expressly continued the recorder's court under a new name, and further provided that the clerk of the court should continue in office until the expiration of the term for which he was elected. As no other mode of compensation was established, and as none of an adequate character existed under the general laws of the State, we must conclude they intended the existing mode should continue until changed by the legislature. We fully agree with the counsel for the city that these fees should now, in justice, be paid by the county, but we are of opinion the clerk has no power to compel such payment, and that the *mandamus* against the city was properly awarded by the circuit court.

*Judgment affirmed.*

## JAMES RIGNEY

*v.*

## DANIEL SMALL *et al.*

1. MORTGAGE—*suit on debt, judgment and sale of the property—foreclosure.* Where a party gave a mortgage on land to secure several notes, and the mortgagee sued on a part of them, obtained judgment and sold the land under execution and it was not redeemed, and the certificate of purchase was regularly assigned through several persons until it came to one who obtained a deed, went into possession and opened a valuable coal mine thereon, and the mortgagor, after nine years from the sale, conveyed the land by quit-claim deed to another person, who filed a bill to redeem: *Held*, that the sale was a foreclosure, and the great length of time before an effort to redeem was made, waived any irregularity, if any existed, in the sale.

2. SALE UNDER EXECUTION—*irregularity—voidable—laches.* Where a certificate of purchase stated the sale was made at four o'clock in the morning, that, if true, would have been ground, if applied for in proper time, for setting aside the sale and awarding a new execution. It rendered the certificate and sale voidable, if the sale was so made, but it was not void. And the holder of the title under the execution sale, having no notice, he would have been protected, but such delay in applying to redeem is laches, and the sale could not be set aside.

3. SALE—*en masse—voidable.* Where property, susceptible of division, is sold *en masse*, the debtor may have the sale set aside if he applies to the court in a reasonable time. Such irregularity does not render the sale void, but simply voidable; but by laches, the debtor will lose the right to have the sale set aside.

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

Messrs. BROADWELL & SPRINGER, for the plaintiff in error.

Mr. G. D. A. PARKS and Mr. S. W. MUNN, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in equity, filed by plaintiff in error, in the Will circuit court, against defendants in error. The bill

alleges that complainant, on the 10th day of April, 1868, recovered a judgment in the Grundy circuit court against Keeffe, for the sum of $4850 and costs of suit, and an execution was issued thereon to the Sheriff of Will county, who levied the same on the southwest quarter of section 5, township 32 north, range 19 east, third meridian, in Will county. The bill alleges that Keeffe has no other property out of which to satisfy the execution.

It is alleged that, in September, 1856, one Philander Morton, and his wife, conveyed the land to Keeffe, who, to secure the purchase money therefor, executed a mortgage thereon to Morton for the sum of $2220; that Morton assigned the mortgage to Henry Fish, and that the same had passed, by successive assignments, to Small, who became the equitable owner of the mortgage and indebtedness; that Fish, whilst he owned the mortgage and notes, sued upon one or more of them and recovered judgment for $103.78 and costs, against Keeffe, sued out execution and had the land in controversy sold thereunder as the property of Keeffe; that the property was purchased at the sale by George W. Morton, who had become the assignee of the judgment, and a certificate of sale was filed in the recorder's office, showing the sale was made on the 25th of September, 1858. The land not having been redeemed, on the 9th day of July, 1865, the sheriff of Will county executed a deed to Small, reciting successive assignments of the certificate of purchase from Fish to him. The bill, in general terms, and without stating facts, charged the judgment to have been fraudulently obtained, the execution, levy, advertisement and sale, irregular, and charges notice thereof to G. W. Morton, who, by the sale, intended to defraud Keeffe out of his homestead.

The bill charges that the property was susceptible of division, and that either forty acres of the quarter was sufficient in value to have satisfied the execution in favor of Fish; that the quarter was worth about $3000; that the sale was made

at a time unauthorized by law, and that it was for an inadequate price; that about the time the sale occurred, Keeffe left the farm and went to Iowa to perform a contract for labor on a railroad, to earn the money necessary to redeem the premises from the sheriff's sale; that he had given to G. W. Morton a chattel mortgage on a large amount of property, which, if it had been properly managed, would have been sufficient to have paid the remaining unpaid purchase money on the land, but was fraudulently converted to his own use by Morton. The bill charges that, if the judgment, execution sale and sheriff's deed are regular, still, Small only holds as mortgagee, and that Keeffe or his assigns have a right to redeem; that Small had opened a valuable coal mine on the land since he received his deed, and had gone into possession.

The bill further charges that Keeffe was embarrassed; that he took a contract on a railroad to earn the money to redeem the land, and had obtained the amount necessary, but through misfortune lost it all and became penniless, and in that condition got to some place in the State of Missouri, when the troubles in the country broke out, and he was, until they ended, unable to return to redeem or to protect his rights in the premises; that, after his return, he being unable to redeem, and being indebted to plaintiff in error, he and his wife, on the 13th of August, 1867, conveyed the premises to plaintiff in error by a quit-claim deed, to aid him in collecting his debt from Keeffe; that plaintiff in error thereupon recovered judgment against Keeffe, sued out execution and had the levy made.

Complainant prays that the deed to Small be set aside and he be deemed a mortgagee, and that the mortgage be decreed satisfied out of the rents and profits received by Small before Keeffe conveyed to complainant, and that he pay to complainant the rents and profits since that date; and that complainant's title be decreed paramount; and that the judgment, execution, sale, mortgage and deed, to Small, be removed as a cloud, and that possession be decreed to complainant.

To this bill a demurrer was filed which was sustained by the court, and the bill dismissed at the September term, 1870. The record is brought to this court and errors are assigned thereon questioning the correctness of the decree.

It is urged that the bill charges the judgment, execution and sale were fraudulent, and the exhibits are referred to as showing in what the fraud consisted. On examining the execution, levy and return of the officer, we can perceive nothing irregular or fraudulent in them. They all seem to conform to the statute. On examining the certificate of purchase, we find that it recites that the sale was made by the sheriff on the 25th day of September, 1858, at four o'clock in the forenoon. If the sale was made at that hour of the day, it was contrary to the statute, and that formed ground for setting aside the sale and awarding an alias execution. The statute has declared that all such sales shall be made "between the hours of nine in the morning and the setting of the sun of the same day." And the same section, after prescribing all the regulations for the sale, and for a punishment of the officer for disregarding them, provides that no such offense, or any irregularity on the part of the sheriff, shall affect the validity of the sale unless it be made to appear the purchaser had notice of the irregularity.

This, then, would have cured all defects unless it be the time of the sale, and there is not the slightest pretense that Small had notice of any other. And under these provisions, it is apparent that such irregularity does not render the sale void, but only voidable. Until the notice is brought home to the purchaser, the law presumes the sale valid and effectual. And there can be no question that all objections to a voidable sale may be waived. Thus it has been held, in such cases, that a party, to avoid a sale, must proceed to do so in a reasonable time. Laches, in such cases, will bar the party of equitable relief. In this case, the defendant in execution must have known of the sale and satisfaction of the judgment against him, and he will be presumed to have known of this

defect, if one existed in fact. The probability is strong that the sale was made as required by the statute, and a mistake occurred in filling a blank certificate, as the sheriff is presumed to have understood the requirements of the statute; and had he designed to aid in defrauding the defendant, he would have, in all probability, made his certificate in due form. Nor does the bill charge that the sale was made at the hour named. It was only ground for setting aside the sale if other rights had not intervened, reviving the judgment and awarding an alias execution against him. Knowing this, he slumbered on his rights, neither moving the court to set aside the sale before the redemption expired, nor by doing any other act for nearly nine years, and then he merely releases his claim to plaintiff in error, and no suit is brought until in May, 1869, more than ten years and a half after the sale was made.

Here is a case where the parties have acquiesced in a judicial sale for a greater period than would have formed a bar, with the performance of the other requirements of the statute, to a suit in ejectment, under at least two limitation laws of the State. The defendant, by his indifference and non-action, treating the sale as valid, and apparently accepting the credit given him by the sale for so many years, must have been satisfied with the result of the proceeding. He never offered to restore plaintiff in execution to his rights by doing any acts, until, by the growth of the country, the property has no doubt greatly appreciated, and large sums, we may infer, have been expended upon the land, as the bill alleges a coal mine has been opened by Small which has rendered large profits. To permit Keeffe to lie by and be governed entirely by circumstances for nine years, whether he would treat the sale as a satisfaction of his debt, or would declare the sale voidable and recover the property, would be highly inequitable and devoid of justice. He should, if he desired to avoid the sale, have acted in a reasonable time and before innocent persons had acquired rights; and having failed to do so, he must be held to have waived all irregularities and to have ratified the sale.

The sale *en masse* is but an irregularity. If there was such an irregularity in this case, it was merely ground for having the sale set aside. It did not render it void, but only voidable. And all we have said in reference to the time of sale, applies for the same reasons to this objection. And the assignee of Keeffe can not occupy a better position than his assignor, as he took the property precisely as Keeffe held it. Small had a right to suppose, after such a length of time, that Keeffe had elected to ratify the sale and claim that the judgment against him was satisfied, and having purchased under such circumstances, it is but reasonable and just that he be protected in the purchase. There was, therefore, no error in dismissing the bill in the court below, and the decree is affirmed.

*Decree affirmed.*

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## TYLER, ULLMAN & Co.

*v.*

## THE WESTERN UNION TELEGRAPH COMPANY.

1. TELEGRAPH COMPANIES—*their duty and liability.* A telegraph company is a servant of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is, to transmit correctly the message as delivered.

2. SAME—*of restricting their liability by contract—necessity of repeating messages.* Where a party, desiring to send a telegraphic dispatch, is required by the company to write his message upon a paper containing a condition exonerating the company from liability for an incorrect transmission of the message unless it shall be repeated, and at an additional cost therefor to the sender, it is held that such a restriction, even if it be regarded as a contract, is unjust, without consideration, and void.

3. Nor is such a restriction upon the liability of the company relieved of its objectionable character by a stipulation in the contract that the company will insure the accurate transmission of the message by a special agreement to be made, in writing, with the superintendent of the company, the amount of risk to be specified in the contract and paid at the

time of sending the message. Such a provision would not be available to persons in localities were there was no superintendent, and would occasion inconvenient delay even where such officer could be found.

4. It is against public policy to permit telegraph companies to secure exemption from the consequences of their own gross negligence, by contract. So, notwithstanding any special conditions which may be contained in a contract between a company and the sender of a message, restricting the liability of the former in case of an inaccurate transmission of the message, the company will still be liable for mistakes happening by their own fault, such as defective instruments, or carelessness or unskillfulness of their operators, but not for mistakes occasioned by uncontrollable causes.

5. SAME—*whether a contract exists is for the jury to determine, not the court.* Whether a paper furnished by a telegraph company, containing conditions and restrictions in respect to the liability of the company in case of an incorrect transmission of messages, and upon which a message is written and signed by the sender, is a contract or not, depends upon the fact whether the sender had knowledge of such conditions and restrictions and assented thereto; and whether or not such regulation was brought to the notice of the sender so as to fix knowledge upon him, is a question of fact to be determined by the jury, and not by the court. Slight evidence of assent will, no doubt, suffice, but it is for the jury to determine.

6. SAME—*burden of proof.* In an action against a telegraph company to recover damages resulting from an alleged incorrect transmission of a message, if the plaintiff prove the inaccuracy of the message, the company, to exonerate themselves, must show how the mistake occurred. In the absence of any proof on their part, in that regard, the jury must presume a want of ordinary care on the part of the company.

7. SAME—*of disclosing to the company the importance of the message.* A telegraphic message was sent from Chicago to New York, as follows: "Sell one hundred Western Union. Answer price." It was *held*, the dispatch sufficiently disclosed to the operator the nature of the business so as to inform him of the importance of its correct transmission. But be a message of great or trifling importance, the company are bound to transmit it literally—at least to use the highest degree of care and skill in their efforts to do so.

8. SAME—*duty of the receiver of the message.* The receiver of a telegraphic message is not required to telegraph back to ascertain the correctness of the message. The company is bound to send the message correctly in the first instance.

9. MEASURE OF DAMAGES—*in case of an incorrect transmission of a telegraphic dispatch.* A party in Chicago delivered to a telegraph company, in that city, a message, directing his banking house in New York to sell

one hundred shares of a certain character of stocks, which amount was then held by the banking house for a customer. The message, as delivered in New York, directed the sale of *one thousand shares*, and thereupon the party receiving the message sold that amount, having to go into the market to buy the residue: *Held*, if the sender of the message was compelled to, and did, purchase nine hundred shares of the stock to replace that so sold by reason of the carelessness of the company in transmitting the message, and that, in the interval between the selling one thousand shares and the repurchase of the nine hundred shares to replace the extra number of shares sold, that stock had advanced in price, this advance, in an action against the company, would be the measure of damages.

10. INSTRUCTION—*of it being based upon evidence.* It is not essential that there should be direct testimony upon a point in order to afford a proper basis for an instruction,—it is sufficient if there are circumstances from which the fact involved may be inferred.

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

Messrs. ROGERS & GARNETT, for the appellants.

Messrs. DENT & BLACK, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit to recover damages of the Western Union Telegraph Company for alleged carelessness in transmitting a dispatch for appellants from Chicago to the city of New York. The delivery of the message at the company's office in Chicago to the operator there, by one of the plaintiffs, is alleged, and proper averments of negligence and carelessness on the part of the company are found in the declaration, and proper averments of damage. The defendant pleaded non-assumpsit, with notice of special matter.

It appears the message was written on one of the blanks prepared by the company, which contained the following stipulations:

"In order to guard against and correct, as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be *repeated* by being sent back from the station at which it is to be received, to the station from which it is originally sent.

"Half the usual price will be charged for repeating the message, and the companies will not hold themselves responsible for errors or delays in the transmission or delivery, nor for the non-delivery of *repeated messages*, beyond two hundred times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid at the time of sending the message. Nor will these companies be responsible for any error or delay in the transmission or delivery, or for the non-delivery of *any unrepeated message* beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated hereon and paid for at the time.

"No liability is assumed for errors in cypher, or obscure messages, nor for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and these companies are hereby made the agents of the sender of this message to forward it over the lines extending beyond those of these companies. No agent or employee is allowed to vary these terms or make any other verbal agreement, nor any promise as to the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through the whole course of this message on all lines by which it may be transmitted."

The message when written, and as delivered to the operator at Chicago, read as follows:

"Dated CHICAGO, Oct. 29, 1866.

"To J. H. WRENN or A. T. BROWN:

Sell one hundred (100) Western Union. Answer price.

T. U. & Co."

As delivered to Wrenn, in New York, the message read as follows:

"Dated CHICAGO, ILL.

"To J. H. WRENN, care GILLMAN, SON & Co.:

Sell one thousand (1000) Western Union. Answer price.

T. U. & Co."

It is averred in the declaration that Wrenn understood the words "one hundred Western Union" to mean one hundred shares in the Western Union Telegraph Company, which number of shares, it appears, the banking house of plaintiffs was then carrying for a customer. On receipt of the message, Wrenn sold one thousand shares of this stock, and to do so, was obliged to go into the market and purchase nine hundred shares, to replace which he had to buy on a rising market the same number of shares, so that the difference in the selling and buying price amounted to seven hundred and twenty-nine dollars and seventy-seven cents, which amount was wholly lost to the plaintiffs.

The court, on its own motion, having refused instructions asked by plaintiffs, charged the jury as follows:

"The dispatch in question, in this case, being sent upon one of the printed blanks of defendant, the printed heading of that blank constitutes a contract between the parties, by the terms of which both parties are bound; and as one of these terms is, that the defendants are not liable for any errors in the transmission of an unrepeated message beyond the amount paid for sending the same, the plaintiffs can only recover that amount, with interest on the same, from the time it was paid to this time, in this suit. Transmission means all that happens between the receipt of the dispatch here from the plaintiffs, and its delivery to them in New York."

It was admitted the message in question was not repeated.

The jury found for the plaintiffs, assessing their damages at two dollars and sixty cents, being the cost of the message, with interest.

A motion for a new trial was overruled and judgment rendered on the verdict, to reverse which the plaintiffs appeal, and make several points, one of which is the refusal of the instructions asked by them on the trial of the cause.

Those instructions are as follows:

"If the jury believe, from the evidence, that the dispatch sent by Tyler, Ullman & Co. to John H. Wrenn, on the 29th

day of October, 1866, was erroneously and negligently read by the operator in Chicago, and that said dispatch was transmitted to said Wrenn in the words as received by him, on account, and as the result of such erroneous and negligent reading by the operator in Chicago, then the verdict must be for the plaintiffs if they suffered pecuniary loss by such error and negligence."

"If they believe, from the evidence, that the dispatch sent by Tyler, Ullman & Co. to John H. Wrenn, on the 29th day of October, 1866, was correctly transmitted from Chicago to New York, and was correctly received in New York at the office of the said defendants, yet if they believe, from the evidence, that said dispatch, although correctly received by defendants, was erroneously and negligently transcribed by their agents in New York, and was delivered by said agents to said Wrenn so erroneously and negligently transcribed, and that such error caused any pecuniary loss and damage to the plaintiffs, then the verdict must be for the plaintiffs."

"If they believe, from the evidence, that a mistake was made in transmitting the message through the gross negligence of defendants, or their servants, and that plaintiffs suffered damage by reason of such mistake in transmitting said message, the defendants are responsible for such damage, although the jury may believe, from the evidence, that plaintiffs used one of the forms of defendants, having the terms printed at the top, as shown by the form copied in the notice accompanying defendants' plea, and that said plaintiffs assented and agreed to such terms, and did not require said message to be repeated, or its correct transmission insured."

"That plaintiffs were not bound by the terms printed at the top of the forms commonly used by defendants, as set out in the form copied in defendants' notice accompanying their plea, if they delivered their message to defendants for transmission by telegraph, and defendants accepted it for that purpose, without plaintiffs' consent or agreement to be bound by such terms."

These instructions, in connection with that given by the court, open up the merits of this controversy, and we have given to the questions raised by them full consideration. It is a case of the first impression in this court, requiring us to examine all the authorities cited, and such others as were within our reach, and we find them not entirely harmonious. It is contended by appellants that telegraph companies are common carriers, and under the same common law liabilities.

In the earlier cases reported they were so held. *McAndrew* v. *The Electric Telegraph Co.* 33 Eng. L. and E. R. 180, decided in 1855. It was also held they could restrict their liability by contract, and that the paper containing the message, signed by the plaintiff, which was identical with the one in this case, was such contract.

They were also held to be common carriers in *Parks* v. *Alta California Telegraph Co.* 13 Cal. 422, decided in 1859. The counsel for the company argued against this proposition, and contended that the rules of the common law governing common carriers did not apply to telegraph companies. He insisted they could not be regarded as insurers, for the reason that a message is without value. The court said there was no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other, is, or may be, attended with the same consequences; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it, in both respects, is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules.

Strong reasons might be urged in favor of holding these companies to the severe liability of common carriers, but the current of authority at this time is not, as admitted by appellants, in that direction. Whilst their liability is held to be

analogous to that of common carriers, who are insurers of the safe delivery of the articles intrusted to them, it is considered, in view of the means employed by telegraph companies to transmit messages, and their liability to sudden accidents which can not be foreseen and provided against, to hold them as insurers of the safe delivery of every message intrusted to them would be too rigid a rule. Cases so holding, hold, nevertheless, that they are liable for a failure to exercise the highest degree of diligence and skill in the performance of their duty.

The case of *Rittenhouse* v. *The Independent Line of Telegraph*, 44 N. Y. 263, is one of this description. There it was held, the failure to transmit a message in the form in which it was received by the operator, was *prima facie* negligence, for which the company is liable, and the *onus* is on the company to show the mistake occurred by no fault of their own.

This case came up from the court of common pleas, and is reported in 1 Daly, 547, and was an unrepeated message.

To the same effect is *New York and Washington Printing Telegraph Co.* v. *Dryburg*, 35 Penn. 298. This action was in tort, and brought by the receiver of the message. The court say, the wrong of which the plaintiff complained consisted in sending him a message different from that which they had contracted with LeRoy to send. That it was a wrong, is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is intrusted to them, their obligations, as far as they reach, spring from the same sources—the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is, to transmit the very message received.

They further say, the company claimed that their operator was a skillful and careful one. Then his negligence in this instance was the more apparent and inexcusable.

In *Elwood et al.* v. *The Western Union Telegraph Co.* 45 N. Y. 549, the court said, the agent was placed in the office and in the control of the instruments to use them in transmitting messages for a compensation. If the agent performed the duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to, and does repose, in the care with which the proprietors of these lines conduct the business, is a source of large remuneration to such proprietors. They have a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instruments of deception and fraud.

Another class of cases holds these companies are bound to the exercise of reasonable diligence and skill. *Washington and N. O. Telegraph Co.* v. *Hobson & Son*, 15 Grattan, 122. In this case the declaration did not allege negligence on the part of the company, and one instruction that the defendants were not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, was not authorized by the pleadings, and was properly refused.

In *Ellis* v. *The American Telegraph Co.* 13 Allen, 226, the court said, it would be manifestly unreasonable and unjust to annex to a business of such a nature the liability of a common carrier, or to require that those engaged in it should assume the risk of loss and damage arising from causes the operation of which they could neither prevent nor control. But, although they ought not to be held to such a standard of diligence, they are not exempt from all responsibility for a want of fidelity and care in the exercise of the employment which they undertake to carry on. There can be no doubt that, in the ordinary employments and occupations of life, men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the

conduct of their own business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph. The court then comments on the efficacy of the regulation of the company requiring a message to be repeated, and hold it is a reasonable regulation.

In *Western Union Telegraph Co.* v. *Carew*, 15 Mich. 525, the court say, this is not a case which calls upon us for laying down the rules which must be held to govern as to the degree of skill, care and diligence to be required in the transmission of messages. But, doubtless, the use of good apparatus and instruments would be required, and reasonable skill and a high—perhaps the very highest—degree of care and diligence in their operation. And when an error has occurred in the transmission of a message, it may be found that they ought to be held *prima facie* guilty of negligence, the *onus* of proof resting upon them to show diligence, the means for doing this being peculiarly within their knowledge and power.

Other cases on this point might be cited: *Birney* v. *New York and Washington Telegraph Co.* 18 Md. 341; *Breese et al.* v. *U. S. Telegraph Co.* 45 Barb. 275.

All these cases hold, as do the following, that these companies may limit or modify their common law liability by stipulations, such as given in evidence in this case. *Wann* v. *Western Union Telegraph Co.* 37 Mo. 472; *Camp* v. *Western Union Telegraph Co.* 1 Met. (Ky.) 164. This last case holds, when a message is not repeated, it will be regarded as sent at the risk of the sender, and the company will not be liable for damages resulting from a mistake not occasioned by negligence or the want of skill of the agents of the company.

An examination of the decided cases shows that the law applicable to telegraph companies is in an unsettled condition.

It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one

under which appellees defended, is a reasonable regulation, and amounts to a contract.

We are not entirely satisfied with the conclusions announced in some of these decisions.

Whether the paper furnished by the company on which a message is written and signed by the sender, is a contract or not, depends on circumstances. In an analogous case in this court, *Adams Express Co.* v. *Haynes,* 42 Ill. 89, and in *Ill. C. R. R. Co.* v. *Frankenberg et al.* 54 ib. 88, it was held, the simple delivery of a receipt to the shipper is not conclusive upon the latter. Whether he had knowledge of its terms and assented to its restrictions, is for the jury to determine as a question of fact upon evidence *aliunde,* and all the circumstances attending the giving the receipt are admissible in evidence to enable the jury to decide that fact. The receipt given by the company, in this case, was declared on its face to be a contract, and was as full for such purpose, in the terms employed, as is the form in the case now before us. It was a question for the jury in that case, but in this case the court undertook to determine the question and decide the fact. We think this was error.

We do not see why the same rule, in this respect, should not apply to telegraph companies as is applied to express companies and railroad companies. In regard to the latter, it is always held, whether or not such a regulation was brought to the notice of the shipper so as to fix knowledge upon him, to be a fact for the jury. *Brown* v. *Eastern Railroad Co.* 11 Cushing, 97. Slight evidence of acceptance, or assent to such regulation, would, no doubt, suffice, but it is for the jury to determine.

In the various and somewhat conflicting decisions of the courts on the questions presented, we are inclined to hold, admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators.

The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred. This proof was not in the power of the plaintiffs, and was in the power of the defendants. In the absence of such proof, the jury would be authorized to presume a want of ordinary care on the part of the defendants.

If the error was caused by atmospheric disturbances, or a momentary displacement of the wires, the defendants knew it, and ought to show it. In the absence of any proof on their part, the jury should be told the presumption was, a want of ordinary care on the part of the company. The court, however, refused to instruct the jury that the company was liable for gross negligence. It is the settled doctrine of this court that a railroad company can not purchase exemption from gross negligence, or protect itself against such; that it would be against public policy so to contract. We see no reason why the rule should not be the same in regard to telegraph companies, for they are, like railroads, public institutions, having duties to perform to the public.

On general principles, we must hold the company, notwithstanding the special conditions relied upon, is responsible for mistakes happening by their own fault, such as defective instruments, or carelessness or unskillfulness of their operators, but not for mistakes occasioned by uncontrollable causes. *Sweatland* v. *Illinois and Mississippi Telegraph Co.* 27 Iowa, 433.

This company sought the patronage of the public in the exercise of their employment, and assured that public they would use at least ordinary care and diligence in their business, both as to their instruments and as to the skill of their operators. It can not be claimed the contract in question was designed to relieve them from that, nor should it. They assure the public they have the most approved instruments and employ skillful operators, and they further assure the public that due care and diligence shall be exercised in conducting their business. If the conditions relied upon were designed to shield the company from consequences flowing from a want

of skill of operators, or insufficiency of instruments, which would be gross negligence, such a condition would be contrary to public policy, and void.

The pretext for imposing the conditions in question is, "to guard against and correct, as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy, etc."

In these "other causes," it can not be allowed to embrace defective instruments or unskillful operators, for the company are bound, by their obligations to the public, to provide the best—certainly, to provide operators of sufficient skill and intelligence, and instruments of the most approved construction. "Other causes" must mean only such causes as appertain specially to the business of telegraphy. Defective apparatus and unskillful operators appertain to business and public employments other than telegraphy. A railroad company can not be excused on failing to employ competent engines, and servants to manage and conduct them and the trains to which they are attached. If a loss happens by reason of insufficient engines, or by the incompetency of their employees, they are liable.

We can not hold that the printed conditions in evidence, in this case, protect this company from losses and damage occasioned by causes wholly within their own control. They must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable.

A point is made by appellees, that the negligence of appellants materially contributed to the loss incurred. This is a question of fact for the jury, and if it is established, they can not recover.

But we fail to discover any evidence of contributory negligence on the part of the plaintiffs. And as to the receiver of the message, it was not his duty to telegraph back to ascertain the correctness of the message. The company was bound to send the message correctly in the first instance.

It is urged by appellees, in their comments on the instructions asked by plaintiffs below, that the first two were properly refused by the court, for the reason there was no evidence on which to base them.

There may have been no direct testimony on this point, but a jury is permitted to infer a fact from circumstances proved to them. It was in proof by John H. Wrenn, and not attempted to be contradicted or questioned, that so soon as he received a telegram from Chicago, which he did on the 30th of October, stating that an error had been committed, and ordering him to cover the extra nine hundred shares, he went immediately to the office of the company in New York and asked them to correct it. They told him the error had not occurred at their office, but in Chicago.

We think the attention of the jury was properly called by these instructions to this testimony, as it was not contradicted. It was in the power of the defendants to show the mistake did not occur at the Chicago office, by producing the original, which was in their possession. This they failed to do.

If the fact was, the error occurred in the Chicago office, then the plaintiffs' right to recover is unquestionable, for there is no excuse for failing to start a message correctly. That fact would show a defective instrument or an unskillful operator, and for this the company would not be exonerated.

Another point is made by appellees, not undeserving notice, and that is, a want of knowledge on the part of the company of the importance or value of the message. It is a sufficient answer to this to say, that, be a message of great or trifling importance, the company is bound to transmit it literally—at least, according to some of the authorities, to use the highest degree of skill and care in their efforts so to do. But the dispatch disclosed the nature of the business as fully as the case demanded. A similar case is reported in 55 Penn. 262, *U. S. Telegraph Co.* v. *Wenger*. The dispatch was, "Buy fifty (50) Northwestern, fifty (50) Prairie Du Chien, limit

forty-five (45)." It was held, this dispatch disclosed the nature of the business to which it related, and that a loss might occur if it was delayed. In this case a great loss has occurred, by incorrect transmission.

As to the point that appellees should have had an opportunity to replace the stock before Wrenn went into the market for that purpose, it is apparent, from Wrenn's testimony, the company had such opportunity, for he testifies he went to them, in New York, and requested them to correct the error. On their refusal, on the pretext that the error occurred at the Chicago office, he then purchased.

We have carefully read and considered all that has been written on the subject of the "Art of Telegraphy" which our libraries can furnish, and we are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed.

In the first place, modern telegraphy is not now an infant art. It sprang into existence from the teeming brain of one, now no more, who had the boldness to attempt to render subservient to the wants of man the most subtle element of nature, and by its mysterious potency convey ideas, wants and wishes to the farthest limit of civilization, and with the speed of its kindred element. In its infancy, it scarcely ever failed to perform its office. Thirty years have witnessed vast improvements in the art—a higher knowledge of the subtle agent called into use—more finished instruments, and almost perfect skill in those who operate them; so that, setting aside atmospheric causes which have not yet been provided against, it may be asserted as an incontestible truth, that, given a line of wire properly established, the most perfect instruments, and skilled operators who exercise their skill with proper care, a message, started at Chicago for New York, is as sure to reach its destination exactly in the words and figures in which it was started, as the lightning is sure to strike the object which attracts it. Intelligent and skillful operators all admit this. There is no reason, the atmosphere being right,

and all else right, why a message, correctly started, should not be correctly transmitted along the line to the end of the line, no matter how many hundred miles asunder may be the point of its departure and the point of its reception.

If this be so, then the efforts made by the courts to excuse those who undertake this business, should not be imitated or encouraged.

Again, it is said by enlightened courts, whose opinions we have quoted, that these forms furnished by the several companies, and they are all alike, when used by the sender of a message, and signed by him, becomes a contract between him and the company, by the terms of which he must abide.

The court told the jury, in so many words, this form signed by appellant was a contract between these parties by which their liability must be gauged. We have, in this opinion, said something on this point—that it was for the jury to determine whether it was, or not, a contract, knowingly executed by the party, with the intention to be bound by it.

We now desire to say, it is not a contract binding in law, for these reasons: Our statute makes it the duty of telegraph companies to transmit all messages committed to them for purposes of transmission, in the order in which they are received. They are bound by law to serve all who apply. They are public institutions, established by public law, and to whom is granted the right of eminent domain. Persons who unlawfully injure or molest, or destroy any of their lines, posts, pins, etc., on conviction, are deemed guilty of a misdemeanor and liable to fine, or imprisonment in the penitentiary, or both. Failing to transmit a message, or suppressing a message, or making known its contents to any one other than the party to whom it is addressed, is deemed a misdemeanor, and punished by a fine not exceeding one thousand dollars.

By section 4 of the act, such companies have the power to purchase, receive and hold such real estate as may be necessary, etc., and may appoint such directors, officers and agents, and employ such servants, and make such prudential rules,

regulations and by-laws, as may be necessary in the transaction of the business, not inconsistent with the laws of this State or of the United States. Laws of 1849, p. 188. This act imposes upon these companies duties to perform to the public, which they must perform *nolens volens*. For their performance they are entitled to a reasonable compensation, the tariff of which they adjust themselves under the power granted by the 4th section. When this tariff is paid by the sender of a message, the duty of the company begins. This payment is the consideration for the performance of its duty in each particular case. On the assumption, then, that it is the duty of the company to transmit correctly the message for which they have received compensation, where, in law, arises any obligation on the part of the sender to repeat the message?

The fact is conceded that a telegraph company is the servant of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is, to transmit correctly the message as delivered. This is conceded. But it is decided by all the courts that a common carrier can, by contract, restrict this liability. The argument is, that the condition for repeating is such a restriction, and being in writing and signed by the sender, is, to all intents and purposes, binding upon him as a contract.

The question at once arises, where is the consideration for this contract? It does not move from the company; on the contrary, they demand of the sender of the message fifty per cent in addition for repeating—for assuring the faithfulness of their own conduct. We fail to perceive any consideration whatever on which to base this so-called contract. It is not a contract of any legal or binding force. This court said, in *Illinois Central Railroad Co.* v. *Morrison et al.* 19 Ill. 136, that a common carrier might restrict his common law liability by a contract fairly made with the shipper. In that case, the contract was special and under seal, and for which the railroad

company paid a valuable consideration by reduction of the freight charges. That was a binding contract for value. The one in question is not so, and does not possess one of the essential elements of a valid and binding contract—namely, a consideration. It is a sham and a delusion, and an imposition upon the public who are compelled to resort to this agency in the transaction of their business.

If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in their corporate greed, might impose, and sign such a paper as the company might present. "Prudential rules and regulations," such as the company is authorized by statute to establish, can not be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions.

But it is said, a special agreement might have been made for insurance, in writing. To do this, the amount of risk must be specified on the contract, and paid at the time of sending the message; and as there is but one person in the world, a superintendent, authorized to make a contract of insurance, he must be hunted up and the terms negotiated—all which requires time—and a favorable opportunity to the sender be irretrievably lost. At Chicago, or other large cities, where a superintendent is supposed to be, there might not be much loss, but we are declaring the law for the whole State, and it is well known that at subordinate, though important stations, on telegraph lines, superintendents are not to be found; this provision is to such perfectly valueless.

As a party, repeating a message, and paying fifty per cent additional therefor, can not recover of the company to the extent of his loss, we are free to say such a contract, forced, as we have shown it is, upon the sender, is, in our opinion,

unjust, unconscionable, without consideration, and utterly void.

The remaining question is, as to the damages. As this case must be tried again, it is necessary some rule should be prescribed by which the damages are to be estimated. As a general principle, every person and corporation ought to make good all damages occasioned by his or their default. But it is not always easy, in cases of this kind, to state a general rule. It has been said, and very properly, that the great difficulty in such cases is, to distinguish between the right to recover and the amount to be recovered—the line dividing these two branches of the law sometimes vanishing entirely. The best reflection we have been able to bestow on this branch of the case, prompts us to say the rule adopted in *U. S. Telegraph Co.* v. *Wenger, supra,* in a similar case, is a reasonable rule.

The message, in that case, ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time it was purchased under another order. The advance in price was held to be the measure of damages.

That message, as this, disclosed to the agent of the telegraph company the nature of the business to which it related —in this case, to sell a certain number of shares of stock.

If appellants were compelled to, and did, purchase nine hundred shares of this stock to replace the stock so sold by reason of the carelessness of this company, and that, in the interval between the selling one thousand shares and the repurchase by Wrenn of the nine hundred shares to replace the extra number of shares sold, that stock had advanced in price, this advance should be the measure of damages. It is reasonable to suppose this is what both parties had in view when the message was committed to the care of appellees.

In looking at these conditions prescribed by telegraph companies, this one in particular—but they do not differ, essentially, from those of other like companies—we are forcibly impressed with the belief that they are designed to relieve

themselves from all responsibility. Content to receive the money of the sender, they design to escape all responsibility. Such conditions are unreasonable, and ought not to receive the sanction of any court.

We have said, and we repeat, that there is no reason, apart from atmospheric causes, why a message should not be transmitted precisely as received. The art is reduced to a certainty. That courts should not be swift to exempt these companies from liability, is a dictate of public policy. To such perfection has the art reached, that, in the last thirty years in which electric telegraphs have been operated, we have been unable to find, among the reported cases in this country and in England, more than fifty instituted against those companies for losses occasioned by their negligence. The messages sent by them in this time, have amounted to millions. Under these circumstances, their bold claim to exemption should meet with no favor from the courts. The doctrine, to benefit the public, must be, as we have endeavored to establish, that a mistake in transmission is *prima facie* evidence of negligence, and the burden is on the company to show the contrary.

If these companies rely upon contracts as restricting their liability, it is incumbent on them to show a valid contract freely entered into by the sender of the message, and for a valuable consideration paid by the company or acknowledged by the sender. But even such contract will not relieve the company from gross negligence.

On the most mature reflection, aided by all the light shed upon this subject, we are at a loss to understand upon what principle telegraph companies should be accorded immunity for their torts, or be relieved from the liabilities voluntarily assumed by them. If they desire to restrict their liability, it must be done by a contract fairly and knowingly entered into, and for a valuable consideration.

Holding these views, the judgment of the court below must be reversed, and the cause remanded for further proceedings consistent with this opinion. *Judgment reversed.*

Syllabus. Statement of the case.

## WILLIAM R. PAGE *et al.*

*v.*

## THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*ordinance.* An ordinance for the curbing "with curb walls where curb walls are not already built" in the designated "portion of Milwaukee avenue," and filling and paving with wooden blocks a portion of that avenue, does not confer any discretion on the board of public works, and it is valid. This case is distinguished from *Foss* v. *City of Chicago*, 56 Ill. 354. In that case, to execute the ordinance required a large discretion on the part of the board of public works, while in this there is none conferred.

2. SAME—*omission to assess property.* Where, in the improvement of a street by special assessment, there was, in the center of the street, a horse railway, and there was no evidence that such railway company was exempt from such assessment, the presumption is, that the track was liable to such assessment, and it was error, on account of its omission, to render judgment on the assessment against other property for the improvement.

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

This was an application by the city collector to the Superior Court of Cook county for a judgment against delinquent lots, on a special assessment to improve a portion of Milwaukee avenue by curb walls and wooden block pavement.

An ordinance was passed, and the assessment made on property deemed benefited; and a portion of the owners failing to pay, this application was made. It appears that a city horse railway runs along the center of the street, and that it was not assessed, nor was there any evidence that it was exempt from such assessment.

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

Mr. M. F. TULEY, Corporation Counsel, for the appellee

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is an appeal from the judgment of the Superior Court of Cook county, in favor of appellee, upon a special assessment warrant.

The objection was urged below, and is made here, that the ordinance under which the assessment was made falls within the decision of the case of *Foss* v. *City of Chicago*, 56 Ill. 354, and is void. So much of the ordinance questioned in this case, as is material, reads thus:

SECTION 1. That Milwaukee avenue, from the east line of Elston avenue and the east line of lot 11, in Harbine & Roman's subdivision of that part southwest of Milwaukee avenue, of the southeast quarter of section 5, town 39, range 14 east, to the southeast line of West Division street, be and is hereby ordered curbed with curb walls, (*where curb walls are not already built in said portion of Milwaukee avenue,*) filled and paved with wooden blocks, (excepting a space of eight feet wide in the middle of said Milwaukee avenue,) from the east line of lot 11, in Harbine & Roman's subdivision of that part southwest of Milwaukee avenue, of the southeast quarter of section 5, town 39 north, range 14 east, to the north line of Augusta street, now occupied by the tracks of the West Chicago Division Railway Company, such work to be done under the superintendence of the board of public works, conformably to the drawings prepared by said board thereto annexed.

It is the opinion of a majority of the court that this ordinance is distinguishable from that in the Foss case, and does not fall within the reasons assigned for holding the ordinance void in that case. There, the exception was as to all portions of the described work which had not already been done in a suitable manner. This left it to the board to determine what had been done in a suitable manner, requiring the exercise of discretion, a power subject to abuse, and which we held could

be exercised only by the council, and could not be delegated to the board. So, in the case of *Bryan* v. *City of Chicago*, *post*, 507, we held an ordinance, respecting the improvement of West Randolph street, void, and as falling within the Foss case; but the ordinance was different from the one at bar. It ordered curb walls to be built along Randolph street "where the same are not already built, and where the same are not now in good, sound condition." This last clause required the exercise of judgment and discretion, but no such words are in the ordinance in question. It simply says "where curb walls are not already built in said portion of Milwaukee avenue." This does not vest the board with any discretion. Anybody who knows what a wall is, could use his eyes and determine the existence or absence of such walls.

There was no evidence in the case tending to show that the Horse Railway Company was exempt from all burdens respecting the improvement of this street. Its property was not assessed, and we think it was competent to prove on the hearing that it was specially benefited by the improvement.

The collector was not authorized to make application for the judgment, and it must be reversed and the cause remanded.

*Judgment reversed.*

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## JACOB SINGER

*v.*

## HENRY F. JENNISON *et al.*

ALLEGATIONS AND PROOFS. Where a bill contains allegations entitling complainant to relief, they must be proved by at least a preponderance of evidence. When the evidence is conflicting, and there is not a preponderance in favor of the bill, or where the preponderance is against the bill, relief should not be granted.

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

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

Mr. JESSE O. NORTON, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This bill was filed by appellant, the complainant below, to enjoin the attempted sale of real estate to satisfy certain notes secured by a trust deed upon the property.

The questions involved are to be determined entirely by the facts.

The complainant claims that the notes were made and delivered to secure the repayment of money advanced; that the money has been repaid, and the notes, having accomplished their purpose, should be cancelled.

On the contrary, the defendants insist that the debt, to secure which the notes were given, has never been paid; and that the trustee was proceeding rightfully to sell the property for satisfaction of this debt.

We have weighed and compared the evidence, with a view to form a correct judgment as to the rights of the parties, and in arriving at a conclusion, it may be best to collate somewhat the testimony.

The facts about which there is no dispute, are, that complainant and one Silverman bargained with the defendants, Stark & Clark, for a distillery, at the price of $15,000; and the complainant executed three notes, payable to the order of Silverman, in twenty, sixty and ninety days from date, and delivered them to Silverman. This occurred in Mobile, Ala., on the 20th of October, though the notes were not then dated. They bear date on the 13th of November following. Soon after this bargain, the complainant and defendant Clark came to Chicago.

The next advance in the progress of this affair was a telegram from the complainant to Silverman, transmitted from

Chicago to Mobile, on the 12th of November, in these words: "Will Stark accept mortgage, twenty thousand, furnish ten thousand if necessary, on (describing the property)? if so, Charles leaves with papers."

Silverman replied, on same day: "Trade closed; papers exchanged. Send Charley immediately with mortgage; have distiller come at once; will be ready to mash on Tuesday; money matters satisfactory."

Between the 17th and 20th of November, the complainant sent the trust deed and notes. The time fixed for the maturity of the notes was not satisfactory, upon their arrival at Mobile.

About the last of November, the complainant, with his wife, proceeded to Mobile; and on the 7th of December the notes and trust deed in controversy were executed.

The distillery was seized by the United States, under the internal revenue law, for non-payment of taxes, and only $440 of the $15,000, the purchase money of the distillery, have been paid; but all the money advanced by the defendants, for the purpose of carrying on the distillery, has been repaid.

The complainant, to maintain his view, testified that the notes and trust deed were not delivered to the defendants as collateral security for the payment of the purchase money of the distillery, but only to secure them for moneys advanced. He also introduced copies of two letters from the defendants, in which they state, substantially, that the claim, to secure which the notes and mortgage were given, had been arranged, and directing that they be returned to the complainant. He stated that Silverman handed them to him, and said that Stark had requested him to do so, and that he suggested to him to leave Mobile and return to Chicago, where he could obtain his papers, as the letters had been sent to the parties who had charge of the papers.

In opposition, both defendants swore positively that the notes and trust deed in question were given as security for the purchase money of the distillery, as well as advances of money.

To the same effect is the testimony of Silverman, the partner of complainant.

Mitchell, a witness without any interest in the suit, testified that the defendants were to advance $5,000 to carry on the business of the distillery; and the complainant was to give notes, secured by trust deed upon property in Chicago, to secure the money advanced, and to be collateral security for the price of the distillery.

Anderson, a lawyer of Mobile, testified that the complainant told him that he and Silverman had purchased the distillery for $15,000, and, to secure payment, had made a mortgage on his property in Chicago.

The conduct of the parties, the dispatches between complainant and Silverman, and the date of the notes given for the distillery, throw some light upon this transaction.

The terms of the bargain having been agreed upon, and the notes having been executed and left with Silverman, the complainant returned to Chicago, accompanied by one of the defendants. Silverman, as he testified, was thus "virtually alone" in Mobile. The money first advanced was upon his responsibility, and he was awaiting a reply to his letter to complainant, to determine the future relation between them.

The reply came in the telegram of November 12th. On the same day Silverman answers: "Trade closed; papers exchanged." The notes given for the distillery bear date on the next day, and the fair inference is, that the bargain was then complete. The notes were indorsed by Silverman, and delivered to the defendants.

They were satisfied, by the telegram, that they could obtain security upon the property in Chicago, and authorized the dispatch to the complainant.

Upon any other hypothesis, what is the meaning of the words, "trade closed; papers exchanged"? They had no reference to the notes and trust deed, for they were not in Mobile—probably not then in existence. They had no reference

to the trade about the property in controversy, for it was not, in fact, closed until the 7th of December afterwards.

They could only refer to the trade about the distillery, which was then closed with a reliance upon the notes secured by the deed of trust upon the Chicago property.

The copies of the letters referred to are susceptible of explanation, and their force very much weakened by a reference to and consideration of the testimony.

Silverman stated that the purpose of showing the letters to the complainant was to compel him to leave Mobile; that he desired his absence, as he had threatened him with prosecutions for violations of the revenue laws; and that the complainant agreed to leave, and said he would consult his lawyer, and if the papers were right, he would accept them. He did consult Anderson, a lawyer in Mobile, and informed him that he was involved in trouble with the United States, but he did not intimate, either to Silverman or to the defendants, any intention of accepting the proposal contained in the copies of letters handed to him.

Stark admitted that he gave to Silverman the original letters to copy, and to obtain the sanction of the complainant; but that he was disgusted with him, and when he learned the nature of his demands, he burned the letters, and had never forwarded them.

This ruse may not have been justified, but, under the proof, it should not be construed as a release of the security, or an admission that the notes and trust deed were not given as security for the purchase money of the distillery.

The allegations of the bill are not sustained by the evidence. The testimony most decidedly preponderates in favor of the conclusion that the notes and trust deed in dispute were given as collateral security for the payment of the purchase money of the distillery.

The complainant has slept upon his assumed rights, and never demanded the trust deed and notes. His conduct was incompatible with the theory of the bill. He never moved in

a matter of such deep interest to him, until the trustee had advertised the property for sale. A prudent man would never have rested until he had obtained possession of papers which evidenced so burdensome an incumbrance upon his property, if it was, in fact, unsubstantial.

As $440 had been paid towards the purchase of the distillery, the trustee must be enjoined from selling for that sum, and ordered to sell for the balance of the purchase money.

The decree must, therefore, be reversed and the cause remanded

*Decree reversed.*

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## THE MERCHANTS' INSURANCE COMPANY OF CHICAGO

*v.*

## ALBERT PAIGE.

1. INSURANCE—*notice.* Where a party obtained from the agent of an insurance company a marine policy on goods, lost or not lost, shipped on a certain day, it appeared the vessel on which the goods had been shipped was lost two days prior to the date of the policy. The defense, in an action against the company, was, that the party procuring the insurance knew of the loss at the time, and failed to inform the agent: *Held*, the fact that the daily papers at the place where the policy was issued, announcing the loss of the vessel, were received at the office of the company on the morning of the day the policy was issued, did not show, necessarily, that the information was received by the company. Moreover, the particular agent through whom the insurance was effected, was the person who should have had the information; and as his business was outside of the office of the company, information at the office was not the same as information to him, or to the company. Nor would notice to one of the agents of the company necessarily import notice to another.

2. WEIGHT OF EVIDENCE—*for the jury.* It is improper for the court to instruct the jury as to the weight of the evidence.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

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

Messrs. SLEEPER & WHITON, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action on a marine policy of insurance issued June 7, 1870, by the appellant, on a quantity of dried fruit, lost or not lost, shipped at Cleveland to the appellee at Chicago, June 3, 1870, on a propeller of the Union Steamboat Company.

The trial in the court below resulted in a verdict and judgment for the appellee.

The fruit was laden on the propeller *Wabash*, which was sunk in Lake Huron on the night of the 5th of June, by a collision.

The insurance was procured by one Stewart, from Atkins, an agent of the appellant.

Previously to procuring the insurance, on the morning of the same day, Stewart had applied to one E. K. Bruce for insurance on the same property, who declined to take it, and at the same time told Stewart that the *Wabash* had sunk, and probably she was the vessel that had the fruit on board.

The ground of defense was, that Stewart did not communicate this information to Atkins.

It was argued on the trial that Atkins, who was absent, would, if present, testify that at the time Stewart applied to him for the policy, he had no information that the *Wabash* had sunk, and that Stewart did not communicate any information to him on that subject.

It seems to be admitted that, if Atkins had possessed this information, Stewart was not required to communicate it to him.

Upon the trial, the court gave to the jury the following instruction on behalf of the plaintiff:

"If the daily papers of this city, containing the news of the disaster to the *Wabash*, were received at the office of the company on the morning of the 7th of June, 1870, a presumption that the news of the disaster reached the defendant in the forenoon of that day might be indulged, unless such presumption is rebutted by other testimony."

We think this instruction is open to the objection of instructing the jury as to the weight of evidence.

The having received at the office of the company the papers referred to, was but evidence tending to show that the news of the disaster had reached the defendant, or its agent, Atkins, and the court should not have instructed the jury as to the weight of the evidence. The jury should have been left free to weigh for themselves the evidence, and determine upon its effect uninfluenced by the opinion of the court.

The evidence shows that the news of the sinking of the *Wabash* had been actually received at the office of the company on the morning in question, and it may be said that the instruction could have done no harm, there being positive proof that such information was actually received at the company's office. But information received at the office of the defendant was not necessarily received by the defendant, so as to obviate the defense here set up. The defendant is an incorporeal entity, which transacts its business by the instrumentality of agents, and notice to one does not necessarily import notice to another of its agents, or to the defendant, so far as this defense is concerned.

Atkins being the particular agent of the company through whom the insurance was effected, he was the person who should have had the information in question. His duties were not within the office, but his business was upon the board of trade, to look up marine risks, where he seems to have been in attendance through the business hours of the day named, and

information at the office of the company was by no means the same as information to him, or, in the language of the instruction, to the "defendant." The instruction was faulty, too, in its being calculated to mislead the jury as to the person who should have had the information, as well as pronouncing as to the weight of the evidence.

For error in giving this instruction, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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## Toledo, Peoria & Warsaw Railway Co.

*v.*

## John Firth.

New trial—*verdict supported by the evidence.* In this case, the verdict being supported by the evidence, a new trial was refused.

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

Messrs. Ingersoll & McCune, for the appellant.

Messrs. McCulloch & Rice, for the appellee.

Per Curiam: This was an action on the case, brought by appellee, in the Peoria circuit court, against appellant, to recover the price of a horse and colt killed by appellant's trains on their road. The cause was tried at the January term, 1871, before the court and a jury, resulting in a verdict and judgment in favor of appellee for $110, from which this appeal is prosecuted.

The evidence warranted the jury in the conclusion that the animals were killed by a train on appellant's road, and that they had been negligent in constructing cattle guards at the

mouth of a lane running to the railroad track, at a place where the law required the company to construct such guards to prevent cattle from getting upon the track of their road.

An examination of the evidence shows that the jury were fully warranted in finding the verdict they did, and the judgment must be affirmed.

*Judgment affirmed.*

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## WILLIAM NOBLE DAVIS
*v.*
## LAURESTON WALKER.

1. JUROR—*competency.* Where a juror answers that he has a fixed opinion on one of the points in issue to be tried, he is incompetent, and it is error to receive him against the objections of the party who challenges him for cause. Such a juror would not be inclined to give due weight to evidence adverse to his preconceived opinion, and is not indifferent between the parties.

2. TEXAS CATTLE—*damages by communicating Spanish fever.* The act of the general assembly assumes that Texas cattle, although free from disease, do communicate disease to other cattle, and whilst it is the duty of courts to enforce the act, it is not a legal presumption that this theory is true. That is a question of fact to be determined by a jury. The act makes the owner of Texas cattle liable for damages sustained from disease communicated by them, but it does not require a jury to believe, without evidence, or that it is a recognized scientific fact, that the disease is thus communicated. The act does not say the jury, in a suit for damages, must accept such a theory as true.

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

Messrs. WHEATON, SMITH & MCDOLE, for the appellant.

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

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court

This was an action brought to recover damages, under the act of 1867, forbidding the introduction of Texas or Cherokee cattle into this State. The plaintiff recovered a verdict and judgment. One of the jurymen, when examined in regard to his competency as a juror, testified that, in his opinion, Texas cattle would communicate disease to native cattle, whether diseased themselves or not. He was objected to as a juror on this ground, but the objection was not allowed.

In this we think the court erred. The juror entered the box with an opinion already formed upon one of the main issues involved in this controversy. That the plaintiff's cattle died not long after the herd of Texas cattle passed along the road to the defendant's farm, was not denied. The question to be determined was, whether the disease which killed them was derived from the Texas cattle or produced by some other cause. If a juror had already a fixed opinion that a deadly malady walked in the footsteps of Texas cattle, though free from disease themselves, it is clear he would almost unavoidably attribute the death of plaintiff's cattle to that cause which he was already satisfied would produce such a result, no other cause being positively shown.

The record shows a good deal of evidence offered and received merely for the purpose of showing that Texas cattle, well themselves, do not communicate disease. This evidence was properly admitted, and yet it related only to the point on which this juror had already formed an opinion. His mind was certainly not in a condition to give it proper weight.

It is true, the act of the legislature, under which this suit was brought, is based upon the theory, assumed as true, that Texas cattle do communicate disease. The legislature, undoubtedly, was convinced this theory rested upon satisfactory evidence, and that the enactment of this law was a necessary precaution. It may have been so, but while it is the duty of

a court to enforce the act, it is not a legal presumption that this theory, in regard to the disease, is true. That is a question of fact which, when it arises, must be left open for the determination of a jury. The act makes the owner of Texas cattle liable for damages suffered through disease derived from them, but it does not require a jury to believe, without evidence, or as a recognized fact of science, that the disease is communicated in the manner supposed. The legislature itself was so convinced on this point, that it prohibited the importation of these cattle into the State, and this, we have decided in another case, it had the right to do, as a measure of prudent police, but it did not seek to say that a jury, in a suit for damages, must accept this theory as true.

We are of opinion this juror was not competent. We find no other error in the record.

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

*Judgment reversed.*

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WILLIAM PETTIS *et al.*

*v.*

CHARLES H. ATKINS *et al.*

1. JOINT STOCK COMPANY—*partnership.* Where a number of persons enter into articles of association for banking purposes, and, without any charter, assume a name, open a stock book, subscribe for shares of stock, and a portion of them pay small sums on the stock, hold meetings, elect directors, publish the names of such directors, none of whom take any steps to inform the public that they do not belong to the association, enter into business, buy and sell exchange, receive deposits, draw bills, and transact business as a bank: *Held*, that all become members of a partnership and are liable as such, and that they may be sued on a draft drawn by the company which is not paid.

2. Although persons may not be, in fact, partners, still they may so act as to become liable to the public as partners, and be estopped from denying a partnership.

3. JUDGMENT—*should be against all.* In an action against the members of a voluntary association, upon a contract, the recovery must be against all or none

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. FULLER & SMITH, for the appellants.

Messrs. HOYNE, HORTON & HOYNE, and Messrs. LEAMING & THOMPSON, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellants in the circuit court of Cook county against appellees. The defendants were named in the declaration and described as partners doing business under the name of "The Mechanics' Savings Bank Association of Chicago." The declaration contained a special count on a draft for $150, and the usual money counts. Pleas were filed, and a trial was had by the court, without a jury, which was dispensed with by agreement of the parties. The court found for plaintiffs against Boggs and Brine, and in favor of Cady, Dow, Baldwin, Gentry, Hedenberg, Chapin and Atkins. A motion for a new trial, entered by plaintiffs, was overruled, and judgment rendered according to the finding.

It appears that on the 30th day of January, 1862, a number of persons undertook to form an association under the name of "The State Savings Bank," as it was called in two places in the articles of association, but in one the word "State" has lines drawn across it, and the word "Mechanics'" is written above it, apparently in a different hand from the body of the writing. On examination we find the names of Boggs, Gentry, Hedenberg, Evans and McPherson signed to these

articles, with the number of shares of stock each agreed to take, opposite their names, and there were five other persons' names subscribed to it who were not named as defendants in this suit. The book containing these articles has no other entry of proceedings of any kind, and, so far as we can see, nothing was ever done under them.

Subsequently, new articles of association were prepared, and during the months of April and May, 1862, Boggs, Gentry, Hedenberg, Evans, Brine and McPherson, signed these new articles, and placed opposite their names the number of shares for which each subscribed. In addition to their names there were signed those of George J. Brine, Charles H. Atkins and James P. Root, in two places, but these names are erased. Also what appears to have been the name of Baldwin, but erased. But we find his name in what is called the stock book, and he is there credited by $10, paid on two shares of stock. We also find the name of Chapin in that book with a credit of $5, paid upon one share, but his name is not signed to the printed articles which were read in evidence, nor are the names of Dow and Cady ; but they, like Chapin's, appear on the stock book, with credits for payment on shares of stock. On the other hand the names of Root, Brine, Hedenberg and Atkins, although signed to the articles, do not appear on the stock book.

One of the remarkable features of the case is, that men holding themselves out to the world as business men of sufficient attainments for bankers, should leave everything in so loose a condition—should organize and attempt to do business in a great commercial city on such scanty means. Unexplained, it has strong marks of fraud, or such recklessness as is as reprehensible as fraud itself.

The evidence shows that meetings were held by the subscribers for stock, a president and directors elected, business commenced and liberal advertisements made soliciting patronage. And what may appear strange to most persons, a failure did not occur for about thirteen months after the bank was opened. And, as any one might readily suppose, debts were

incurred which could not be paid from the small amount of capital paid in by the shareholders.

Alexander and Wilson testify that all of the defendants, unless it might be Chapin, signed the articles of association, and this does not seem to be controverted. Alexander says that the directors had other copies of the articles of association which had signatures, and we may safely presume that those whose names appear on the stock book, but are not signed to the articles read in evidence, signed other copies, and we must suppose that they all knew the effect of entering into such an organization, and in doing so, intended to assume the liability it imposed. Most of them attended meetings, some of them were elected officers, and the names of the officers were published to the world, and no steps were taken by them to contradict the notices thus given, but permitted the public to suppose they were connected with the organization. Having signed the articles of association, except Chapin, they can not be permitted to escape liability. And Chapin, as Alexander swears, attended the preliminary meetings, and paid on one share of stock and was elected a director, and can not be held to be in better condition than his associates.

This organization not having been formed under any statute, it became a voluntary association, like any other partnership, and must be governed by the law regulating that relation. The law is well and uniformly settled that persons may not, as to themselves, be partners, and yet, as to other persons, incur the same liabilities as if they were, in fact, partners. And by signing the articles in this case, by attending the meetings, being elected and published as officers, each of the defendants, from the proof before us, became, if not as to themselves, as to the world, partners.

Some of them say they either went or sent word to Alexander and directed him to strike their names from the articles, but there is no pretense this was ever done, or that legal or other proceedings were adopted to stop the operations of this organization. Even if they could have withdrawn their names

from the agreement so as to release themselves from liability without the assent of the others, which is not conceded, still, their names were not withdrawn. The notice to Alexander was not notice to the public that they repudiated all connection with the concern. One or more of them say they only signed the articles to aid Alexander in starting in business. We can not inquire into the motives which prompted their action in the matter, but can only look to what they did. Having loaned their credit, they must respond to the liability they thereby incurred.

The evidence, as it appears in this record, shows that others than those against whom judgment was rendered signed the articles of association, or were elected directors, or whose names were published as such, and judgment should also have been rendered against them. For this error, the judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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## MICHAEL C. HICKEY

*v.*

## ALFRED U. STONE *et al.*

1. PRACTICE IN CHANCERY—*affidavit.* Where, in a suit for an injunction, there appeared in the record an affidavit of the defendant denying the allegations of the bill upon which the injunction was sought, but the affidavit appeared to have been filed on the day the writ of injunction was awarded, it was *held*, that the practice in this State did not admit of such an affidavit, made out of court, to be thus brought into the record, and such affidavit had no such place in the record as to entitle it to consideration by this court.

2. SAME—*motion to dismiss the bill—and herein of the office of a demurrer.* In chancery, a motion to dismiss the bill has the effect of a demurrer to the bill for want of equity, and such a motion may be regarded as an oral demurrer.

3. The office of a demurrer in chancery is to bring the merits of the case before the court. It admits all the facts well pleaded, and asks the judgment of the court, if, upon the facts so admitted, the complainant is entitled to the relief he asks or to have the matters of the bill adjudged in his favor.

4. The same is the office of a motion to dismiss. It admits the facts alleged in the bill and calls for the judgment of the court upon them.

5. The defendant in an execution issued on a judgment at law obtained against him, filed a bill against the plaintiff in the action at law, who had control of the execution, and the officer in whose hands the execution had been placed, to enjoin proceedings under it. The injunction was granted on the allegations that complainant was not indebted to the plaintiff in the action at law, nor was he under any legal liability to him; that no summons or other process was ever served upon him to appear and answer to the action, nor did he know that an action was pending against him at the suit of such party, which, if he had known, he would have appeared and defended; that the first intimation he had of the suit was the execution in the hands of the sheriff; that the judgment was obtained by fraud and imposition on the court rendering it, and that if a summons issued against him and was returned served, the same was untrue, and was made by mistake or fraud: *Held*, upon the motion of the defendants, it was error to dissolve the injunction and dismiss the bill. The allegations of the bill, which were admitted by the motion to dismiss, presented strong equities in favor of the complainant.

6. OFFICER'S RETURN—*whether may be contradicted.* A party may, in some cases, contest the fact of service of process upon him.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

Mr. JOHN LYLE KING and Mr. WILLIAM DON MAUS, for the appellant.

Mr. C. A. ROBERTS and Mr. N. W. GREEN, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Alfred U. Stone, a resident of Tazewell county, in this State, brought an action of assumpsit in the circuit court of that county against Michael C. Hickey, the complainant herein,

then a resident of Cook county, and recovered a judgment against him for the sum of one hundred and fifty dollars and costs, on which an execution was duly issued and placed in the hands of the sheriff of Cook county to execute.

The complainant filed his bill to enjoin proceedings under the execution, making Stone, the plaintiff in the action at law, and Fisher, the sheriff of Cook county, and Hendricks, his deputy, defendants to the bill.

An injunction was granted on the allegations that complainant was not indebted to Stone, nor was he under any legal liability to him; that no summons or other process was ever served upon him to appear and answer to the action, nor did he know that an action was pending against him at the suit of Stone, which, if he had known, he would have appeared and defended against it; and that the first intimation of the suit was the execution in the hands of the sheriff, and that the judgment was obtained by fraud and imposition on the court rendering it; and the further allegation, if a summons issued against him, and was returned served, that the same is untrue and was made by mistake or fraud.

The prayer of the bill is, that unless Stone consents to vacate this judgment, with leave to complainant to plead any and all defenses, he be enjoined from any further proceedings on the judgment.

An affidavit of Stone appears in the record, as having been filed on the 28th of March, 1870, the day the writ of injunction was awarded, in which he states the time when the suit at law was commenced by him, the return of the first summons not served, and of an *alias* summons returned served on complainant by the proper officer, on the 31st of August, 1869, and stating further, the indebtedness of complainant, and that the judgment is just, and denies all matters and things in the bill alleged, in conflict with the statements in the affidavit.

At the June term, 1870, a motion was made by defendant Stone, to dissolve the injunction, and the same was dissolved, and damages assessed and the bill dismissed.

To reverse this decree, complainant appeals.

The first remark we deem it proper to make, is as to the affidavit made by appellee out of court, and brought into the record. We are not advised of any practice in a court of chancery in this State to allow of such an affidavit, and it has no such place in this record as to entitle it to consideration by this court.

The question now before us is, was the motion to dissolve the injunction and dismiss the bill properly allowed; or, in other words, was the bill destitute of equity on its face?

It has been the practice in this State, for many years, to give to such a motion the effect of a demurrer to the bill for want of equity in the bill. It was said by this court, in *Brill et al.* v. *Stiles et al.* 35 Ill. 308, that a motion to dismiss in such a case might be regarded as an oral demurrer.

The office of a demurrer to a bill in chancery is to bring the merits of the case before the court. It admits all the facts well pleaded, and asks the judgment of the court if, upon the facts so admitted, the complainant is entitled to the relief he asks, or to have the matters of the bill adjudged in his favor.

The same is the office of a motion to dismiss. It admits the facts alleged in the bill, and calls for the judgment of the court upon them.

In this view, we are clear the motion to dismiss the bill should have been denied, for the allegations of the bill, on the admission they are true, make a strong case in favor of the complainant.

The effect of the motion to dismiss was to admit that complainant was not served with process in the action at law; that he did not owe the plaintiff in that action; that the return of the officer on the summons, of service, if there be such, was untrue, and made through fraud or by mistake, and that the judgment was obtained by fraud and imposition.

These facts present strong equities in favor of complainant, and being admitted, the bill should not have been dismissed.

That a party may contest the fact of service of process, is settled in the case of *Owens* v. *Ranstead*, 22 Ill. 161, and has been sustained in subsequent cases. *Brown* v. *Brown*, 59 Ill. 315.

For the error in dismissing the bill, the decree is reversed and the cause remanded.

*Decree reversed.*

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AMOS C. GRAVES

*v.*

FANNIE E. SHOEFELT.

1. JUSTICE OF THE PEACE—*jurisdiction, waiver.* If a person not a justice of the peace were to assume the functions of such officer and issue a writ of replevin, he would be a trespasser; but if the defendant in such writ were to apply to him and procure a change of venue to a person who was a justice, and then proceed to trial before the latter, he thereby waives all objection to the want of jurisdiction and confers it on the officer trying the case, both as to the person and the subject matter, and can not maintain a motion to dismiss the suit on appeal in the circuit court.

2. VENUE—*change of—notice.* It is not error for the circuit court to overrule an application for a change of venue, where no notice of the motion has been given to the other party.

3. REPLEVIN BOND. It is not ground for dismissing a replevin suit, on appeal in the circuit court, that the bond does not correctly state the date of the writ.

4. ERROR *will not always reverse.* A judgment will be affirmed if it is clearly sustained by uncontradicted evidence, notwithstanding the court may have given an erroneous instruction, where it can be seen no injury could result therefrom.

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

Mr. J. D. DUNNING, party in interest, for the appellant.

Opinion of the Court.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an action of replevin, originally commenced, by appellee against appellant, before one D. Iliff, as a justice of the peace, for the alleged wrongful taking by appellant of a sewing machine, the property of appellee.

The case was taken by a change of venue, on appellant's application, from Iliff to Rood, a justice of the peace, before whom both parties appeared, and the cause was tried before a jury, whose verdict was unfavorable to appellant, and he thereupon took an appeal to the Court of Common Pleas of the city of Aurora, and there made a motion to dismiss the suit, on the ground that Iliff was not a justice of the peace, in law or fact, and for want of a sufficient replevin bond, which motion was overruled by the court and exception taken. Appellant, upon the affidavit of J. Dunning, who claimed to be the party in interest, moved for a change of venue on account of the prejudice of the judge. This motion was also overruled. The case was tried before the court and a jury. Upon the trial, appellant sought to justify the taking of the sewing machine by virtue of a landlord's distress warrant issued by said Dunning, for rent due from appellee to him to the amount of $9.

This defense was sought to be avoided by appellee by showing that she was the head of a family, having three children to support, and that the sewing machine was exempt from distress. The jury returned a verdict in favor of appellee. The court overruled a motion for a new trial made by appellant, gave judgment on the verdict, and the case is brought here by appeal.

The grounds for reversal are:

*First*—That the court erred in denying appellant's motion to dismiss the suit.

*Second*—In denying the motion for a change of venue.

*Third*—In giving improper instructions on behalf of appellee, and overruling the motion for a new trial.

The motion to dismiss the suit was properly denied. If Iliff was not a justice of the peace, either *de jure* or *de facto*, he made himself liable as a trespasser, and the writ was void. But by applying for, and taking a change of venue to Rood who was a lawful justice, and both parties going to trial before him and a jury, jurisdiction of the subject matter and the parties was conferred upon that court, to the same extent as if Rood had issued the writ.

By the 66th and 67th sections of the Justices' Act, R. S. 325, the only exception which can be taken in the circuit or appellate court, to the proceedings before the justice, is, that the justice had no jurisdiction of the subject matter of the suit.

The only objection to the replevin bond is, that the date of the commencement of the suit is not correctly recited in the condition, it being "on or about the 3d day of August," whereas the transcript shows that it was the 20th of August. This variance was immaterial. The suit and the property replevied were sufficiently described to give the obligee a complete remedy upon the bond.

The motion to change the venue was properly overruled, because the record fails to show that any notice was given to the opposite party.

The instruction given on behalf of appellee, was as follows:

"If the jury believe, from the evidence, that the machine in controversy was the only implement or means of obtaining a livelihood that plaintiff owned, and that it was used for the purpose of carrying on her trade or business, and that it was not exceeding $100 in value, and that the defendant, Graves, took it from her before the commencement of this suit, the jury should find for the plaintiff."

The objection made to it is, that it did not submit to the jury the question whether or not the plaintiff was the head of a family, or householder. It was defective in this respect, in failing to submit the question whether plaintiff belonged to

the class of persons to whom the exemption is extended. But it appears that she was, in fact, the head of a family, and where it appears by the uncontradicted testimony, as it does here, that the verdict is supported by the evidence, and substantial justice has been done, this court will not reverse for such defect in the instruction.

The judgment of the court below is affirmed.

*Judgment affirmed.*

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## THE WINNESHEIK INSURANCE COMPANY

*v.*

## REGINA SCHUELLER.

1. PROOF OF LOSS—*condition in policy of insurance.* Where the condition in a policy required that, in case of loss, the assured should forthwith give notice and make the required proof within thirty days, and on the occurrence of a loss the assured filled a blank furnished by an agent of the company and swore to the same, thus proving the loss, and handed it to an agent of the company, who only objected to some items in the schedule, which he struck out, and the assured frequently saw and conversed with the agent before the expiration of the thirty days, but no further proof was required nor other objections made: *Held*, that if the proof was insufficient, all irregularities were waived by failing to point out objections to the proof, that they might have been obviated within the limited time.

2. VARIANCE—*proof.* Where the declaration averred a waiver of all objections to the insufficiency of the proof of loss, and the evidence showed that proof was furnished in time and no objection was made to its sufficiency, there was no variance.

3. PROOF OF LOSS—*examination of assured.* The personal examination of the assured, reserved to the company by the conditions of the policy, formed no part of the proof of loss provided by the policy, and it did not matter that such an examination was made more than thirty days after the loss occurred. The right to so examine was a privilege reserved to the company, which they could exercise or not, as they might choose, but was not a duty imposed on the assured.

4. INSTRUCTIONS. In such a case, it is not error to refuse instructions which inform the jury that such a personal examination is a part of the proof of loss required of the assured by the condition in the policy.

5. SUIT ON THE POLICY. The suit on the policy was brought one hundred and four days after proof of loss, and the money was payable ninety days after proof of loss, and it was not error to refuse to instruct the jury that the suit could not be maintained until ninety days after a personal examination of assured, which was less than ninety days before the commencement of the suit, as such examination constituted no part of the preliminary proof of loss, and it was proper to so instruct the jury.

6. WAIVER—*a question of law.* Where certain facts are found to exist, it is then a question of law whether they amount to a waiver, and it is not error for the court to instruct the jury that if certain facts, which amount to a waiver, are found to exist, there was a waiver by the company of further proof of loss.

7. PROPERTY—*title of assured.* Where the policy describes the property insured as averred by the assured, and on the trial a deed, conveying the property to the assured, was read in evidence, and it was proved that assured had been in possession of the property for more than seven years, these facts raise a presumption of ownership in fee in the absence of any objection on the trial to the sufficiency of the proof of title.

8. JUROR—*challenge for cause.* Where a juror, on his examination, states that he has a prejudice against all insurance companies, that it was founded on the fact that he could not comprehend their proceedings, but that the prejudice would not affect his verdict: *Held*, that it was error to disallow a challenge for cause, as he did not stand indifferent between the parties; but it was further held that, as the proof showed that justice was clearly done between the parties, and there could have been no other finding, the judgment should not be reversed for such an error.

9. CHALLENGE—*of a juror subject to be reviewed.* Although such a challenge may be for favor and not for principal cause, still, under our practice, the decision of the court below is not final, but will be reviewed in this court.

APPEAL from the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. J. M. BAILEY and Mr. J. I. NEFF, for the appellant.

Mr. U. D. MEACHAM, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Numerous errors have been assigned for a reversal of this judgment.

It is objected that there is a material variance between the declaration and the proofs.

Every material averment in the declaration must be proved, to entitle a plaintiff to recovery.

One of the conditions of the policy required proof of loss within thirty days after its occurrence.

The declaration avers that, within the time a schedule of the property, with affidavit thereto attached, was delivered by appellee, in person, to the secretary of the company, and that the company then waived any further proofs of the loss, and all conditions in the policy requiring appraisement.

The account of the loss thus delivered was not formally correct. There were omissions of some of the requirements in the condition of the policy. The schedule, however, had a description of the dwelling house and saloon, and a long list of the furniture, etc., burned, and was sworn to before a magistrate.

Were these omissions waived by the acts of the agents of appellant?

It was in proof that, when the secretary was first notified of the loss, he gave to appellee a blank on which to make her proofs of loss. This was filled up and returned to him. He examined it and made no objection to it, except that a few articles were not covered by the policy, and erased them. He retained the paper and did not require any further proof, or the performance of any other act.

During the thirty days, appellee visited the office of the company on different occasions after she had delivered her proof of loss, and no additional requirement was made, and no objection preferred.

But it is insisted that the personal examination of appellee, after the expiration of the thirty days from the fire, was a part of the proof of loss, and that the waiver on the part of the company was only as to information not furnished by the personal examination in connection with the written proof.

The personal examination made by the officers of the company, constituted no part of the proof required on the part of the assured by the condition. It requires that the assured shall make out a written account of the loss within thirty days thereafter and deliver it at the office of the company. This is a duty incumbent upon the assured, which must be performed unless waived. The personal examination is entirely optional with any officer of the company. The assured must submit to it, but can not enforce it. If the corporation desired this personal examination in aid, or as explanatory, of the proofs submitted by the assured, it should have insisted upon it within the thirty days. It can not be permitted to postpone such examination for the purpose of involving the assured in difficulties and entrapping her into a violation of the condition of the policy.

As to the acts of the agents of the company which conduced to waive its rights, the evidence is entirely satisfactory. We are clearly of opinion that it had waived any omissions or irregularities in the proof of loss delivered, and that there is no variance.

Error is assigned upon the refusal of the court to give the twelfth and fourteenth instructions asked by appellant. They involve the question already discussed. They are based upon the idea that the personal examination of the assured, after the expiration of thirty days from the loss, forms a part of the proof referred to in the condition of the policy which must be made by the assured. As we have already said, they are wholly distinct. One must be done, the other may be done. Even if the personal examination at any time might constitute proof of loss, it could never when made after the lapse of the thirty days. The opposite construction would enable these corporations to delay the examination and thus compel a forfeiture of the policy.

According to the view we have heretofore taken of the evidence, there is no force in the objection that the suit was prematurely brought.

According to the terms of the policy, the amount of the loss or damage was not payable for ninety days after due notice and proof. The schedule of the property which was made, and which we hold to have been sufficient according to the evidence, was delivered to the secretary of the company on the 11th day of May, 1870. The suit was commenced on the 23d of August following, making one hundred and four days after the proof of loss.

It was not error to refuse the thirteenth instruction in behalf of appellant. It is founded upon the assumption, which is held to be erroneous, that the personal examination of the assured was a necessary part of the proof of loss.

The first instruction given for appellee was clearly right. It informed the jury that the personal examination was no part of the preliminary proofs of loss. This is the true construction of the condition in the policy. The averments in the declaration did not impose the proof of such examination upon appellee. When she had proved the delivery of the schedule and the acts of waiver, she had made a *prima facie* case as to the proof of loss. She was not bound, as assumed by counsel, to prove the personal examination and all the acts of the company by its officers, in order to constitute a waiver. She need only show acts which were sufficient to convince the jury that the company had waived any irregularity in the proof of loss. When this was done the law did not burden her with the ridiculous labor of accumulating testimony.

The last clause of the instruction is not objectionable. The refusal to submit to the examination was solely a matter of defense. The language clearly indicates this view. It is susceptible of no other construction.

The language of the condition is: "The assured shall forthwith give notice of any loss to the secretary of the company, and within thirty days after such loss shall deliver, at the office of the company, etc., a particular account of such loss;" and then proceeds with particular specifications. The condition

then contains the following: "And the assured shall, if required, submit to an examination, etc."

The requisition for the examination must proceed from the company. The assured must yield to it only upon demand. Upon demand, followed by submission or refusal, then the company may prove the facts. The effect of refusal is not involved in this case, as the assured did not refuse. The examination was had after the expiration of the time in which to perfect proofs of loss, and formed a part of the evidence introduced by the company. It was used, as avowed, merely to show the fact of examination. For the purpose offered, it was wholly immaterial. It might have been used in rebuttal with a view of contradiction, but taken at the time it was, it could not be offered as any part of the preliminary proofs; nor could the bare fact of examination constitute any defense under the circumstances.

Objection is also made to the second instruction, given at the instance of appellee.

It is contended that the court should not have instructed the jury that certain acts, if proved, were a waiver of further proof of loss, and that the instruction should have been that the acts enumerated were only evidence of a waiver. The jury find the facts, and the court determines the law. Whether certain acts have been proved or not, must be ascertained by the jury; whether or not they amount to a waiver when proved, the court must decide.

We have already expressed the opinion that the acts in question did constitute a waiver. The assured was, after the fire, frequently at the office of the company, and in communication with its officers, before the lapse of the thirty days mentioned in the condition.

Good faith required that the company should apprise the assured of any objections entertained before she lost her right to supply defects and omissions. *Peoria Marine and Fire Insurance Co.* v. *Lewis*, 18 Ill. 553; *Great Western Insurance*

*Co.* v. *Staaden,* 26 Ill. 361; *Turley* v. *The North American Insurance Co.* 25 Wend. 374; *Ætna Insurance Co.* v. *Tyler,* 16 Wend. 385.

It is claimed that there was not sufficient proof of title to the property. The averment in the declaration was, that the assured was the owner, and it is contended that this was equivalent to an averment of an estate in fee. Such was its effect.

Did the failure to prove a regular paper title defeat the right to recover?

A deed conveying the property to appellee was introduced and read to the jury. It was objected to at the time, but the objection was properly overruled. It was some evidence of title, and appellee was under no obligation, prior to its introduction, to produce the deed to her grantor.

The evidence shows that the property destroyed was the same as that mentioned in the policy; that the company designated it in the policy as the dwelling house and saloon of appellee; that she was in actual possession at the time of the loss, and had been for seven years prior thereto, and that she held the property by virtue of the deed introduced. On the trial no exception was taken to the parol testimony.

This case was unlike the one referred to by counsel, *Illinois Mutual Fire Insurance Co.* v. *Marseilles Manufacturing Co.* 1 Gilm. 236. In that case the only evidence as to title was, that the defendants in error were the owners of the buildings only, and not the land. In this case there is proof of an actual occupancy.

Appellant asked no instruction as to the insufficiency of the evidence. Its silence dispensed with the production of higher and better evidence. *Clay* v. *Boyer,* 5 Gilm. 506.

The actual possession, accompanied with a claim of the fee, raises the presumption of an estate in fee. *Mason* v. *Park,* 3 Scam. 532; *Brooks* v. *Bruyn,* 18 Ill. 539.

The position of counsel is not defensible.

But it was error to overrule the challenge of the juror, Samuel Askey. He said that he had some prejudice in his mind against insurance companies generally; that his prejudice was founded on the fact that he could not comprehend their proceedings, but that the prejudice would not affect his verdict.

A man may have a prejudice against crime; against a mean action; against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a juror to prejudge an innocent and an honest man.

As to this juror, the feeling he entertained against insurance companies was of a bigoted and reprehensible character. It was not founded upon any knowledge or information of conduct which should condemn them, but merely upon the fact of his inability to understand the proceedings of these corporations. They must then disclose all their operations—open to him all their business transactions—in order to remove his suspicion. His prejudice, based upon the reason assigned, must have been deep-seated, and would necessarily have affected his verdict.

A juror should stand indifferent between the parties. No bias should influence his judgment and swerve him from strict impartiality. It would have required as much evidence to remove his unfounded prejudice as to convince him of the justice of the defense.

The juror said that he had no more prejudice against this than any other company, but that he had a prejudice against all insurance companies. How is it possible that his mind would not be biased, and his determination, to some extent, influenced? It is not necessary that his unfavorable impressions should be so strong that they can not be shaken by evidence. It is sufficient if proof be necessary to restore his impartiality. A party should never be compelled to produce proof to change a preconceived opinion or prejudice which may control the action of the juror.

A preconceived prejudice against a party may be as difficult to remove as an opinion. A prejudice is, in some sense, an opinion.

In Burr's case, Chief Justice Marshall said: "Those strong and deep impressions which will close the mind against the testimony which may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection." 1 Burr's Trial, 416.

The counsel for appellee insists that, as this was a challenge to the polls for favor, and not for principal cause, the judge was selected as the trier, and that his finding is conclusive unless he committed some error of law. Such has never been the practice in this State, and we think it is the better rule, and that it is our duty, to review the action of the court below in all cases as to the competency of jurors.

The question arises, shall the judgment be reversed for this error of the court? Was the company prejudiced thereby?

The rule of this court, established by its earliest decisions and persistently adhered to is, that it will not grant a new trial or reverse a judgment on error on account of the admission of improper, or the rejection of proper, evidence, or for misdirection of the court below, if it appears from the entire record that justice has been done, and that the errors complained of could not have affected the merits of the cause or influenced the action of the jury. *Greenup* v. *Stoker*, 3 Gilm. 202.

The errors assigned are errors of law. We hold that the ruling of the court was right, and the jury were bound to take the law from the court.

The only issue of fact contested was, as to the sufficiency of proof of loss. The waiver of the irregularity in the proof was amply established by uncontradicted proof. The acceptance of the schedule by the secretary, without objection, was a waiver of all omissions in the proof. The testimony of appellee, as well as the secretary of the company, abundantly proved this fact, and it is not contradicted.

The company could not, therefore, have been prejudiced, even if there were a biased juror.

We think the verdict is eminently just, and affirm the judgment.

*Judgment affirmed.*

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## JOSEPH TRIPP *et al.*

*v.*

## EDWARD GROUNER.

1. DISTRESS FOR RENT—*irregularities—case—trover.* Where rent was in arrear, and property was distrained for its payment, and after having the amount of rent due ascertained before a justice of the peace, the constable making the distress sold the property without first having it appraised, as required by the statute, and after a tender of rent and costs, whereupon the tenant brought an action with two counts in case for not returning the property, and one in trover: *Held*, that trover will lie in such a case; that the statute requires the property to be appraised before it can be sold, and the requirement must be observed.

2. DAMAGES—*measure of.* In such a case, after the sale, when the proceeds of the sale are applied to the payment of the rent due, it is error for the court to instruct that the value of the property, when converted, is the measure of damages, as the amount applied to the payment of the rent should go in mitigation, as it was applied to the payment of plaintiff's debt.

3. DAMAGES—*vindictive.* Where an officer only omits a duty unintentionally, as was done in this case, and has not acted wilfully or oppressively, punitive damages should not be allowed. If the tender was made, it was not urged on the trial before the justice, and the person entitled to receive the rent having signified a willingness to receive it, after it was claimed to have been made, these are acts tending to show that the proceeding was not wilful, and as precluding a recovery of vindictive damages.

4. SAME—*excessive.* Where the verdict is flagrantly excessive, the court will reverse the judgment for that reason.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. THEODORE SCHINTZ, for the appellants.

Messrs. COOPER & PACKARD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action on the case, brought by Grouner against Tripp, Friedrick & Michelson, to recover damages on account of alleged irregularities in conducting a distress of certain personal property which was distrained and sold, for rent due to Friedrick, by virtue of a distress warrant.

Michelson was the constable who distrained and made the sale. Tripp was a land agent, and agent of Friedrick for the collection of his rent, and had direction of the proceeding. Friedrick, the landlord, does not appear to have had any active participation in it, being absent from town when the distress was made, and Tripp signing his name to the distress warrant, though Tripp testifies he had authority to do so, and that the sale was by authority of Friedrick.

The irregularities complained of are, refusing to restore the property after tender of the rent in arrear and costs, and making sale of it without an appraisement.

There are three counts in the declaration, upon which the cause was finally tried: two for not restoring the property after the alleged tender, and the other in trover.

The first point made by the appellants is, that the counts are not maintainable for these irregularities.

It is deemed only necessary to consider whether trover lies for not making the appraisement, as, if it does, a recovery may be supported under that count.

The statute enabling sale to be made of goods distrained for rent, provides that, in case of a distraint and failure to replevy, "the person distraining, or his agent duly authorized, may, with the sheriff or constable of the county, cause the

goods and chattels so distrained to be appraised by two reputable freeholders, under oath, which oath may be administered by such sheriff or constable, to appraise said goods and chattels," and then provides, after having obtained the assessment of the amount of rent due, as directed in a former section, that he may sell such goods and chattels.

The statute, in giving this power to make sale, regulates the mode of its exercise; and it prescribes, as one regulation, that this appraisement shall be had. We regard a compliance with this requirement of the statute as essential to authorize a sale, and that a sale of the distrained goods without such appraisement subjects the party making it to liability in an action of trover as for a wrongful disposition of the property.

The cases cited to the contrary seem to be cases arising under the statute of 11 Geo. 2, c. 19, sec. 19, and other similar statutes, taking away this species of action for an irregularity in the disposition of a distress.

A remaining question is made upon the subject of damages: that erroneous instructions were given in respect to them, and that they are excessive.

By the first and second instructions, the court laid down the measure of damages to be the actual value of the goods at the time of the conversion. Such is the general rule, but it has its exceptions and qualifications. The justice before whom the proceeding was had, assessed the amount of rent due $85, and $15.20 costs. This amount of the plaintiff's indebtedness, $100.20, was discharged by the produce of the sale, and we are of opinion that in this case a deduction of at least the sum of $85 of rent discharged should have been made from the measure of damages as laid down. *Pierce* v. *Benjamin*, 14 Pick. 356.

Where property, after having been wrongfully taken, is returned to the owner, that goes in mitigation of damages, and we think that when it is appropriated to the owner's benefit, by being applied in the satisfaction and discharge of a debt owing by him, that should be taken in mitigation of damages.

The court also instructed the jury, if they found the defendants guilty, and that they acted wilfully with intent to harrass and oppress the plaintiff, they might give exemplary damages by way of punishment.

We do not regard the present case as one calling for vindictive damages.

The distraint and sale were made by an officer of the law, a constable. The proceeding was rightly commenced. The copy of the distress warrant and an inventory of the goods distrained were filed with the justice July 18, 1870, and summons issued to Grouner returnable July 23, 1870. The tender of the rent is claimed to have been on the 20th of July. On the 23d of July the suit was continued by agreement of parties to the 26th of July, when both parties were present, evidence heard, and the rent due found by the justice to be $85. Grouner then admitted it to be right; he made no defense of a previous tender, nor did he even inform the justice that he had made one.

A. S. Trude, who held a chattel mortgage on the property, who appeared as the attorney of Grouner on the trial, testified that he, for Grouner, tendered to Tripp, July 20, 1870, $110, for the rent and costs, and he is supported by Grouner. Tripp denied that any tender was made.

After the supposed tender, and before the trial under the distress proceedings, Mr. Trude met Tripp at the office of Mr. Schintz, the attorney of Friedrick, Grouner seeming to be present, and Trude stated he had made the tender to Tripp, when Tripp denied that such tender was ever made. What took place on this occasion evinced, on the part of Schintz, as the attorney of Friedrick, a willingness to receive the rent; that that was all that Friedrick wanted, and might be considered as amounting to a demand of the rent.

It seems that a distress may, after a tender and refusal, be made for rent in arrear; that a tender only takes away the right to distrain till a subsequent demand and refusal. 5 Bac.

Ab. 13 (F.) sec. 20; Archbold Land. & Ten. 122, 318; *Hunter* v. *LeConte*, 6 Cow. 728. But as we have not made the right of action to depend upon the failure to restore the goods after tender, we pass the question, whether, after what transpired in Schintz's office, and the neglect to set up the tender on the trial, going forward with the distress proceeding from that time might not be justified, even if a previous tender had been made. But these are facts properly to be considered upon the question of vindictive damages.

There appears to have been a good attendance at the sale, spirited bidding, Grouner having actual notice of it; the property sold for $110.20, neither Friedrick nor Tripp purchasing any of it.

It appears there was here the pursuit of a legal remedy for the collection of a just claim. A slip was made in the proceeding unattended with especial circumstances of aggravation. We fail to see wherein it deserves the visitation of punishment in addition to the damages sustained. The valuation of the property distrained, even by the plaintiff himself, was only $376. There is a claim, which appears not to be well-founded, that some $60 of other property was also converted. Other testimony places a much lower value upon the property.

The jury returned a verdict for $1450. A *remittitur* of $686.50 was entered, and judgment rendered for the residue.

The verdict of the jury, as rendered, we regard as flagrantly excessive, and that it is only somewhat less so, as it now stands.

The judgment must be reversed and the cause remanded.

*Judgment reversed.*

Syllabus. Statement of the case.

JOSEPH SILMEYER

*v.*

WILLIAM SCHAFFER.

RELEASE OF SURETY—*extension of time—principal.* Where the payee of a note entered into an agreement with the principal, without the knowledge or consent of the surety, to extend the time of payment of the note for one year, upon condition that the principal should pay him twelve per cent interest, it was *held*, that such agreement did not release the surety from liability on the note.

WRIT OF ERROR to the County Court of LaSalle county; the Hon. P. KIMBALL LELAND, Judge, presiding.

This was an action of assumpsit, brought by Joseph Silmeyer against William Schaffer and Phillip K. Behrend, upon the following promissory note:

"$2,758.85. One year after date, for value received, we promise to pay to the order of Joseph Silmeyer two thousand seven hundred and fifty-eight 85-100 dollars.

Peru, Ill., April 19, 1867. P. K. BEHREND,
WM. SCHAFFER."

Summons was returned served upon the defendants to the September term, 1869, of said court. On the 6th of September, 1869, the defendant Schaffer filed three pleas: 1st, non-assumpsit; 2d, usury as to $295.68 of the consideration of the note; and 3d, a special plea in bar, averring in substance that said note was the only cause of action; that he signed the note as security for Behrend, and that after its maturity, to wit, August 28, 1868, without Schaffer's knowledge or consent, the plaintiff agreed, on the application of Behrend, "in consideration that said Behrend then and there promised and agreed to and with said plaintiff to pay him interest upon said note at the rate of twelve per cent per annum from the 19th day

of July, A. D. 1868, to and until the 19th day of January, A. D. 1869, to extend the time for the payment of said note from the said 19th day of July, A. D. 1868, until said 19th day of January, A. D. 1869," and that by said extension he, the defendant in error, became discharged from liability upon said note.

Judgment by default against Behrend.

The plaintiff demurred to Schaffer's third plea. The court overruled the demurrer and the plaintiff abided by his demurrer. Judgment *pro forma* for the defendant, Schaffer, against the plaintiff, and for costs.

The plaintiff brings the record to this court and makes the following assignments of error:

1. The court below erred in overruling the demurrer of plaintiff to the third plea of defendant Schaffer.

2. The court below erred in rendering judgment against the plaintiff and in favor of defendant Schaffer.

Messrs. CRAWFORD & BECK, for the plaintiff in error.

Mr. G. S. ELDRIDGE, for the defendant in error.

Per CURIAM: This case is, in all particulars, like *Galbraith* v. *Fullerton*, 53 Ill. 126, which had not been reported when the case at bar was tried. On the authority of that case, this judgment must be reversed and the cause remanded.

*Judgment reversed.*

Syllabus. Statement of the case.

## THE BOARD OF SUPERVISORS OF KANE COUNTY

*v.*

## HENRY P. PIERCE.

COUNTY CLERK'S FEES. Where the law prohibits the county clerks from charging any fees for services to the county, but that the courts shall allow them such reasonable compensation as they may think right as an *ex officio* fee, not exceeding $100 per annum, exclusive of an allowance of not exceeding $3 per day for their attendance on the courts in term time doing county or probate business: *Held*, that while attending the board of supervisors, transacting county business, the clerk is entitled to the *ex officio* fee and the *per diem* of $3, as he gets no other fees; but when attending probate court he gets his fees, and although the board of supervisors may allow the *per diem* whilst attending the probate court, they are not compelled to do so, as it is left to their discretion, and a writ of *mandamus* will not be awarded to compel them to make an allowance.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

This was a petition for a writ of *mandamus*, filed by Henry P. Pierce, in Kane circuit court, to compel the board of supervisors to audit a bill charged for services rendered the county as county clerk of Kane county. It is stated in the petition that he had been elected and served as clerk of the county court of Kane county from December, 1861, to December, 1869, and attended the court while sitting for the transaction of probate business 1459 days; that he made out and presented his bill to the board of supervisors of the county at the March session, 1870, and that the board refused to allow him any compensation therefor.

An alternative writ was awarded at the October term, 1870, of the circuit court of Kane county. To the petition and writ the county demurred, and the court held that the petitioner had shown no grounds for relief, and sustained the demurrer, and this appeal is prosecuted from that decision.

Messrs. SAWIN & WELLS, for the appellant.

Messrs. MAYBORN & BROWN, and WHEATON & BARRY, for the appellee.

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

This was a petition for a writ of *mandamus*, to compel the board of supervisors of Kane county to make a *per diem* allowance to the petitioner, for services rendered by him as clerk of the county court while sitting for the transaction of probate business. The court refused the peremptory writ.

So far as the members of this court are advised, it has not been the practice to allow a *per diem* to county clerks for attendance upon the court while engaged only in probate business. It appears that this petitioner was elected county clerk in 1861, and served until December, 1869, during which time he claims to have attended the court while engaged in probate business 1459 days, and it does not appear that he ever claimed a *per diem* until March, 1870.

The act of 1855, in regard to fees and salaries, Gross' Stat. 280, provides that the county clerks shall charge no fees for services to the county, but that the courts shall allow the clerks such reasonable compensation as they may think right as an *ex officio* fee, not exceeding $100 per annum, exclusive of a *per diem* allowance not exceeding $3 per day, for their attendance on the courts in term time during county or probate business.

It is contended by counsel for appellant that, although the amount to be allowed is discretionary with the county court, or with the board of supervisors in counties under township organization, yet some amount must be allowed under this act as a *per diem*.

So far as relates to the attendance of the clerk upon the board of supervisors while engaged in county business, this position is plausible. For his services in the transaction of such business, the law allows the clerk no fees. It gives

him instead the *ex officio* fee not exceeding $100 per annum, and the *per diem* not exceeding $3 per day. But for all services rendered while the court is engaged in probate business, the law does allow him specific fees, and in most counties in the State these fees amount to a sum sufficiently large to cause the office of county clerk to be greatly coveted. While, therefore, the statute authorizes the county authorities to make a *per diem* allowance for attendance on the court while engaged in probate business, if they deem proper to do so, we are of opinion that it does not oblige them to do so. It should be left to their discretion. If the county is so small that the entire compensation of the clerk is not sufficient to command the services of a competent officer, the proper authorities would have the power, under this act, to grant the *per diem*. The amount of fees received by the clerk would naturally control the action of the county court or board of supervisors. The statute provides that neither the *ex officio* fee nor the *per diem* shall exceed a certain sum, but what they shall be within those limits, or whether anything, was intended by the law to be confided to the judgment of the county authorities, at least so far as concerns probate business. It must be so, because the action of the authorities would almost necessarily depend upon the amount of the income derived by the clerk from his probate fees. It being, then, a matter of discretion, we can not interfere.

Our decision is based upon this principle: that, while a county may probably be compelled to allow some compensation to its officers for services which they are required to render without fees, but for which the law contemplates they shall be paid by an allowance from the county treasury, to be fixed by the proper county authorities in their discretion, yet where services rendered by an officer to individuals are compensated by fixed fees, and the county authorities are authorized, as in the other case, to allow such additional compensation from the county treasury as they may think proper, the legislature must have intended that they should be at liberty

to make additional compensation, or not, as they might deem right in view of the amount of fees received, and in such cases the courts ought not to interfere with the exercise of their discretion.

The judgment of the court below is affirmed.

*Judgment affirmed.*

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## JOHN BISHOP *et al.*

*v.*

## JOHN GEORGESON.

1. EVIDENCE—*hearsay, inadmissible.* It is error for the court trying a cause to admit hearsay evidence. The party originally making the statement should be called and required to testify, and not a person who has heard the witness make the statements.

2. PARTNERSHIP—*proof of, where denied.* Where a partnership is denied by one of the persons sued, he can not be proved a partner by the acts or declarations of those claimed to be partners. Their declarations are admissible to prove them partners, but it is error, when such evidence has been adduced, to instruct the jury that, if they find from all the evidence that the person denying the partnership is a partner, then the declarations of either partner will bind the firm. Such instruction authorizes the jury to consider the evidence not applicable to the proof of partnership, by the person denying it, to make him a partner.

3. A person can not be made a partner in fact, or appearance, so as to bind him, unless by his consent, admissions or acts. The declarations or acts of others can have no such effect unless authorized or ratified by him.

APPEAL from the Circuit Court of Kane county; the Hon. SILVANUS WILCOX, Judge, presiding.

Mr. J. V. RANDALL and Messrs. WHEATON, SMITH & MCDOLE, for the appellant

Messrs. DIVINE & PRATT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that appellant Bishop, in the autumn of 1867, and had, for some years previously, resided in Waukegan, in this State, and was engaged in the lumber trade at DeKalb. The business was conducted by F. W. Smith, in the name of Bishop. But in that fall they formed a partnership in that business, Smith still continuing to conduct it, and in addition thereto engaged in the business of erecting houses, and acted as an insurance agent. He continued to be thus engaged through the summer and fall of 1868. In building houses, he either furnished the material and employed the labor, or sub-let his contracts. In carrying on the business of erecting houses, one Griffin did the greater part of the work by himself and his workmen.

Some time in the fall of 1867, appellee called at the office of Smith, which was connected with the lumber yard, and applied for work as a carpenter. Smith referred him to Griffin, and he was employed. About the first of December of that year, Griffin and appellee settled their accounts, when it was found there was due to the latter $50, which was subsequently paid, a portion by Griffin and the remainder by Smith on Griffin's order.

Appellee continued to labor as before during the winter, and two or three times in the following spring and summer.

About the first of December, 1868, appellee becoming apprehensive of losing his pay, stated to one Wiley that Griffin contracted too low, and was losing money; that Griffin failed to pay his hands, and he could not afford to lose any more, and quit work, but said if Smith would become responsible, he would remain and finish the house on which he was then at work. Before quitting, he notified Smith that he would work no longer unless he would see him paid, but Smith declined, and he did no more work.

Appellee brought this suit, claiming that Bishop was a partner with Smith and Griffin in building; that he was employed by the firm to work on buildings they erected.

Smith, the proof shows, carried on the business of building in the name of F. W. Smith & Co. He erected a shop near the lumber yard, in which Griffin prepared most of the materials for the buildings on which he was engaged. Smith filed a plea denying that he was a partner of Bishop & Griffin, and all joint liability with them as partners, which plea was verified by affidavit. Smith filed the general issue.

The venue of the cause was subsequently changed to Kane county, where a trial was had by the court and a jury, who found a verdict against the defendants. A motion for a new trial was entered, which the court overruled and rendered a judgment in favor of plaintiff, and defendants appeal to this court.

The court below erred in permitting appellee to detail what the witness White told him in reference to his conversation with Smith. It was but hearsay, and was, under no rule of evidence, admissible. The mere fact that appellee expected to call White to testify to the conversation with Smith, and did call him, did not render it competent. It was calculated to make an impression on the jury against appellants, and was introduced for that purpose, and being illegal, it should not have been admitted.

The court below gave for appellee this instruction:

"Although the declaration or admission of an alleged partner is competent testimony to establish the existence of a co-partnership only as to the alleged partner making such declaration or admission, still, in this case, if the jury find, from all the testimony in the case, that the defendants were co-partners as to the plaintiff, as alleged, then the declaration or admission of each partner, so far as properly made, in and about the business of the co-partnership, is evidence against all the defendants."

This instruction does not, even if correct in principle, state the law with clearness. A person can not be made a partner

in fact or in appearance, so as to bind him, except by his consent, admissions or acts. The declarations or acts of others can not bind him unless authorized to be done, or are subsequently ratified by him, after being informed of them.

The instruction proceeds to tell the jury that, if they find, from all the evidence, that defendants were co-partners, their declarations would bind the firm. This latter clause is repugnant to the first, and the jury might well understand from the entire instruction that, although Griffin's declarations or admissions, when considered alone, could not establish the partnership except as to himself, yet they might consider it with the other evidence in determining whether Smith was a partner. The instruction should have informed the jury that it must be proved that Smith was a partner by evidence independent of Griffin's statements, and if so proved, then the declarations of either partner in reference to the partnership business, would be binding on the firm. This may have been intended, but it is not so stated. The instruction was calculated to mislead, and should have been refused, or modified before it was given.

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

*Judgment reversed.*

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## SAMUEL CLAYCOMB

*v.*

## TIMOTHY MOSHIER.

NEW TRIAL—*decree supported by the evidence.* In this case the decree of the court below is regarded as clearly sustained by the evidence.

WRIT OF ERROR to the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

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

Mr. T. G. FROST, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, in the Warren circuit court, to foreclose a mortgage executed by William H. H. Claycomb and wife to Andrew Claycomb, bearing date April 16, 1863, to secure the payment of five thousand six hundred and sixty-five dollars, and assigned by Andrew, by indorsement, to the complainant, Timothy Moshier. Samuel Claycomb was made a party to the bill, claiming an equitable interest in the premises. The premises are described in the mortgage as lot one (1) in block ten (10) in the city of Monmouth.

The mortgage contained this provision: "One thousand nine hundred and fifteen dollars of the above sum is put into this deed on the condition that the said Andrew Claycomb pays a judgment, together with the interest and costs, which William V. Cecil, in the prosecution of a mechanic's lien on the said premises, obtained in the circuit court of Peoria county, and which is to bear interest only from the time the same is tried. If the said judgment is not paid by the said Andrew Claycomb, the said sum of nineteen hundred and fifteen dollars is not to be a part of the consideration of the mortgage, and is to be deducted from the said sum of five thousand six hundred and sixty-five dollars."

This mortgage was acknowledged before Orson Waite, a justice of the peace of Warren county, on the 24th of April, 1863, and recorded on the 30th of January, 1866.

Samuel Claycomb put in his answer to the bill, in which he details the various transactions between him and William and Andrew Claycomb, by which it would appear that Samuel, prior to the date of the mortgage, although the owner of a large amount of real and personal property, was, in 1859, greatly embarrassed in his finances—unable to pay his debts. In that year he conveyed his property, real and personal,

or a large amount of it, by an absolute deed, to his brothers, William and Andrew, on a credit of eight years, they executing their notes at six per cent interest, amounting, in the aggregate, to about twenty-one thousand four hundred dollars, and to secure this sum they, William and Andrew, executed a mortgage on the real estate. The understanding was, that William and Andrew, having the legal title, were to sell the property for the benefit of Samuel, the proceeds of sales to be paid to the creditors of Samuel, and such payments were to be credited by Samuel on their notes which they had executed to him. The arrangement was, in truth, an assignment by Samuel for the benefit of his creditors.

This was the posture of affairs up to the 16th of September, 1863, when Andrew Claycomb was desirous of having a settlement with Samuel of the trust, when the parties had a meeting for that purpose.

Samuel states, in his answer, that the mortgage in question was executed by William to Andrew, he, William, then holding the legal title simply, as a basis of settlement between himself, Samuel and Andrew, but that the parties failed to come to terms, and the mortgage was considered as null and void, and was not then delivered to Andrew. The answer then states that they did, subsequently, in October, 1863, come to an understanding and settlement, and at that time, William executed a mortgage on the lot in question to Andrew to secure the payment of three thousand seven hundred and fifty dollars, as the whole amount due to Andrew, which mortgage was dated back to the 16th of April, 1863, by agreement of the parties, and the same was delivered to Andrew, which he caused to be recorded in the proper office.

Samuel insists that this mortgage was given in lieu of the mortgage for five thousand six hundred and sixty-five dollars, which mortgage, he alleges, Andrew fraudulently obtained from William and placed on record.

Samuel further says, in his answer, that this mortgage for three thousand seven hundred and fifty dollars was executed

and acknowledged in October, 1863, and that the acknowledgment was, by agreement, dated back to the 17th of April, 1863, by W. A. Wood, notary public of Knox county, where William Claycomb resided, and in which county it was executed.

This is the point in controversy: Was this mortgage for three thousand seven hundred and fifty dollars executed subsequent to the one in suit and in lieu of that mortgage? This is to be tested by the proofs in the cause. There is no question of law involved, but simply the fact, which is the real subsisting mortgage? If the mortgage for three thousand seven hundred and fifty dollars is the true one, then it is conceded by appellee the decree is wrong, and should be reversed.

The facts of the case are not very voluminous. These brothers had been for a long time endeavoring to adjust the matters in difference between them, Andrew claiming that he had paid for his brother Samuel a large amount, for which he had no sufficient security, and as early as September 16, 1862, in view of this, a mortgage was executed by William to Andrew, duly acknowledged on that day, for the consideration of six thousand dollars, on the premises in controversy. This mortgage recites that Samuel Claycomb was justly indebted to Andrew Claycomb in the sum of six thousand dollars, and that Andrew was, jointly with Samuel Claycomb and otherwise, liable for debts of Samuel in an amount not then definitely ascertained, but which might amount to one thousand six hundred dollars, and which he was then unable to pay. The mortgage was for the express purpose of saving Andrew from all suits, loss and damage on account of any of the debts of Samuel for which Andrew was in any way liable. It was intended as security and indemnity to Andrew. This mortgage was in the handwriting of James Strain, the attorney of Andrew Claycomb.

When the parties met with a view to a final settlement, this mortgage was presented to Samuel as the basis of the settlement, which he refused to adopt as the basis, saying that

Andrew was the cause of the west half of lot one in block eleven being placed past redemption, and that he would have to take that as part pay in the settlement. The mortgage was not delivered, and matters remained in this position until in April, 1863, when Andrew agreed to take this west half of lot one at two thousand dollars. Samuel still objected, and would not acknowledge more than three thousand seven hundred and fifty dollars to be due. William Claycomb then, for the purpose of effecting a settlement, agreed to pay Andrew two hundred and fifty dollars for Samuel, and a mortgage was executed for the balance—three thousand seven hundred and fifty dollars. This mortgage bears date April 16, 1863, and was acknowledged before W. A. Wood, a notary public of Knox county, on the 17th of the same month.

Andrew Claycomb testified, on the hearing, to these facts, and they were not contradicted by any witness. He states further, that, soon after this mortgage was executed and delivered, an order came from this court remanding the cause of Cecil against Samuel Claycomb for a mechanic's lien on the premises in controversy, which William and Samuel insisted Andrew should discharge. To this Andrew agreed, provided another mortgage should be made, and the amount of that lien inserted as part of the consideration. This lien was admitted to be nineteen hundred and fifteen dollars, without going into a particular scrutiny of the real amount; whereupon the mortgage in suit was executed and acknowledged on the 24th of April, 1863.

These three mortgages, it would seem, were before the parties on their final settlement in October following. The mortgage in suit, and the one for three thousand seven hundred and fifty dollars, were both prepared by Samuel Claycomb's solicitor and counsel, James G. Madden. They bear on their face intrinsic evidence that the last named was executed first, for the real sum Samuel admits he then owed Andrew. It was made in good faith and to secure a debt then amounting

to the sum named in it as the consideration, namely, three thousand seven hundred and fifty dollars.

The mechanic's lien judgment being afterwards brought up, and its payment assumed by Andrew to the extent of nineteen hundred and fifteen dollars, caused the mortgage in suit to be executed, in which is an express provision for the payment of this lien, and if not paid by Andrew, the consideration should be reduced *pro tanto*. These two sums, three thousand seven hundred and fifty dollars, and the mechanic's lien of nineteen hundred and fifteen dollars, make the precise sum of the mortgage in suit. If the mechanic's lien was not discharged by Andrew, the mortgage would be for only three thousand seven hundred and fifty dollars. Andrew discharged this lien, which amounted, with interest and costs, to more than the sum named in the proviso of the mortgage, and that payment established the mortgage in suit as the true mortgage, and shows conclusively that it was the last one executed. Samuel testified that Wood, the notary, dated the acknowledgment back, but he said he was not present at the time of the acknowledgment, and did not know the fact.

The acknowledgment is in regular form, and bears date April 17, 1863.

Other exhibits in the bill presented by Samuel show that this same notary took, on that day, other acknowledgments of deeds from William and Andrew Claycomb to Samuel.

William and Andrew Claycomb were both examined as witnesses, and they do not say the acknowledgment was dated back, and we are not permitted to presume that a public officer would be guilty of such a malfeasance. This fact, and the insertion of the proviso in the last mortgage, being the one in suit, in regard to the mechanic's lien, furnishes a complete answer to the claim of Samuel, and shows that it is wholly unfounded.

It is, however, insisted by Samuel that Andrew took the west half of lot one in block eleven as remuneration for the discharge of the mechanic's lien. This can not be so, for, if

so, why should provision be made for its payment in the mortgage for five thousand six hundred and sixty-five dollars?

These mortgages were executed at the time they bear date, and were acknowledged: the smaller one on the 17th of April, 1863, and the larger one, the one in suit, on the 24th of the same month. In that month a final settlement was attempted, but none was made until the following October, when, on the 24th of that month, it was consummated, and the mortgage for three thousand seven hundred and fifty dollars was delivered to Andrew, clearly by mistake, and he put it on record, and it seems he remained in ignorance of the mistake for several years, and was undeceived by Madden in the manner he states in his testimony.

It is true, Madden denies the statement made by Andrew, but Andrew is corroborated by William. William says he heard a conversation between Madden and Andrew relative to the mortgages—it was at Madden's office. His brother presented the small mortgage to him; he (Madden) said it was not the right one. Madden is contradicted also in another particular, wherein he swears that the mortgage in suit, the large mortgage, was the one first drawn. All the witnesses contradict him in this, except, perhaps, Samuel Claycomb.

Almon Kidder also weakens very much the credibility of Madden. He says he called at his office with Andrew Claycomb on the 16th of April, 1863, and found Madden engaged in drawing a mortgage, which he examined; thought it satisfactory so far as Andrew and William Claycomb were concerned; that mortgage, he thinks, is the one marked Exhibit A, for five thousand six hundred and sixty-five dollars. He further says about that time there had been another mortgage prepared by Madden, which was not satisfactory to Andrew; which mortgage was there at that time, and is, exhibit C (the small mortgage). The only difference in the two mortgages was the mechanic's lien of about nineteen hundred and fifteen dollars. About this time, Kidder says, the parties were trying to make a settlement of matters since 1863, and he went

with Andrew and William, as their attorney, to Madden's office, who was acting as attorney for Samuel. These mortgages were talked of between Andrew, William and himself before Samuel Claycomb came in. Madden then said the mechanic's lien was included in the mortgage agreed to in the settlement, and seemed surprised that the mortgage recorded, and then in the hands of Andrew, did not include that lien, and thought there must be some mistake about it.

There is another circumstance in the case which is wholly unexplained by Samuel, and that is, the execution of the mortgage for six thousand dollars, in September, 1862. A clear and rational account in regard to that is given by Andrew. The reduction of the amount by taking the west half of lot one in block eleven by Andrew at two thousand dollars, and the reduction of the balance to three thousand seven hundred and fifty dollars, by the "donation" of William, for so he calls it, of two hundred and fifty dollars, though William thinks it was only two hundred dollars, presents a consistent and reasonable case, while the claim of Samuel that this half lot was taken to discharge the mechanic's lien, and valued at nineteen hundred and fifteen dollars, is unreasonable, taken in connection with the fact that the smaller mortgage was first executed, and an express stipulation in the larger mortgage by Andrew to pay off this lien.

From the consideration we have been able to give to the proofs in the record, we are satisfied that the theory of Samuel Claycomb, that the mortgage in suit was the first executed and reduced to three thousand seven hundred and fifty dollars, by the agreement of Andrew to take the west half of lot one in block eleven, is not the true theory, but that the true theory is, that the mortgage first executed was the smaller mortgage, and that was raised to the amount now found in the larger mortgage—the mortgage in suit—by the agreement of Andrew to discharge the mechanic's lien, then assumed to be nineteen hundred and fifteen dollars.

It has never been denied that Samuel was indebted to Andrew the amount of the smaller mortgage when it was executed; his after assumption of the mechanic's lien raised the indebtedness to the amount of the mortgage in suit.

As to the fact that Andrew, at the settlement in October, when many papers were in course of delivery to the several parties interested, it is not strange that Andrew should have taken away and put on record a mortgage which did not belong to him, and that William should have taken the one which should have been delivered to Andrew. These parties all confided in each other, and each supposed, when they separated, that each one had the papers to which he was entitled. There was nothing to excite suspicion or inquiry upon the subject, until the occasion spoken of by Andrew at Madden's office, when, producing the smaller mortgage, Madden told him it was not the right one, as it had not in it the mechanic's lien. Up to that time there is every reason to believe Andrew rested in the confident belief he had the larger mortgage, to which he was entitled.

But it is urged, against this view, that Andrew received payments on the mortgage for three thousand seven hundred and fifty dollars from Samuel, and calculated the interest for six months upon it. Exhibit "O" is relied on as proving this, whereas, in fact, it does not. The item is, "S. Claycomb, Dr., for interest to six months interest," carried out, $137.54. On what this interest is calculated, is not shown, except by Samuel's testimony, which may or may not be true, and is susceptible of explanation on the theory that, as no interest was calculated on the amount of the mechanic's lien, and which Andrew had not paid at that time, the parties had in view, alone, the debt due to Andrew, exclusive of this lien.

But it is further urged, that Andrew signed receipts for payments on this mortgage, and they are made exhibits W and X. Exhibit W bears date December 13, 1864, admitted to be in the handwriting of Samuel, and is for the assignment of lease by Whitorack & Co., estimated at four hundred and fifty

dollars per annum, "to be applied on mortgage," without specifying the mortgage.

Up to this time, we are inclined to think Samuel did not know that Andrew had taken the smaller mortgage and placed it on record. Both parties then supposed everything was right. But Samuel did discover, before the next payment was made, which was April 3, 1865, and is "Exhibit X," that the smaller mortgage was the mortgage on record. Samuel wrote this receipt, and, as Andrew testifies, he signed all the receipts without examination or hearing them read by Samuel. If this be so, and we are inclined to believe it, Samuel never read to him the words "being $3750" placed, as the proof shows, some distance from the word "pay," which properly concludes the sentence. We have not a particle of doubt that word, "being," and the figures "$3750," were added after Andrew signed it.

Can it be possible, if such a receipt was read to him "to be applied upon a mortgage that I hold upon lot one in block ten and against W. H. H. Claycomb, which the said S. Claycomb had to pay," and that mortgage then stated to be for $3750 only, that it would not have arrested his attention, he being well assured he had the mortgage for five thousand six hundred and sixty-five dollars? It is scarcely possible, and not at all probable. The whole thing looks like a contrivance.

We have carefully examined all the testimony in this record, and we are satisfied the smaller mortgage was the first executed to secure a debt then existing and not denied, and raised afterwards to five thousand six hundred and sixty-five dollars, by the addition of the mechanic's lien, which Andrew Claycomb assumed to pay, and so provided in the mortgage, and which he did, in fact, pay. The facts are clearly against the plaintiff in error.

The decree is affirmed.

*Decree affirmed.*

## JOHN LAMB *et al.*

*v.*

## JAMES F. HOLMES.

1. PLEAS—*demurrer—practice.* Where a party files a number of pleas in such a confused manner that it is difficult to determine the order in which they were filed, and a defective special plea appears first in the series, and the general issue the second, and a demurrer, as appears by the record, was sustained to the first plea, it will be held that the demurrer was sustained to the bad special plea, and not to the general issue, unless it appears from the record that the court deprived the defendant of the benefit of the general issue on the trial.

2. ASSUMPSIT—*non est factum—practice.* The plea of *non est factum* is not an appropriate plea in the action of assumpsit, and it is proper practice, in such a case, to strike it from the files on motion. Even if it could be used, the plea of *non-assumpsit* is broader and will admit a more comprehensive defense, and is preferable.

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

Mr. S. R. MOORE, for the appellants.

Mr. T. E. MILCHRIST, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was assumpsit, brought by appellee against appellants. The declaration contains three special counts upon three respective promissory notes, and the common counts. Pleas:

*First*—That the causes of action in the several counts were for one and the same thing, to wit: the promissory notes; that the only consideration for said notes, and each of them, was for notes and bank bills issued and published by a joint stock or banking company not incorporated by law, with banking powers authorizing them to issue said bills, passed by

said plaintiff to said defendants, and given in consideration of said notes.

*Second*—The general issue.

*Third*—*Non est factum.*

*Fourth*—Partial failure of consideration.

To the first and fourth pleas appellee demurred, but on the same day filed a replication to the fourth plea, which, of course, waived the demurrer thereto. The court sustained the demurrer to the first plea, and struck the third plea, being *non est factum*, from the files.

The demurrer to the first plea was properly sustained, simply because it does not contain facts sufficient to constitute a defense, and appellants do not even claim that the plea which we have designated the first plea, was good, but insist that the first plea was, in fact, the general issue; and as the demurrer refers to a plea as the first plea, the court sustained the demurrer to the general issue. When defendants file their pleas in such a confused manner as to render it perplexing and difficult to designate them and discriminate one from the other, and come into this court claiming that the court has sustained a demurrer to the general issue in the usual form, we will require them to show with certainty, from the pleadings, that such was the case if doubtful from the pleadings, or that the court denied them the benefit of the general issue upon the trial. The commencement of the pleas is worded as if the general issue were the first plea, and that the one we have referred to as the first was a further plea; but the amended record shows that the pleas, when placed on file, were so transposed as that the general issue was the second plea. Besides, it does not appear that they were denied the benefit of the plea on the trial.

There was no error in striking the plea of *non est factum* from the files. The action was assumpsit, and the notes not under seal. That plea had no appropriate place in this case, and even if it had, with the effect which the law gives to it when properly pleaded, still, the plea of non-assumpsit is

much broader, and defendants could not have been deprived of any rights of defense by having *non est factum* stricken from the files.

No error being apparent in the record, the judgment of the court below is affirmed.

*Judgment affirmed.*

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## ASA WHITE

*v.*

## MOSES ROBINSON.

1. AWARD—*evidence—taken by two arbitrators.* Where matters in difference were submitted to the award of three persons, two of whom heard the evidence of a sick witness, reduced it to writing, and all considered it in connection with the other evidence: *Held*, that as the evidence of the witness, taken in the presence of the attorney who now objects, was fairly taken and no objection was made at the time, or before the arbitrators, there was no injury sustained, and the award can not be set aside, under the circumstances, for such an irregularity.

2. Had there been any fraud, misconduct or misrepresentation, it would have been otherwise.

This case distinguished from *Smith* v. *Smith*, 28 Ill. 56, as in that case no rights were waived, whilst in this there were.

WRIT OF ERROR to the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLIAMS, CLARK & CALKINS, for the plaintiff in error.

Messrs. STEWART & PHELPS, for the defendant in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The basis of this suit was an award, regular and certain upon its face. It was signed by the two arbitrators chosen by

the parties, and by the umpire, selected by the arbitrators named in the submission.

The only irregularity complained of is, that one of the arbitrators was not present when one of the witnesses was examined. This witness was sick, and for the purpose of obtaining his testimony two of the arbitrators and the counsel of both parties went to his house and wrote down his statement, which was read to him and approved. This written statement was then submitted to the three arbitrators, and the award made.

This evidence was received without objection at the hearing, and was commented upon by counsel in their arguments.

One of the counsel for appellee, against whom the award was made, testified that the evidence was substantially reported to the absent arbitrator, and it was mutually agreed to be the statement of the absent witness.

There is neither charge nor proof of misrepresentation or fraud, or other misconduct.

This irregularity can not render the award invalid.

The case of *Smith* v. *Smith*, 28 Ill. 56, is not decisive of the case at bar. The decision in that case was merely that, if an intoxicated person—one so drunk as to be *non compos mentis* —acts as an arbitrator, the award will be set aside. It is true that the language is used, that "each arbitrator must be present at every meeting, and the witnesses and parties must be examined in the presence of them all."

As a general principle this is correct, but parties may waive its necessity. No objection was made before the arbitrators to the admission of the written statement of the absent witness. It was present and used by both parties, and was known to all the arbitrators. If objection had then been made, the irregularity could easily have been remedied.

No wrong has been inflicted upon appellee. His own judges, by consent of his counsel, acted upon the evidence. He should not be allowed to insist that such mere irregularity, without any prejudice, should operate to defeat the award.

In *Hawkins* v. *Colclough*, 1 Burr. 274, Lord Mansfield said: "Awards are now considered with greater latitude and less strictness than they were formerly. It is right that they should be liberally construed, because they are made by judges of the parties' own choosing." And he declared against *critical niceties* in scanning awards made by judges chosen by the parties.

The defense is entirely technical; the award is certain and final; and the utmost good faith seems to have been observed in making it. Under the facts disclosed, we think it is conclusive upon the parties.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

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## Chicago, Burlington & Quincy Railroad Company

*v.*

## Mary J. Lee.

1. Agent—*declarations of—res gestæ—depositions.* The declarations of an agent are not admissible as evidence unless they are made in connection with the transaction of the business of his agency, and form a part of the *res gestæ*. And it is error for the court to refuse to suppress an answer to an interrogatory in a deposition which proves the declarations of an agent after the transaction has occurred. And to suppress such answer, it is not necessary that the answer should have been objected to when the deposition was taken.

2. Railroad—*negligence—evidence.* It is error for the court to admit evidence that, at previous times, the bell had not been rung or the whistle sounded as trains passed the place where the accident occurred, to prove negligence at the time of the collision. Nor does it waive the error that defendant had permitted similar evidence of other witnesses without objection. That did not render the further admission of such evidence admissible when objected to, on being offered. Nor was it admissible to discredit the evidence of the engineer, as he made the statements intended to be contradicted, in answer to questions propounded by plaintiff on

cross-examination. A party can not cross-examine a witness as to a collateral fact for the purpose of laying a foundation to contradict him.

3. Negligence—*comparative.* Where an instruction informed the jury that, if the employees neglected to ring a bell or sound the whistle as required by statute, the plaintiff was entitled to recover of the company for killing her husband unless he was guilty of a greater degree of negligence: *Held*, such an instruction was too broad, as it should have limited the liability of the company to the injury caused by a failure to ring the bell or sound the whistle, and it should have been modified so as to have informed the jury that the negligence of deceased must have been slight as compared with that of the company. Instructions in such cases should lay down the duty of both parties, and leave the jury to find whether the defendant was guilty of negligence; and even if the deceased was guilty of negligence, whether it was slight as compared with that of the company.

Appeal from the Circuit Court of Henderson county; the Hon. Arthur A. Smith, Judge, presiding.

Messrs. Frost & Tunnicliff, for the appellants.

Messrs. Kitchell & Arnold, for the appellee.

Mr. Justice Sheldon delivered the opinion of the Court:

This was an action brought by the administratrix of the estate of Darius B. Lee, deceased, under the act of 1853, on behalf of herself and children, as the widow and next of kin of the deceased, for damages resulting to them from his death, charged to have been caused by the carelessness and negligence of the defendants below in operating their engine and train, and occasioning a collision between the same and the deceased while driving his team along the highway and over the railroad track of the defendants at a public crossing.

The charge of carelessness alleged in the declaration was, the failure to ring the bell or sound the whistle while the train was approaching the crossing with unusual speed, or to give the deceased any warning of its approach.

Previous to the commencement of the trial in the court below, the defendant moved to suppress all that portion of the answer to interrogatory seven of the deposition of George

A. Clark, which states the declarations of the engineer of the company as to the transactions at the time of the accident, made at a subsequent time and after his return to the place of the accident, which motion the court overruled. This was erroneous.

When the acts of the agent will bind the principal, then his declarations respecting the subject matter will be evidence against the principal if made at the same time, and constituting a part of the *res gestæ*.

But the agent's declarations are not admissible against the principal if not made at the very time of the transaction, but upon another occasion.

These declarations were not made in regard to a transaction then depending, characterizing it, and admissible as verbal acts forming a part and parcel of the transaction. But they were made afterwards upon another occasion, and were a mere narration in regard to a transaction already passed, and should have been excluded as merely hearsay testimony. 1 Greenlf. Ev. sec 113; *Thallhimer* v. *Brinkerhoff*, 4 Wend. 394; *Stiles et al.* v. *Western Railroad Corporation*, 8 Metc. 44; *Luby* v. *The Hudson River Railroad Co.* 17 N. Y. 133; Story on Agency, secs. 134, 135; *Waterman et al.* v. *Peet et al.* 11 Ill. 648; *C. B. & Q. R. R. Co.* v. *Riddle, post*, 534. The answer is without force, that the objection should have been made at the time of taking the deposition. The evidence being wholly incompetent, the objection might be taken at any time.

The same objection applies to the answer of Green to the twentieth interrogatory in his deposition, which details the particulars of the conversation between the witness and Martin. So much of the answer as is merely responsive to the interrogatory, that it was spoken of, whether the bell was or was not rung and whistle sounded, might not be objectionable as a circumstance to fix what then occurred in the memory of the witness. But the particulars of the conversation were clearly inadmissible.

Evidence was wrongly admitted, too, that the trains had, at other times, passed the crossing without ringing the bell. From the fact of omitting to ring the bell at any previous time, no reasonable inference could be drawn that it was not rung on the occasion in question.

The point in issue was, whether there was a failure to ring it then, not at any other time; and the evidence should have been restricted to negligent conduct at the time of the accident.

Nor does it afford a justification for the admission of the testimony that other like testimony had been introduced into the case without objection. It is the right of a party to have incompetent testimony excluded on his objection, whenever offered. The fact of there being other like testimony in the case would bear only upon the question of the extent to which the party was prejudiced by the admission of the additional incompetent testimony.

Neither can the admission of the testimony be sustained upon the ground that it was introduced for the purpose only of discrediting the engineer in his testimony that he always rung the bell at the crossing. That testimony of the engineer does not appear to have been brought out on his examination in chief by the defendant, but on the cross-examination of the witness by the plaintiff. A witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him.

If a question, as to a collateral fact, be put to a witness for the purpose of discrediting his testimony, his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it. 1 Stark. Ev. 189.

The following instructions were given for the plaintiff, viz.:

"It was the duty of the servants of the defendant, in the management of the engine by which Lee was killed, at the approach to said Gale's crossing, and for the distance of eighty rods before reaching the same, to continuously sound the bell

or whistle on said engine for the purpose of warning all persons of their approach, and if they neglected to do so, then the plaintiff in this suit will be entitled to recover for killing said Lee, unless the jury shall believe from the evidence that Lee was guilty of a greater degree of negligence which contributed to his death."

"If the jury shall believe, from the evidence, that the servants of the defendant, in the management of the engine by which Lee was killed, might, by diligent watchfulness, have seen said Lee or his team on their way over the Gale crossing in time to have checked the speed of said train and saved the life of said Lee, then it was their duty to have done so, and to have used all means in their power for such purpose. And if the jury believe, from the evidence, that they neglected to do so, then the plaintiff will be entitled to recover, even if the bell was being rung upon said engine at the time said Lee was killed, and for eighty rods previous thereto."

The first above instruction is erroneous in that it makes the company liable for Lee's death upon failure to sound the whistle or ring the bell, without reference to whether the omission to do so was the cause of, or conduced to his death, or not. If the bell was not rung or whistle sounded, the plaintiff can recover, the instruction says, provided the deceased was not guilty of greater negligence, without saying whether the omission was found to have had any effect in causing his death or not.

The acts might have been performed and the deceased not have heard the signal, or heeded it; or he might, notwithstanding, have ventured to attempt to cross the track in advance of the approaching train, in mistaken reliance upon his ability to do so before it would reach the crossing. It is not to be asserted as a matter of law that, by reason of the neglect to ring the bell or sound the whistle, the injury was produced.

The instruction was not properly qualified in regard to the degree of negligence on the part of the deceased which would

allow a recovery. The effect of the instruction in this respect was, that if the defendant was guilty of negligence the plaintiff could recover, although the deceased was also guilty of negligence, if his negligence was not greater than that of the defendant, which would allow a recovery if the negligence of both parties was equal.

But a recovery could not be had in such case, under the rule as laid down by this court, nor unless the contributory negligence of the deceased was far less in degree than that of the defendant. *C. B. &. Q. R. R. Co.* v. *Dunn*, 52 Ill. 452; *Keokuk Packet Co.* v. *Henry*, 50 Ill. 264; *C. & N. W. R. R. Co.* v. *Sweeney*, 52 Ill. 325.

The other instruction makes the company liable for negligence and entitles the plaintiff to recover, whether Lee was in fault or not, and without reference to the degree of his negligence. It lays his duty entirely out of view, and makes the right of recovery to turn on the question of the defendant's negligence alone. In this respect the instruction was erroneous, as decided in the case of a like instruction in *C. B. & Q. R. R. Co.* v. *Payne*, 49 Ill. 500. See, also, *Keokuk Packet Co.* v. *Henry*, 50 Ill. 264.

And on the authority of the first case, it is not a sufficient answer to say that instructions, given for the defendant, qualified the rule laid down in the plaintiff's instructions and correctly announced the law in the case. It being there held that it is not sufficient to say that the law in the case is correctly given in one set of instructions, if it is incorrectly stated in another set. In such case, the jury may well be in doubt which of the instructions give to them correctly the law, and be left to select and follow either, as it might strike them as being most proper. See, also, *Denman* v. *Bloomer*, 11 Ill. 240.

The question of the negligence of the deceased was an important element in the case, and fairly presented by the evidence, and it was essential to the defense that the law on that

head should have been stated unmistakably to the jury. Erroneous instructions on that question might well have misled the jury to the defendant's prejudice, and we can not see, from all the instructions in the case, that they were not so misled in arriving at their verdict.

For the errors indicated, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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## F. A. BRYAN

*v.*

## CITY OF CHICAGO.

SPECIAL ASSESSMENT—*illegal ordinance.* Where the common council passed an ordinance for the improvement of a street, and ordered curb walls to be built where the same were not already built, and in good and sound condition, but it did not specify what portion was in good and sound condition and what was not: *Held*, that the ordinance was an attempt to confer on the board of public works an illegal discretion which would tend to open the way to an unfair assessment, and to favoritism and fraud. It is governed by the case of *Foss* v. *City of Chicago*, 56 Ill. 354, and is held to be void, and the collector had no authority to apply for judgment.

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

The facts appear in the opinion.

Messrs. BARKER & WAITE, and Mr. WM. HOPKINS, for the appellant.

Mr. M. F. TULEY, Corporation Counsel, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is an appeal from the judgment of the Superior Court of Cook county, in favor of the city, upon a warrant for a

special assessment for improving a portion of West Randolph street in the city of Chicago.

The ordinance under which the assessment was levied, ordered "that West Randolph street, from the west line of Halsted street to the east curb line of Carpenter street, be curbed with curb walls *where the same are not already built*, and *where the same are not now in good and sound condition;* West Randolph street from the west line of Halsted street to the east curb line of Carpenter street, and curbing with curb stones where the same are not already set, and *where the same are not now in a good and sound condition;* said Randolph street from the west curb line of Carpenter street to the western terminus of said West Randolph street at Union Park, and filling, grading, and paving with wooden blocks said West Randolph street from the west line of Halsted street to the western terminus of said West Randolph street at Union Park, (excepting a space sixteen feet wide in the middle of said West Randolph street, from the west line of Halsted street to the western terminus of said West Randolph street at Union Park, now occupied by the tracks of the Chicago West Division Railway Company,) in the manner particularly described in the accompanying drawing and in the ordinance herewith submitted, directing the doing of the work."

This ordinance is an attempt to vest the board of public works with an illegal discretion; it tends to open the way to an unfair assessment, and to favoritism and fraud. It falls directly within the grounds of condemnation stated in *Foss* v. *City of Chicago*, 56 Ill. 354.

The ordinance was void, and the city collector had no authority to apply for judgment.

Judgment reversed and cause remanded.

*Judgment reversed.*

## K112 THE EQUITABLE INSURANCE COMPANY

*v.*

## PAUL H. COOPER.

1. INSURANCE POLICY—*indorsement of—after sale of property.* Where a person purchased property already insured and received an assignment of the policy, and after the purchase called on the agent of the company to learn whether he would make the necessary indorsement of consent to the transfer, when the agent said he would if the grantee would bring him the policy, but the holder did not present it until after the property was destroyed by fire: *Held*, this did not amount to a waiver of the condition that if the property should be sold the policy should be void unless the company should give its consent, indorsed in writing, on the policy; that the company had said or done nothing to change the action of the purchaser.

2. EQUITY—*specific performance.* In such a case, there is no contract for a court of equity to enforce against the company. It was but a mere promise without consideration of benefit to the promisor or injury to the promisee, and the latter has no right to recover either at law or in equity.

APPEAL from the County Court of LaSalle county; the Hon. C. H. GILMAN, Judge, presiding.

Mr. J. B. RICE, for the appellant.

Mr. FRANK J. CRAWFORD and Messrs. CROOKER & HUNTER, for the appellee.

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

This was a bill in chancery, filed by Cooper, to compel the specific performance of a verbal agreement made by the agent of the Equitable Insurance Company to indorse upon the policy the consent of the company to its transfer from one Anna M. Pearce, the holder of the policy, to complainant, who had purchased a part of the property insured. According to the testimony of the complainant himself, it appears that soon

after purchasing the property he saw the agent of the company and asked him if he would indorse the transfer. The agent told him, in reply, to bring in the policy and he would make the necessary indorsement. Cooper, however, never procured the policy from Mrs. Pearce, and it was never presented to the agent until after the fire.

The various cases cited by appellee's counsel show how willing the courts have been to apply the doctrine of waiver to many of the conditions contained in policies of insurance, conditions perhaps necessary, but which often escape the observation of the assured, and on the technical letter of which companies so often rely in order to escape their liabilities. We have no difficulty in applying this doctrine where the waiver has lulled the assured into security and induced him to adopt a line of conduct which he would not have adopted but for the waiver. Thus, in *The Illinois Insurance Co.* v. *Stanton*, 57 Ill. 354, where the assured desired to make a conveyance of the property, and there being some hesitation because the policy was not at hand to be indorsed by the agent, the latter said they could proceed with the conveyance and he would indorse the policy afterwards, we held, the property having soon after burned, and before the indorsement, that this was waived. But we so held because, but for the verbal consent of the agent to the conveyance and his promise of a future indorsement, the parties would have postponed the conveyance until the policy could be produced and indorsed. It was because the parties had acted upon this verbal arrangement with the agent that we held it binding on the company. If the same thing had taken place here, or even if, after the sale, the agent had said to the appellee that he need not bring the policy for indorsement, or that he need give himself no trouble to do so as they would consider the indorsement already made, we think we should have no difficulty in saying, on the authority of the case above cited, and of others cited by appellee, that the agent had waived the indorsement and thereby induced the appellee to neglect doing what he would have

otherwise done for his own protection, and that it would be inequitable, under such circumstances, to permit the company to evade payment upon that ground.

But the difficulty in this case is, there has been no waiver. The agent simply told the appellee he would indorse the policy when brought to him. But he did not say it need not be indorsed, or in any way authorize the parties to act as if it were already indorsed. Neither had he, as in some of the cases cited, received a new premium from the appellee, or done anything to indicate that he was willing to depart from the strict letter of the policy. He merely offered to act in accordance with its letter.

The counsel for appellee, probably feeling this difficulty, instead of bringing an action at law on the policy, have filed this bill for specific performance, asking to have the policy indorsed and then enforced. But this promise to indorse the policy, made after the appellee had purchased the property and received the conveyance, was not a contract, and can not be made the foundation of an action either at law or in equity. There was no consideration, either of advantage to the promisor, or of detriment to the promisee, and if the policy had been presented to the agent before the fire, his previous promise to indorse it might have been disregarded by him without any legal consequences either to himself or to the company. If the building had not burned we could not, in the absence of any consideration, have decreed a specific performance of this promise, and we can not now. We must reverse the decree.

*Decree reversed.*

Syllabus.

## EDWARD F. THOMAS

*v.*

## HIRAM LOWY.

1. PROMISSORY NOTE—*judgment confessed—coverture—general issue—plea in abatement.* A husband and his wife joined in the execution of a note and power of attorney to confess a judgment, and on the maturity of the note a judgment was confessed thereon, an execution was issued, when a motion was made to set aside the execution, vacate the judgment and permit the parties to plead. The court let the parties in to plead, when they filed the plea of the general issue, and a plea of the coverture of the wife. To this latter plea a demurrer was sustained, and the wife thereupon filed a plea of her coverture in abatement, and the plaintiff moved to strike this plea from the files, but the motion was denied. A trial was had resulting in a judgment in favor of the wife and against the husband: *Held*, the suit was improperly brought against the wife, as she was not legally liable; the joint plea in abatement was obnoxious to a demurrer, as it came too late after the plea in bar.

2. ABATEMENT. That the plea in abatement filed by the wife also came too late, as she had joined her husband in the plea in bar, and it should have been stricken from the files. Matter in abatement must be pleaded before pleas in bar, to be available.

3. It was error to render a judgment against the husband alone, as he was sued jointly with the wife. In suits on contract, a recovery must be had against all or none of the defendants sued.

4. SAME—*evidence.* Evidence of coverture may be pleaded or given in evidence under the general issue, but it can not be allowed except it be proved, and in the absence of such proof on producing the note as it was executed, the plaintiff was entitled to judgment against both defendants.

5. STATUTE—*practice.* Where the execution of a note is not put in issue by a sworn plea, nor evidence that either of the parties was not liable, the act of March 26th, 1869, can have no application. Had the plea of the wife been in bar instead of abatement, thereby failing to answer it, it would have stood as confessed; but being improperly pleaded, and wrongfully in the record, it could not be regarded as establishing the coverture.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. R. W. SMITH, for the plaintiff in error.

Messrs. FULLER & SMITH, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that Edward F. Thomas and Harriet C. Thomas, his wife, executed a promissory note payable to West, Austin & Co., due at one year from date, dated the 4th of November, 1869, and for the sum of $1500. The payees afterwards assigned the note to appellee, who, on the 5th day of November, 1870, caused a judgment by confession to be entered in the circuit court of Cook county for the amount of the note and against both Thomas and wife, under a power of attorney given at the same time, and which accompanied the note. On this judgment an execution was issued and levied on property of Thomas. He thereupon applied to the circuit court to set aside the judgment and to quash the execution, upon the ground that he and Harriet C. Thomas were, when the note was given, and continued to be, husband and wife, and the judgment being against them jointly, was erroneous, and had been rendered against the wife wrongfully, as she had no power to execute the note and power of attorney.

The court below entered an order allowing defendants to plead to the declaration, and stayed proceedings under the execution, and directed the judgment to stand until the trial should be had on the merits. Defendants then pleaded the general issue, and in abatement the coverture of Mrs. Thomas. To this latter plea, plaintiff filed a demurrer, which the court sustained. Thereupon Mrs. Thomas filed a plea in abatement, verified by affidavit, that she was, at the time the note was executed, and still was, a *feme covert*. A motion was made to strike this plea from the files, which was overruled.

The case was submitted to the court for trial, without the intervention of a jury, but issue was not taken on the plea of coverture. Plaintiff introduced the note and power of attorney, and rested his case.

Defendants moved to dismiss the suit, but the motion was overruled, and the issue was found against Edward F. Thomas, and the court assessed the damages against him for $1640, as of the day when the judgment was confessed, and found in favor of Harriet C. Thomas and against the plaintiff.

Defendant Edward F. Thomas, entered a motion for a new trial, which was overruled by the court, and judgment was rendered on the finding, and the record is brought to this court, and a reversal is asked.

That the suit was improperly brought against the wife is manifest, inasmuch as the note was void as to her, she having no power to bind herself by such a contract; and the court having let the defendants in to plead, the trial then should have progressed as though no judgment had been confessed. The joint plea in abatement was obnoxious to a demurrer, as the husband had filed a plea in bar, and the plea in abatement came too late; and the plea in abatement filed by Mrs. Thomas also came too late, inasmuch as she had joined with her husband in the plea of the general issue before filing her plea of coverture to abate the writ, and it should have been stricken from the files. Pleas of this character must be pleaded before pleas in bar are filed, or the matter in abatement can not be relied upon. By the first plea filed, a traverse of the facts in bar of the action was formed, and it was then too late to form issues on matter in abatement.

It is, however, urged that, inasmuch as both husband and wife were sued, it was error to render judgment against the husband alone; that in suits on contract the recovery must be against all or none of the defendants.

The case of *McLean* v. *Griswold*, 22 Ill. 218, was, like the present, against a husband and his wife, and the court below permitted the plaintiff to enter a *nolle prosequi* as to the wife, and to take judgment against the husband. On error brought to this court, it was held to be error, as the judgment should have been against both or neither, and the judgment was reversed.

In *Streeter* v. *Streeter*, 43 Ill. 155, it was held that coverture might be pleaded, or given in evidence under the general issue. But in this case no evidence of coverture was adduced on the trial, and the plea in abatement was out of time and unavailing.

The suit having been jointly brought against both parties, and there being no evidence that Harriet was ever the wife of Edward, the court should have rendered judgment against both, as their signatures were to the note, and its production proved the averments of the declaration and overcame the general issue; and in the absence of countervailing evidence, appellee was entitled to judgment.

We are referred to the act of March 26, 1869 (Sess. p. 370, sec. 2), as bearing on this question, but it can have no application, as the execution of the note was not put in issue by a sworn plea, nor is there any evidence in the record from which it appears that either of the parties is not liable. Had the plea separately filed by Mrs. Thomas been in bar instead of in abatement, their failing to take issue upon it would have operated as a confession of the truth of the averments it contained; but being improperly pleaded, and in the record, the court could not regard it as establishing the coverture.

The court below, in the absence of evidence of the coverture of Mrs. Thomas, erred in finding for her under the plea of the general issue, and the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Judgment reversed.*

## SYLVESTER REMINGTON

*v.*

## JAMES CAMPBELL.

1. RESULTING TRUST—*how created.* To establish a resulting trust, the money of the *cestui que trust* must be used in the purchase of the property in which the trust is claimed to exist. Such a trust can not be created by agreement or contract.

2. SALE *in form absolute—whether a mortgage.* When a sale is in form absolute, in order to change its character to that of a mortgage, the evidence must clearly show that it was so intended. Slight evidence is not sufficient.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM W. FARWELL, Judge, presiding.

Mr. R. H. FORRESTER and Mr. J. H. KEDZIE, for the appellant.

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

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in equity, in the Superior Court of Chicago, praying that the defendant be decreed to reconvey to complainant a certain tract of land therein described, and for general relief.

Complainant's claim to relief is placed on two grounds: first, that of a resulting trust; second, as an equitable mortgagor entitled to redeem.

We have carefully considered the pleadings and testimony in the cause, and are well satisfied that, in neither aspect of the case, is the complainant entitled to any relief.

There is no semblance of a resulting trust as that relation is understood. This court has said, and such is the uniform doctrine, that such a trust can not be created unless the money of the *cestui que trust* was used in the purchase of the property

in which the trust is claimed to exist. *Holmes* v. *Holmes*, 44 Ill. 168. It can not be created by agreement or contract. *Sheldon* v. *Harding*, ib. 68; *Bruce* v. *Roney*, 18 ib. 67.

Had Remington, in this case, advanced the money on the purchase of the land, and the deed made to Campbell, there would be a resulting trust.

The other ground of relief is, that appellant was an equitable mortgagor and entitled to redeem.

The facts in the record show most clearly, we think, appellant occupied, in no sense, the position of a mortgagor. The fact alone, that appellant took a contract from appellee to convey to him, at a certain day, the south half of the tract on the payment, by appellant, of one half the original purchase by the first day of March, 1866, repels the idea of any such relation.

It is well settled, when parties give to a transaction all the forms of a sale, the proof must be clear, it was intended as a mortgage, in order to change its character. Slight evidence is not sufficient. *Dwen, Ex'r, et al.* v. *Blake, Ex'r*, 44 Ill. 135. We look in vain into this record for any, the slightest, evidence, to show this transaction was a mortgage. The cases cited by appellant have no analogies in common with this case, and have no application to it. Campbell had loaned no money to appellant, nor had he agreed to loan any to him. They were, in the first instance, jointly interested in the purchase of the land, every dollar of the purchase price of which was advanced by Campbell on the promise of appellant that he would refund his portion in a few days. Failing in this, he transferred all his interest in the land to Campbell, allowing him to take a deed for it in his own name, and solely as a gratuity, with the view, alone, that appellant might derive some benefit from the purchase, which was then a hazardous one. Campbell gave appellant a written contract to convey to him the south half of the tract, provided appellant paid him therefor one half the purchase money on the first day of March, 1866, the day Campbell's note for the purchase money matured, with a clause in the contract making time of the

essence. This, appellant failed to do, when, from a generous impulse, and from no other consideration, Campbell extended the time to appellant, in which to make this payment, thirty days. Appellant was again in default, when Campbell served a notice upon him on the 2d of April, 1866, declaring the contract forfeited. How an equitable mortgage can be constructed out of such a transaction as this, we can not perceive.

To this declaration of forfeiture appellant made no objection. He regarded the contract as at an end, the property, at the date of forfeiture, being worth but little more, if anything more, than the original purchase price. This is evident from the testimony. If it had advanced in value, there would have been no difficulty in raising one half the purchase money upon it. The truth appears to be, appellant was not very anxious to raise the money he had engaged to pay Campbell, and was not stimulated thereto until some four years after the forfeiture was declared, when in June, 1870, he filed this bill. We fail to perceive any ground on which to ask the equitable interposition of this court. Appellant has, at no time prior to filing this bill, manifested any desire to perform his contract. About that time, by reason of projected public improvements in the neighborhood, this land had risen very greatly in value, and without the payment of one dollar on his contract, and that contract declared forfeited without any objection from him four years previously, he now seeks, on the vainest possible pretenses, to stir up an equity, which, if one existed, has been lost by his laches. Had the bill been filed for a specific performance of the contract of October, 1866, appellant would have had, for the reasons given, no standing in a court of equity. Equally unsubstantial is his position as a *cestui que trust,* or an equitable mortgagor. *Ranstead* v. *Otis et al.* 52 Ill. 30, is not unlike this case.

We perceive no error in the decree, and all agree it should be affirmed.

*Decree affirmed.*

## SOPHIA C. NEWMAN *et al.*

*v.*

## WELLS WILLITTS.

1. CREDITOR'S BILL—*for sale of life estate to satisfy a judgment at law.* Where a defendant in a judgment held a life estate in a tract of land and sold the same to a third person without consideration, and he, at the request of his grantor, conveyed the same to her daughter: *Held*, that a court of equity will give relief on a bill filed for the purpose of subjecting the life estate to the payment of the judgment.

2. ERROR IN THE JUDGMENT. Nor does it matter, in such a case, that the clerk assessed the damages on a default where there was a special count on a note and the common counts in the declaration. If an error, a court of equity will not hold the judgment void for that reason.

3. EXECUTION—*variance.* Nor will a court of equity withhold relief because the first execution, returned *nulla bona*, was issued for a less sum than the judgment. Such a variance would be ground to have it set aside in the court whence it was issued; it was not void but only voidable.

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

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

Mr. JOHN C. PEPPER, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a creditor's bill, filed upon a judgment recovered by appellee, against Sophia C. Newman, at the April term, 1861, of the Mercer circuit court, for $814.85, besides costs. The bill alleged that, on the 4th of October, 1861, an execution was issued upon this judgment, described in the writ as a judgment for $800.85, and was returned *nulla bona*; that, on the 11th of August, 1864, another execution was issued and returned in like manner; that Sophia C. Newman has a life estate in certain real estate described in the bill, and in order to defraud appellee she executed a deed of it to one J. Martin

without consideration, and the latter, at the request of the former, conveyed the same to Martha A. Newman, the daughter of said Sophia C.

A stipulation was entered into, admitting the life estate in Sophia C. Newman, and a homestead right, and that the life estate had, from the time of appellee's judgment, been subject to the same, and that the deed from Sophia C. to Martin, and from him to Martha A. Newman, were void as to appellee; the stipulation reserving to appellants the right to question the validity of the judgment and avail themselves of the statute of limitations.

Two points are presented for the consideration of the court:

*First*—That the judgment upon which the bill is based was irregular and void, because it appears, by the record in that case, that there was one special count in the declaration upon a promissory note, and the common counts; that a default was taken, and the court ordered that the clerk assess the damages upon the count on the note without any withdrawal of the common counts.

*Second*—That the first execution did not correspond with the judgment, but was for $14 less, and that intermediate the time of filing this bill and the hearing upon application to the court at law by the appellee, the execution was amended by order of the court so as to correspond with the judgment.

By the first point, appellants ask a court of equity to question a judgment at law for irregularity, and upon a ground which, this court has expressly decided, is not sufficient to reverse the judgment upon error. *Thompson* v. *Haskell*, 21 Ill. 215.

A judgment at law may be impeached in equity for fraud, but there is no case in which equity has ever undertaken to question a judgment for irregularity. *Shottenkirk* v. *Wheeler*, 3 Johns. Ch. 275.

The second point calls in question the validity of the execution. The variance between the amount stated in the execution and the judgment, was an irregularity which rendered

the writ voidable and subject to be set aside upon the application of the judgment debtor to the court whence it issued, but was not void. *Durham et al.* v. *Heaton,* 28 Ill. 264.

Upon a creditor's bill, filed to obtain satisfaction of a judgment after the return of an execution at law unsatisfied, the court of chancery is not authorized to decide upon the regularity of the judgment and execution in the court of law. But in a proper case, the proceedings upon the creditor's bill will be stayed a sufficient length of time to enable the defendant to apply to the court at law for an order to set aside the judgment or execution for irregularity. *Sandford* v. *Sinclair,* 8 Paige R. 373.

The points made being untenable, and this court perceiving no error in the record, the decree of the court below will be affirmed. *Decree affirmed.*

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## HOME MUTUAL FIRE INSURANCE CO., OF CHICAGO,

*v.*

## GEORGE HAUSLEIN.

1. INSURANCE—*policy—condition—violation of.* A policy of insurance contained a condition that, in case of any sale, transfer or change of title, the insurance should be void and cease, unless assented to by the company; afterward the assured assigned the policy, with the assent of the company, to a mortgagee, and afterwards the assured sold the property to three persons, one of whom re-conveyed to him, and the other two executed mortgages to secure the purchase money: *Held,* that the assignee took the policy subject to the conditions it contained, and his equities confer no right. If the assignor has lost all right of recovery, by violating the conditions of the policy, the assignee occupies the same position.

2. It was a change of title in the property. The assured had agreed that he would not change the title to the property, and if he did, the insurance should cease, and when the condition was violated, the policy became void. Nor did the memorandum that the loss, if any, should be paid to the assignee as his interest might appear, change the rights of the assignee.

3. PARTIES—*interest—legal rights.* The assured, who held the legal title, could not sue, because he had broken the condition of the policy. The assignee could not sue because he was not originally a party to the contract. The assignment could only pass an equitable interest, and he could not sue in his own name for a breach.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. SLEEPER & WHITON, for the appellants.

Messrs. DENT & BLACK, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The effect upon the policy, caused by the alienation of the property insured, is the only question argued.

One of the conditions of the insurance, made a part of the policy, was that, "in case of any sale, transfer or change of title in the property insured by the company, the insurance shall be void and cease."

The title of the assured to the property, at the date of the policy, is not questioned; and the assignment to Seibert, the mortgagee, was made with the assent of the company.

After the execution and delivery of the policy and the making of the assignment, the assured sold and conveyed the property to three other persons. One of them re-conveyed to him, and the other two executed to him mortgages to secure the purchase money.

At the time the insurance was effected, the assured was the absolute owner; at the time of the fire he owned one-third, and was mortgagee of two-thirds, of the property.

It has been fully settled by this court, that the assignee of a policy takes it subject to the conditions expressed upon its face; and his equities confer no right, if the assignor has lost all right of recovery by a violation of any of the terms or conditions of the policy. *Ill. Mu. Ins. Co.* v. *Fix,* 53 Ill. 151.

When the assignment was made, the assignee knew of the condition in the policy providing for forfeiture in the event of alienation, and his rights must be controlled thereby. His

position is identical with that of the assured, so far as the terms of the contract must govern the rights of the parties.

There was, unquestionably, a *change of title* in the property. The absolute ownership of the entire property is easily distinguished from the ownership of one-third and a mortgage of two-thirds. The interest, at the time of the insurance, and at the time of the loss, was not the same.

The insured became a member of a mutual company, and contracted that he would not make a sale of the property insured, or change the title; and that if he did so, the insurance should cease. The condition is plain, and we must interpret the contract according to the intention of the parties, to be gathered from the language employed.

Section fifteen of the charter of the company, which was printed on the back of the policy, provided, in as absolute terms as the conditions of the policy referred to, that the policy should be void upon any alienation, by sale of the property or otherwise.

There can be but one conclusion, that, by the act of the insured, the policy became void. *Dix* v. *Mercantile Ins. Co.* 22 Ill. 272; *Hartford Fire Ins. Co.* v. *Ross*, 23 Ind. 179; *Finley* v. *Lycoming Mu. Ins. Co.* 30 Penn. 311; *Tittmore* v. *Vermont Mu. Ins. Co.* 20 Vt. 546.

But it is contended that the memorandum, that the loss, if any, should be payable to the assignee, as his interest might appear, shows that his interest was intended to be protected, and that there was no sale or change of title affecting the interest of the assignee.

The insured can not sue, because he has so acted as to forfeit the policy. The assignee can not sue, for he was not a party to the contract originally. In its nature, the policy was only assignable so as to pass an equitable interest to the assignee. Even, as in this case, where the assignment was made with the consent of the company, the assignee can not sue for a breach, in his own name. *Jessel* v. *Williamsburg Ins. Co.* 3 Hill, 88.

The assignment was made with the consent of the company, but the condition of forfeiture upon alienation, without the consent of the company, was still applicable to the assignee as well as to the insured. The company did not waive the effect of the breach of the condition.

The insured testified that he thought that he informed the secretary of the company of the sale after it had been made, and that he would bring the policy and have it transferred to the purchaser, and the secretary replied, "All right."

The secretary testified positively that he never heard of the sale until after the loss. The weight of testimony is decidedly in favor of the company, that no information of the alienation was communicated to its officers. The insured had no distinct recollection of the fact, and he certainly would have remembered if the communication had been made.

But this information, if given, was not a compliance with section fifteen of the charter. That section made the policy void, upon alienation, and required its surrender to the company; but it was provided that the grantee, or alienee, to whom it may have been assigned, might have it confirmed, with the consent of the directors, within thirty days after the alienation, by giving security, to their satisfaction, for the payment of the unpaid premium note.

The policy was forfeited, as to the insured party, by the act of alienation; and the communication of the fact, after forfeiture, could not revive it; nor could it be a waiver. To avoid the consequence of a sale, under this section, the knowledge of the intention to sell should be brought home to the company before the forfeiture has been absolutely accomplished; or, if after alienation, notice is given of it, the proviso of the section must be complied with by the alienee, unless the directors dispense with the security. Of this there is no proof.

The confirmation, under this section, is for the benefit of the alienee, and not for the benefit of the party who has lost all his rights.

Counsel for appellee have referred to a number of authorities in favor of the position that the alienation was not of such a character as to render the policy void.

In *Stetson* v. *Mass. Ins. Co.* 4 Mass. 330, the article in the policy did not declare that it should be void upon alienation. The court held the articles imported a continuance of the contract, notwithstanding alienation.

In *Strong* v. *Man. Ins. Co.* 10 Pick. 40, the policy did contain the provision "that, if the property should be sold or conveyed, the policy should be void."

The sale was made by the act of the law, and without the assent of the insured, and was mortgaged when the insurance was effected. It was held that the insurable interest was not divested by sale on execution of the equity of redemption, so long as the right to redeem continued. Besides, the language of the condition might properly be construed to mean a voluntary sale, and not a forced sale under the law.

In *Power* v. *Ocean Ins. Co.* 19 La. 28, after the sale the property reverted by reason of the non-payment of the purchase money.

In *Trumbull* v. *Portage County Mu. Ins. Co.*, 12 Ohio, 305, there was a mere agreement to sell, without any conveyance.

*Titmore* v. *Vt. Mu. Ins. Co.* 20 Vt. 546, was a conditional sale only. The assured conveyed the property, and at the same time took back a deed, to be void upon the payment of so much money; but the grantor in the last deed never agreed to pay the money.

In *Lane* v. *Mu. Fire Ins. Co.* 12 Me. 44, the assured took back the goods sold, before the loss. The court, in effect, decided that there was no alienation, but term the pretended purchaser a mere tenant at will.

The authorities cited do not sustain the position taken in behalf of appellee.

We think that the policy sued on is void, and the judgment must be reversed and the cause remanded.

*Judgment reversed.*

JOHN H. DANIELS

*v.*

CHARLES D. WILBER.

MEASURE OF DAMAGES *upon bill rendered.* Where a person, at the request of another, went to, and saw, the treasurer of a coal company, for the purpose of negotiating the sale of a tract of coal land to the company, and conversed with the treasurer on the subject, and was only engaged in such employment not exceeding one day, and the owner subsequently sold the land to the company, and the person who had seen the treasurer presented a bill for a specified sum for his compensation, but it was not paid: *Held*, that the amount of such bill thus presented is the extreme limit of any recovery he can have. It is the price he fixes on the value of his compensation and an admission that it is worth no more.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. VAN ARMAN & VALETTE, for the appellant.

Messrs. HARDY & HERRICK, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by Wilber against Daniels, to recover for labor and service rendered by the former to the latter in and about the negotiation of a sale of certain real estate of Daniels.

The proof of any employment, at all, of Wilber by Daniels, was not very satisfactory—there was no contract for the amount of compensation pretended—but the claim and recovery of compensation were upon a mere *quantum meruit.*

The service rendered by Wilber, and for which he claimed compensation, as sworn to by himself, consisted in making a journey from his home in Wilmington, Ill., to Chicago, and there holding an interview and conversation with a certain person for the purpose of negotiating for the sale of certain coal

lands of Daniels, all which, with Wilber's return home, occupied only the whole or some part of a single day.

Daniels subsequently effected a sale of the land to a certain coal company, of which the person with whom Wilber had the interview and conversation, was treasurer; but to what extent, if any, Wilber's services conduced to the sale, was disputed and uncertain.

About six months after the conclusion of the sale by Daniels, Wilber presented to him a bill in writing for the services he claimed to have rendered in making the sale, in which bill the price charged for the entire service for which the suit was brought, was the sum of $1000.

The verdict was for $3750, upon which judgment was rendered.

This deliberate estimate which Wilber himself, in view of all the facts in the case, placed upon the value of his services in the bill presented, was an admission of the strongest character that it was all that his services were reasonably worth—an admission so strong that, under the circumstances of this case, and for aught that appears in this record to detract from its force, we think it should constitute the utmost limit of any recovery on the part of Wilber.

The court below should have set aside the verdict because the damages were palpably excessive.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

## NATHAN G. HARDING *et al.*

*v.*

## JOHN W. DILLEY.

PROMISSORY NOTE—*liability of indorser.* It is not necessary in this State, in order to fix the liability of the indorser of a promissory note to the indorsee, that the latter should prove a demand upon the maker of the note, a refusal to pay, and notice to the indorser of non-payment.

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

This was an action of assumpsit, brought by Nathan G. Harding and Alvin Bryan against John W. Dilley, as indorser of a promissory note made by one Seneca S. Lake, to defendant, and by him indorsed to the plaintiffs. Upon a trial in the circuit court judgment was rendered in favor of the defendant, from which the plaintiffs appeal.

Messrs. KIDDER & NORCROSS, for the appellants.

Messrs. STEWART & PHELPS, for the appellee.

Per CURIAM: In this case, the seventh instruction for the defendant was, that the indorser of a note could not be held without demand and notice. This, under our statute, was erroneous.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

## The Chicago, Burlington & Quincy Railroad Co.

*v.*

## James Magee.

1. Pleading—*duplicity.* Where a count in a declaration averred that a railway company failed to fence its road, and that a train was run, conducted and directed carelessly, whereby plaintiff's horse was killed: *Held*, that plaintiff might recover on proving either ground; that the declaration was obnoxious to a demurrer for duplicity, but both grounds were traversed by filing the general issue.

2. Allegations and proofs. Where the plaintiff avers, in his declaration, that defendant carelessly "ran, conducted and directed" its train, it is error to instruct the jury that they might consider the condition of the brakes employed. The action was for carelessness, and not for a failure to properly equip their road.

3. It was error to instruct the jury that, if the road was not so fenced as to prevent the horse from getting upon it, they were bound, under any circumstances, to find for the plaintiff. There was evidence tending to show that the horse came upon the road through an open gate. If this was true, plaintiff could not recover, unless the gate had been so long open as to raise the presumption that the servants of the company knew it, or to charge them with negligence. The instruction excluded from the jury the consideration whether, if the horse came through the open gate, the company was chargeable with carelessness.

Appeal from the Circuit Court of Henderson county; the Hon. Arthur A. Smith, Judge, presiding.

Mr. B. C. Cook and Mr. John J. Glenn, for the appellant.

Mr. J. W. Davidson, for the appellee.

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

This was an action brought by the appellee to recover the value of a horse killed by one of defendant's trains. The declaration has but one count, and in that the plaintiff avers a failure to build and maintain a sufficient fence, as required

by the statute, and also avers that the defendant so carelessly ran, conducted and directed its train that it struck and killed the plaintiff's horse.

On the trial the plaintiff was permitted to introduce evidence tending to prove both the grounds of liability alleged in his declaration; and the court instructed, a recovery could be had upon either ground, if the proof was sufficient. It is now insisted this was error. The objection, however, is not well taken.

The declaration was liable to a demurrer for duplicity, in uniting in one count two causes of action. But the defendant pleaded the general issue, and on the trial of the issue thus made, the plaintiff was entitled to prove either of the causes of action alleged in his declaration.

The third instruction for plaintiff does, however, go further than is proper under the declaration. It tells the jury they may, in determining the question of negligence, consider whether the brakes were fit for use. The only common law negligence averred in the declaration is, that the defendant carelessly "ran, conducted and directed" its train. Under this averment the jury had no right to consider any carelessness there may have been in the equipment of the train with proper machinery. *Central Military Tract R. R. Co.* v. *Rockafellow*, 17 Ill. 541.

The first instruction for the plaintiff also went too far, in that the court told the jury, if they found the road was not so fenced as to prevent the horse from going upon it, "they were bound, under any circumstances, to find for the plaintiff." There was considerable evidence tending to show the horse came on the road through an open gate. If it did so, the plaintiff could not recover, unless the gate had been so long open as to justify the presumption that the defendant's servants knew that fact, or as to charge them with negligence in not ascertaining it. *Ill. Cent. R. R. Co.* v. *Swearingen*, 47 Ill. 206.

It was error, therefor, to tell the jury, if the fence was insufficient, their verdict must be for the plaintiff, under any

circumstances. This instruction excluded from their consideration the important question whether, if the horse came through the open gate, the defendant was chargeable with carelessness in connection with that fact.

For these errors, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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## SAMUEL BURNS

*v.*

## THOMAS C. NOTTINGHAM.

1. PARTNERSHIP—*suit by one partner against another—when it will lie.* One partner can not sue another at law until there has been a dissolution of the partnership, a final settlement of the affairs of the firm, a balance struck and a promise to pay. Balances struck only preparatory to a settlement are not sufficient. Until the final settlement is had, the remedy is in equity. A statement of accounts between two of three partners, showing the amount of profits that had been made, but which failed to state in whose hands they were, the amount each partner was entitled to receive, or whether the partners had received their capital stock put in, or had accounted for funds, if any, drawn out by them, is not such an accounting and settlement as authorizes one partner to sue another at law.

2. SETTLEMENT—*evidence.* Where one partner testifies a settlement was had with one or two other partners, and he understood that a certain sum was due him, but does not say it was found to be due on the settlement, or that the other admitted such sum to be due, and testifies that the other agreed to give his notes for what he owed, but the latter, in his testimony, denies that any sum was found to be due, and that he was willing to give his notes for what was due when it could be ascertained: *Held*, this evidence fails to prove a final settlement and a balance struck. In such a case, the remedy is in a court of equity.

WRIT OF ERROR to the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

Mr. WILLIAM POTTER and Mr. J. H. BURNS, for the plaintiff in error.

Mr. THOMAS P. BONFIELD, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by defendant in error, in the Kankakee circuit court, against plaintiff in error. A trial was had by the court and a jury, resulting in a verdict and judgment of $1000 against plaintiff in error, to reverse which the record is brought to this court on error.

It appears that the parties to this suit were, for a time, partners as suttlers for the army, and afterwards took one Robinson into the firm. This action was brought to recover a balance claimed to be due from plaintiff in error on a settlement of the affairs of the firm. But it is urged by plaintiff in error that the evidence fails to show a final settlement, the ascertainment of the balance due, and a promise to pay the same. It is the settled law of this court that one partner can not bring an action in assumpsit against his late partner, unless, upon a dissolution of the co-partnership, the partners account together, and a balance is stated in favor of one, and the other agrees to make payment of such sum. The balance so found must be a final settlement of all the partnership accounts, but balances only struck preparatory to a final account are not sufficient to form the subject matter of an action at law. Until this is done, the remedy is in equity. *Davenport* v. *Gear*, 2 Scam. 495; *Frink* v. *Ryan*, 3 Scam. 322; *Chadsey* v. *Harrison*, 11 Ill. 151; *Ridgway* v. *Grant*, 17 Ill. 117. And as a general rule, such a settlement must be accompanied by a promise to pay by the partner thus found indebted, to confer jurisdiction on a court of law.

The question is, then, presented whether, in this case, it appears that there was such a settlement and promise. A written statement signed by the parties was produced and read in

evidence, which states that it is a settlement between the parties to this suit, but is not signed by Robinson, the other partner. It states that it shows the profits of the concern. It fails to state in whose hands the funds were; and there is no presumption that one partner has them rather than another, as each has an equal right to retain them until there is a final settlement.

This instrument does not fix any amount that each partner is entitled to receive out of these profits; nor does it appear whether the partners had each received his share of the capital stock put into the partnership, or what amount, if anything, may have been drawn out by the several partners. Although called a settlement, it is indefinite and wholly unsatisfactory as to the rights and liabilities of the several partners. Again, Robinson was not a party to this statement, and if he were, it fails to appear what portion of these profits belong to him. This written statement is wholly insufficient to fix a liability for any sum on plaintiff in error.

When considered, the evidence of defendant in error is not clear and satisfactory as to a settlement. He testifies that he got the tin ware and collected the account of Robinson, and that plaintiff in error paid him a watch at $100. He says the settlement was made, and plaintiff in error owed him a balance of $1100, and agreed to give his notes. On cross-examination, he says he understood that Burns owed him $1100, and that Burns proposed to give his notes to him and pay them as they fell due. Defendant in error does not say that plaintiff in error admitted that he owed him the $1100. He says that sum was due him, and that he understood it to be due him. He does not say that sum was found due him on settlement. And plaintiff in error swears that he told defendant in error that he would pay him when he could ascertain the amount he owed him; that he was willing to give notes, horses, or anything else, if he could ascertain the amount; that he wrote to Robinson for a statement of their accounts, but did not receive it; that he had no other settlement except as

shown by the written statement. He also states that their clerk took the books, and he has no knowledge of what became of them; that defendant brought the written statement with him, and that he does not believe he owes defendant the amount he claims.

In considering all the evidence, we fail to find that there was a final settlement, a balance struck, and a promise to pay the balance. It is not shown by the written instrument, nor is any amount fixed upon by defendant in error, which was admitted by plaintiff in error as being due him; and plaintiff in error denies that he agreed to any definite amount. This, then, falls far short of the evidence of such a settlement of the partnership affairs, and the striking of a balance, as authorizes a recovery in an action of assumpsit for money had and received. On the state of facts disclosed by this record, the only remedy is in a court of equity.

The court below erred in overruling the motion for a new trial, and the judgment of the court below is reversed and the cause remanded.

*Judgment reversed.*

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## Chicago, Burlington & Quincy Railroad Company

*v.*

## John Riddle.

Evidence—*admissions of an agent.* The admission of an agent can bind the principal only when it is made in regard to a transaction then depending.

Appeal from the Circuit Court of Mercer county; the Hon. Arthur A. Smith, Judge, presiding.

Mr. B. C. Cook and Mr. H. Bigelow, for the appellants.

Messrs. Bassett & Connell, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This was an action on the case to recover damages of appellants for killing a hog by a railroad train under their control.

The only point we have deemed it necessary to consider is, the admissibility in evidence of statements made by Lampson, the engine driver, made after the accident occurred. Lampson was the agent of appellants for a particular purpose, and whilst in the accomplishment of such purpose, his acts and declarations made at the time would doubtless be evidence to charge the principal. But his declarations made after the purpose for which he was employed has been accomplished, or the act done which he was required to perform, can not be given in evidence against his principal, for they are no part of the *res gestæ*.

The rule is, that the admission of an agent can bind the principal only where it is made in regard to a transaction then depending. Whenever what he did is admitted in evidence, then it is competent to prove what he said about the act while doing it. Greenlf. on Ev. 146.

The testimony of this driver was material and produced the verdict. For the error in admitting it, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

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1. *Too late after plea in bar.* In a suit against husband and wife upon a promissory note executed by them jointly, the defendants joined in a plea in bar to which a demurrer was sustained, after which the wife pleaded her coverture in abatement: *Held*, the plea in abatement filed by the wife came too late, as she had joined her husband in the plea in bar, and it should have been stricken from the files. Matter in abatement must be pleaded before pleas in bar, to be available. *Thomas* v. *Lowy*, 512.

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ACTIONS.

In case of distress for rent.

1. *Remedies of the tenant.* The action of replevin may be brought to try the legality of a distress for rent, provided there is no sum whatever due for rent; but if any sum, however small, is due, and the distress is for a greater sum, or is excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by case. *Hare* v. *Stegall*, 380.

2. Where rent was in arrear, and property was distrained for its payment, and after having the amount of rent due ascertained before a justice of the peace, the constable making the distress sold the property without first having it appraised, as required by the statute, and after a tender of rent and costs, whereupon the tenant brought an action with two counts in case for not returning the property, and one in trover: *Held*, that trover will lie in such a case; that the statute requires the property to be appraised before it can be sold, and the requirement must be observed. *Tripp et al.* v. *Grouner*, 474.

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Subsequent discovery and probate of a will.

1. *After the appointment of an administrator.* Where a person died in the State of Pennsylvania, leaving a will, and having property and creditors in this State, letters of administration were granted in this State without it being known that there was a will, but on its discovery it was probated and recorded, and the letters of administration were revoked, and letters with the will annexed were granted to another person: *Held*, that the grant of the first letters was not void, but voidable, and the acts performed by the first administrator are binding in a collateral proceeding. *Shephard* v. *Rhodes et al.* 301.

2. Under our Statute of Wills, upon the revocation of letters of administration on the discovery and probate of a will, the various acts done and performed under the first grant of letters are binding until set aside in a direct proceeding. The court having jurisdiction of the person and the subject matter, its act is not void in granting letters, although it may have proceeded erroneously. Ibid. 301.

Suit by an administrator.

3. *When he may sue in his own name—and whether he must prove his fiduciary character.* It has been held that, where a note is made specially payable to a party described as administrator or guardian, such

party may bring an action in his own name to recover the money secured thereby, and will not be required to prove his fiduciary character. Words descriptive of such character, used in the instrument sued on or in the pleadings, are immaterial, and need not be proved. *Lacock* v. *Oleson*, 30.

4. So, in an action to recover the price of personal property purchased at an administrator's sale, the administrator may sue in his own name, and if he describe himself in the pleadings as administrator, he need not prove such words of description. Ibid. 30.

APPLICATION TO SELL LAND TO PAY DEBTS.

5. *Evidence*, upon such an application, that one of the heirs had purchased the interest of others, but whether before or after the commencement of the proceeding did not appear, nor whether the purchase had been consummated or the consideration paid, was too loose to be considered by the court. *Bursen et al.* v. *Goodspeed, Admr.* 277.

6. *Adjusting equities.* In a proceeding of this character the court has no power to adjust the equities of the parties. The statute only confers power to order the sale of the real estate, in a proper case. Ibid. 277.

7. *Limitation—within what time the application should be made—and herein, when delay is properly accounted for.* See LIMITATIONS, 3, 4.

8. *Demurrer to the petition—disposition thereof on appeal to the circuit court.* See PRACTICE, 3.

ORDER OF DISTRIBUTION.

9. *Necessity of notice.* In case of a surplus remaining in the hands of an administrator from the sale of lands directed to be sold to pay debts, an order made by the probate court for its distribution, without notice to those entitled thereto, is void. *Long, Admx.* v. *Thompson, Guardian, et al.* 27.

10. *Setting it aside at a subsequent term.* Where a probate court improperly made an order for the distribution of money in the hands of an administrator, without notice to those entitled thereto, there having been no final settlement of the administration, and nothing done under the order of distribution, the whole matter was *in fieri*, and it was competent for the probate court, on notice to the administrator, to set aside such order at a subsequent term. Ibid. 27.

TIME FOR PRESENTING CLAIMS.

*Of the limitation of two years.* See LIMITATIONS, 1, 2.

ADOPTED CHILD. See PARENT AND CHILD.

AGENCY.

OF A SPECIAL AGENCY.

1. A special agent, to bind his principal, must act within the special authority conferred, and a party purchasing of such agent is

AGENCY. Of a special agency. *Continued.*

bound, at his peril, to know the extent of the agent's authority. *Baxter* v. *Lamont*, 237.

2. A party authorized another by letter to sell for him a certain tract of land. The portion of the letter creating the authority was as follows: "My terms are, parties purchasing it to assume the mortgage now on it, due in one and two years from the twenty-second day of last March, of $5,275, the balance to be paid to me, one-third cash, the rest in one and two years, at eight per cent. Now, if you can sell it on those terms within a few days, you can sell it for $800 per acre net." The agent contracted a sale of the premises at $850 per acre on substantially the above terms, but with a condition giving the purchaser an option whether or not he would complete the purchase, allowing him thirty days after he was furnished with an abstract of the title, in which to decide, and with a further condition that, in case the title was not perfect, the vendor should pay $2000 and all other damages and expenses. In an action by the purchaser against the vendor to recover damages for a failure to convey in compliance with the terms of the contract, the above conditions were regarded as exceeding the agent's authority, and hence the contract was not binding on the principal. Ibid. 237.

Admissions and declarations of an agent.

3. *Whether binding on the principal.* See EVIDENCE, 7, 8.

ALIMONY. See DIVORCE, 5, 6.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 1 to 10.

AMENDMENTS.

Certificate of publication in attachment.

*Amendment thereof after a reversal of the judgment—of its effect.* See ATTACHMENT, 7.

APPEARANCE.

Entered by attorney.

1. A court acquires jurisdiction of a party beyond reach of its process, on entry of appearance by attorney. *Martin* v. *Judd*, 78.

2. The authority of an attorney appearing in open court, will be presumed to be regular until the contrary is shown. But in vacation, authority to confess judgment must affirmatively appear; no presumption will be indulged as to his authority. Ibid. 78.

ARBITRATIONS AND AWARDS.

OF THE SUBMISSION.

1. It is indispensable to the jurisdiction of courts to render judgment upon an award of arbitrators that the submission be executed with the formalities of, and contain, in substance, what is required by the statute. *Moody* v. *Nelson et al.* 229.

2. A submission under the 1st section of the chapter of the Revised Statutes, entitled "Arbitrations and Awards," which authorizes persons to submit to the award of arbitrators any controversy existing between them, not in suit, it appearing the submission was not attested by any witness, was regarded as insufficient to confer jurisdiction on the court to render judgment upon the award. Ibid. 229.

3. The submission recited: "And it is hereby further agreed and understood, by and between the said parties, that this submission shall be made a rule of the circuit court within and for the county of Kane aforesaid:" *Held*, such language was not equivalent to an agreement that a judgment should be rendered upon the award made pursuant to the submission, as provided by the statute. Ibid. 229.

EVIDENCE TAKEN BY TWO OF THREE ARBITRATORS.

4. Where matters in difference were submitted to the award of three persons, two of whom heard the evidence of a sick witness, reduced it to writing, and all considered it in connection with the other evidence: *Held*, that as the evidence of the witness, taken in the presence of the attorney who now objects, was fairly taken and no objection was made at the time, or before the arbitrators, there was no injury sustained, and the award can not be set aside, under the circumstances, for such an irregularity. *White* v. *Robinson*, 499.

5. Had there been any fraud, misconduct or misrepresentation, it would have been otherwise. Ibid. 499.

6. This case distinguished from *Smith* v. *Smith*, 28 Ill. 56, as in that case no rights were waived, whilst in this there were. Ibid. 499.

ASSIGNMENT.

ASSIGNMENT IN BLANK.

1. An instruction, where the suit is by an assignee of a note, announcing that a note is indorsed in blank when the name of the indorser is simply written on the back of the note, leaving a space over the signature to insert the name of the indorsee or subsequent holder, and that whilst the indorsement remains blank the note may be passed by mere delivery, and the indorsee or other holder has authority to demand payment, or to make it payable to himself or to another person, is proper, and should be given. It is error to refuse it. *Palmer* v. *Marshall*, 289.

ASSIGNMENT. Assignment in blank. *Continued.*

2. It is not error, in such a case, to instruct the jury that if the note was placed in the hands of an agent for collection, indorsed in blank, and it was purchased of the agent in good faith, the holder can recover, unless the note was past due when purchased, and had been paid. In such a case, if purchased after maturity in good faith, and it had not been paid, it could be enforced. Or, if purchased under the supposed circumstances before it was due, its payment could be enforced although it had been paid. *Palmer* v. *Marshall*, 289.

Liability of assignor of promissory note.

3. *Pre-requisites thereto.* It is not necessary in this State, in order to fix the liability of the indorser of a promissory note to the indorsee, that the latter should prove a demand upon the maker of the note, a refusal to pay, and notice to the indorser of non-payment. *Harding et al.* v. *Dilley*, 528.

Of a right of action.

4. *Whether assignable.* The bare right to file a bill in equity growing out of the perpetration of a fraud on a party, is not assignable, being contrary to public policy and savoring of the character of maintenance. Neither is the right of action for a tort assignable. The assignor must have a substantial right, and not a mere naked right to overset a legal instrument or to maintain a suit. *Norton* v. *Tuttle et al.* 130.

Lease.

5. *Whether assignable.* See LANDLORD AND TENANT, 1, 2, 3.

Assignee of notes secured by mortgage.

6. *Of his power to sell under the mortgage, and to exercise the option to declare the whole debt due.* See MORTGAGES, 7, 8.

Assignee of policy of insurance.

7. *Of his rights.* See INSURANCE, 3, 4; PARTIES, 2.

Of a life insurance policy.

8. *Assignment thereof by the wife, for whose benefit it was issued.* See INSURANCE, 16, 17, 18.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Whether fraudulent.

1. While courts will sustain assignments preferring creditors, they are ever watchful to prevent conditions onerous, burdensome and discriminating, and which must result in giving the debtor control of a large part of the assigned property, and enable him to defeat the avowed purpose of the conveyance. Such conditions should always taint the instrument with fraud. *Hardin* v. *Osborne*, 93.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

WHETHER FRAUDULENT. *Continued.*

2. Thus, the reservation of a use or benefit to the grantor avoids the assignment. *Hardin* v. *Osborne*, 93.

3. Thus, where the deed of assignment excludes from its benefits all creditors residing at great distances, who do not signify their acceptance within a fixed time, which, under the circumstances, is unreasonably short, especially while relieving resident and preferred creditors from the necessity of any acceptance. Ibid. 93.

4. Thus, when unusual conditions and restrictions are imposed upon a trustee, delaying his action and dictating when and how he may sell, evidently intended to enable the debtor to control the execution of the trust. Ibid. 93.

EXCESS OF AUTHORITY IN TRUSTEE.

5. If the assignee is invested with power which the law would not give, and it is absolute and improper, the assignment must be held void. Ibid. 93.

RESTRICTIONS UPON THE TRUSTEE.

6. If the directions given and the restrictions imposed are not in affirmance of the legal duties and obligations of the trustee, and do not promote the interests of creditors, but tend to their injury, the assignment can not be sustained. The trustee must be left free to act in accordance with the rules and principles which govern trustees in similar cases. Ibid. 93.

ATTACHMENT.

THE REMEDY IS STATUTORY.

1. An attachment is not a proceeding at common law; it exists and is conferred alone by the statute, and is in derogation of the common law. It derives all its validity from the statute, and in all essential particulars must conform to its requirements, and where there is not personal service, notice by publication is as essential to jurisdiction as the issue of the writ and the levy on property, and the authority must be strictly pursued. *Haywood* v. *Collins et al.* 328.

OF THE NOTICE.

2. *Necessity thereof.* It is a principle of natural justice that a person must have notice of some kind before his property shall be bound by a judicial sentence. Without this principle is enforced, the right to possess and enjoy property can not be sustained, and our attachment law has, in accordance with this well settled rule, required notice, either by service or by publication. Ibid. 328.

3. By a levy of the writ on property, the court acquires jurisdiction of the subject matter, but there must also be jurisdiction of the

ATTACHMENT. Of the notice. *Continued.*

person of the defendant in some of the modes known to the statute, and without it the judgment will be void, and its validity may be questioned collaterally. And the facts showing jurisdiction must appear on the face of the proceedings. *Haywood* v. *Collins et al.* 328.

4. *Of its sufficiency.* Where a writ of attachment was sued out against a non-resident, sent to another county, levied upon lands, but returned not found as to the defendant, a judgment was rendered at the return term against the defendant, but the court did not find there was notice, either actual or constructive, and there was no personal service, and the notice of publication filed did not purport to be signed by the publisher or printer of a newspaper: *Held*, the notice was fatally defective, and the court thereby acquired no jurisdiction of the person of defendant, and the judgment was void. Ibid. 328.

5. *Proof of publication—in what manner made.* Proof of publication may be made in some other mode than by a certificate of the printer or publisher, but when the latter mode is adopted it must conform to the requirement of the statute. The certificate of a person not appearing to be the printer or publisher of a newspaper, does not comply with the statute; nor will any presumption be indulged, but the fact must appear. And where there is not a proper certificate, and the court does not, in its judgment, find that notice of some kind was given, the judgment can not be sustained. Ibid. 328.

6. Where there has been an effort to procure service by publication, and the publisher's certificate is insufficient, the judgment reversed, and the defendant files a bill to set aside sales under the judgment as a cloud on his title, the judgment which was void for want of proof of service can not be rendered valid by the evidence of the printer or publisher that the publication was legally made; that must appear from the certificate of the printer or publisher, or by the finding of the court. It can not be shown by parol in a collateral proceeding. To permit it, would be violative of all the rules of evidence; would destroy all the safeguards to purchasers at judicial sales; render records useless, and open wide the door to fraud and perjury. Ibid. 328.

7. *Amending certificate of publication after a reversal of the judgment —effect thereof.* Where a judgment in attachment was rendered without evidence of publication, and without personal service, and error was prosecuted and the judgment reversed and the cause remanded, and the note upon which the judgment was rendered was withdrawn and no further trial was had in the attachment case, and the defendant in the attachment suit filed a bill to set aside the deeds on a sale under the judgment in attachment as a cloud on his title, and after the bill was filed, plaintiff in the attachment, ten years after the rendition

ATTACHMENT. Of the notice. *Continued.*

of the judgment, on leave of the court, but without notice to defendant, filed an amended certificate of publication: *Held*, that the judgment being reversed and the cause remanded, and no trial subsequently had, there was no judgment existing; the amendment did not revive it. The plaintiff should have re-docketed the suit in the court below, and by proof on the trial, or by default, obtained another judgment, and failing to do so for such a length of time, there was an abandonment of the cause. But had the case been reinstated after it had gone from the docket five years, notice should have been given to the defendant.

The suit was in attachment, and it was under the statute that it commenced and progressed, and the reversal of the judgment did not change it to a common law proceeding; the judgment, as it stood when the sale was made, was under the statute and must be tested by its provisions, and if void, the purchaser acquired no title. *Haywood* v. *Collins et al.* 328.

Attachment for contempt.

*Nature of the process.* See CONTEMPT, 2.

BILL OF LADING.

Of its transfer.

*As a means for the delivery of goods.* See PLEDGE, 2, 3.

BONDS.

Replevin bond.

*Its requisites.* See REPLEVIN, 2.

BRITISH STATUTES.

In aid of the common law.

*How far in force in this State.* See STATUTES, 2; LANDLORD AND TENANT, 1, 2, 3.

BURDEN OF PROOF. See TELEGRAPHY, 6.

CARRIERS.

Of delay in transportation.

1. *Duty and liability of a carrier in that regard.* A railway company having received a large quantity of wool for transportation to Boston, carried it to within fifty miles of the terminus of their road, where, owing to the obstruction of the road with which it connected on the route to Boston, from snow, the wool was stored for two months, within which time the price declined in the Boston market: *Held*, that the company were liable, if for no other reason, because the

CARRIERS. Of delay in transportation. *Continued.*

agents of the company knew that the road was so blocked with freight that the wool could not go through in a reasonable time, and failed to inform the shipper of the fact, that he might have either sold at the point whence shipped, or have selected another route if he had so chosen. *The Great Western Railway Co. of Canada* v. *Burns et al.* 284.

2. The company, as a common carrier, having received the wool without giving notice, were required to carry it through in a reasonable time or respond in damages growing out of the delay. Ibid. 284.

3. The company were liable for another reason: When they stored the wool, there were twelve hundred car loads of freight stored ahead of the wool, and when the track of the other road was cleared and freight could be shipped through, there was sent forward nineteen hundred car loads before this wool was reshipped. The wool should have been reshipped in its turn, and the road had no right to give freight, shipped after it was, the precedence. Nor was the fact, that a portion of the latter shipments were perishable freight and live stock, any legal excuse for the delay in reshipping the wool, as they should have declined to receive such freight until it could be sent through without delaying freight having the precedence. Ibid. 284.

4. Nor is it any defense that the wool was shipped from the warehouse in which the company had stored it, in advance of other goods stored there before the wool, and having the precedence, as, if the company had received no new freight until the blockade was removed, the wool would have gone through several weeks earlier than it did, and this is the real ground of the liability of the company. A common carrier has no right to store a part of the freight received for transportation, and leave it there whilst he receives new freight and sends it through, and when it does so it must make compensation to parties injured thereby. Ibid. 284.

Delivery of goods beyond their own lines.

5. *Liability of carriers in respect thereto.* Where goods are delivered to a railroad company for carriage, marked to a particular place, and beyond the terminus of their line of road, the company receiving the goods are bound to carry them to the place of destination. To that extent is their undertaking at the common law, but they may, by express agreement, limit their liability to their own route and to its terminus. *Chicago & Northwestern Railway Co.* v. *Montfort et al.* 175.

6. *Receipt of the carrier as a contract.* See CONTRACTS, 8.

CASE.

Whether the action will lie.

*In favor of a tenant in case of an improper distress.* See ACTIONS, 1

CAVEAT EMPTOR.

As applied to judicial sales. See SALES, 12, 13.

CHANCERY.

Denying allegations of bill by affidavit.

1. *Not allowable.* Where, in a suit for an injunction, there appeared in the record an affidavit of the defendant denying the allegations of the bill upon which the injunction was sought, but the affidavit appeared to have been filed on the day the writ of injunction was awarded, it was *held*, that the practice in this State did not admit of such an affidavit, made out of court, to be thus brought into the record, and such affidavit had no such place in the record as to entitle it to consideration by this court. *Hickey* v. *Stone et al.* 458.

Motion to dismiss a bill.

2. *And herein of the office of a demurrer.* In chancery, a motion to dismiss the bill has the effect of a demurrer to the bill for want of equity, and such a motion may be regarded as an oral demurrer. Ibid. 458.

3. The office of a demurrer in chancery is to bring the merits of the case before the court. It admits all the facts well pleaded, and asks the judgment of the court, if, upon the facts so admitted, the complainant is entitled to the relief he asks, or to have the matters of the bill adjudged in his favor. Ibid. 458.

4. The same is the office of a motion to dismiss. It admits the facts alleged in the bill and calls for the judgment of the court upon them. Ibid. 458.

Dismissal of bill as to one party.

5. *Effect thereof on the jurisdiction of the court in regard to such party.* See USURY, 4.

Removing cloud upon title.

6. *Invalid tax title.* A party in possession may maintain a bill to cancel an invalid tax title and certificate of purchase as a cloud on his title. *Barnett* v. *Cline*, 205.

7. *What terms.* In such a case, the court will require the complainant to pay the purchase money at the tax sale, and all taxes subsequently paid on the land with six per cent interest, as conditions to granting the relief sought. Ibid. 205.

8. It is error, on granting relief in such a case, to require the holder of the tax title to release his title to complainant. The court, in such a case, should simply restrain the holder of such title, his heirs and assigns, from ever asserting the same. Ibid. 205.

CHANCERY. *Continued.*

CREDITOR'S BILL.

9. *For sale of life estate to satisfy a judgment at law.* Where a defendant in a judgment held a life estate in a tract of land and sold the same to a third person without consideration, and he, at the request of his grantor, conveyed the same to her daughter: *Held*, that a court of equity will give relief on a bill filed for the purpose of subjecting the life estate to the payment of the judgment. *Newman et al.* v. *Willitts*, 519.

10. *Effect of error in the judgment.* Nor does it matter, in such a case, that the clerk assessed the damages on a default where there was a special count on a note and the common counts in the declaration. If an error, a court of equity will not hold the judgment void for that reason. Ibid. 519.

11. *Variance in the execution.* Nor will a court of equity withhold relief because the first execution, returned *nulla bona*, was issued for a less sum than the judgment. Such a variance would be ground to have it set aside in the court whence it was issued; it was not void but only voidable. Ibid. 519.

PRESERVING EVIDENCE IN CHANCERY.

12. Where the chancellor gives a certificate of evidence heard on the trial, and it is not sufficient to sustain the action of the court, the decree will be reversed, notwithstanding it finds and recites facts that are sufficient. In such a case, the certificate of evidence must control. *Grob* v. *Cushman*, 201.

ANSWER NEED NOT BE SWORN TO.

13. *In suit for divorce—and herein, of its effect as evidence if sworn to.* See DIVORCE, 4.

CONTRACTS AGAINST PUBLIC POLICY.

14. *Remedy in respect to them.* See CONTRACTS, 4, 5.

CORRECTING MISTAKES.

15. *Remedy in chancery.* See MISTAKE, 1, 2.

RESCISSION OF CONTRACTS.

16. *As between husband and wife, where the latter procures a conveyance upon a threat of abandoning her husband.* See HUSBAND AND WIFE, 3.

DECREE UPON CONSTRUCTION SERVICE.

17. *Opening the same.* See DECREE, 1, 2, 3.

SPECIFIC PERFORMANCE.

18. *Of a promise by an insurance agent to endorse on the policy consent to a sale of the property after it was made.* See INSURANCE, 5, 6.

CLERK OF CRIMINAL COURT OF COOK COUNTY.

TENURE OF HIS OFFICE.

*Under constitution of* 1870. See OFFICERS, 2.

CLOUD UPON TITLE. See CHANCERY, 6, 7, 8.

COLOR OF TITLE. See LIMITATIONS, 7 to 11.

COMMON LAW.

AND BRITISH STATUTES IN AID THEREOF. See STATUTES, 2.

CONSIDERATION.

WHEN SUFFICIENT.

1. Where a person, being indebted, conveyed his property, real and personal, to a trustee, to be sold for the payment of his debts, and a portion of the real estate was conveyed to his principal creditors in satisfaction of their claims: *Held*, that those debts formed a sufficient consideration to support the conveyance, although the proceeds were not applied on all of the debts. *Finley et al.* v. *McConnell*, 259.

FAILURE OF CONSIDERATION.

2. *What amounts to.* Where property constitutes the consideration of a note, there can be no failure of the consideration, unless there is a warranty of the soundness or quality of the property, or a knowingly false representation made in regard to it. *Leggat et al.* v. *Sands' Ale Brewing Co.* 158.

FAILURE OR PARTIAL FAILURE OF CONSIDERATION.

3. *Must be specially pleaded.* See PLEADING AND EVIDENCE, 11.

WANT OF CONSIDERATION.

4. *Promise of an insurance agent to endorse on the policy consent to a sale of the property after it was made.* See INSURANCE, 6.

CONSIGNOR AND CONSIGNEE.

CONTROL OF THE FORMER OVER HIS OWN PROPERTY. See PLEDGE, 2.

CONSTITUTIONAL LAW.

SPECIAL CHARTERS FOR TOWNS.

*Under constitution of* 1848. See CORPORATIONS, 3.

JURISDICTION OF CRIMINAL COURT OF COOK COUNTY.

*Under constitution of* 1870. See HABEAS CORPUS, 3 to 8.

CLERK OF CRIMINAL COURT OF COOK COUNTY.

*Tenure of his office under constitution of* 1870. See OFFICERS, 2.

CONSTITUTIONAL LAW. *Continued.*

COMMUTATION WITH A STREET RAILWAY.

*In respect to improvements upon the street.* See SPECIAL ASSESSMENTS, 16.

OF THE TITLE OF PRIVATE OR LOCAL LAWS. See STATUTES, 1.

SALE FOR DELINQUENT TAXES.

*By whom to be made*—section four of article nine of the constitution construed in *Hills* v. *City of Chicago*, 86. See TAXES, 1 to 8.

SPECIAL ASSESSMENTS.

*Of the rule of equality between burdens and benefits.* See SPECIAL ASSESSMENTS, 10, 11.

CONSTRUCTION.

OF THE ADOPTION OF FOREIGN STATUTES.

*Together with their construction.* See STATUTES, 2.

CONTEMPT.

IN A COURT OF LAW AND CHANCERY.

1. *Difference in the practice.* In a court of law, the defendant may clear himself of a contempt by his answer, and be discharged; but in equity, the defendant's answer to interrogatories may be contradicted and disproved by the adverse party. *Buck* v. *Buck*, 105.

2. *Attachment for contempt—nature of the process.* The attachment for this kind of contempt—disobedience to an order to pay money—is rather a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. Ibid. 105.

3. *Evidence admissible.* In such a proceeding, the adverse party may avail himself of the evidence of defendant as in a civil case. Ibid. 105.

4. *Replication to interrogatories.* The rules of chancery practice do not require a replication to an answer to interrogatories filed in a proceeding for contempt. Ibid. 105.

DISOBEYING WRIT OF HABEAS CORPUS. See HABEAS CORPUS, 10, 11, 12.

CONTINUANCE.

ABSENT WITNESS.

1. *Requisites of the affidavit.* It is not error to refuse a continuance where the affidavit fails to state that the party has no other than the absent witness by whom he could prove the facts relied on by the party. *Jarvis* v. *Shacklock et al.* 378.

CONTINUANCE. *Continued.*

ILLNESS OF COUNSEL.

2. Where a case was called, and passed because of the illness of the counsel, and nearly three weeks afterwards the case was again called for trial and a motion was made for a continuance by defendant because his counsel was sick, and the court can see that a fair trial would be prevented by illness of counsel, the case should be continued; but where there are no questions of law, but simply a question of fact, and the evidence is in a small compass, and another attorney could be readily informed of the character of the case, and the defendant was himself an attorney, it is not error to refuse a continuance. *Jarvis* v. *Shacklock*, 378.

ADMITTING TRUTH OF AFFIDAVIT.

3. *Construction of practice act and of the act of* 1869, *amendatory thereof.* On a trial for a riot, the defendant filed an affidavit for a continuance, which contained sufficient grounds for allowing the motion, but the State's attorney offered to admit that the witnesses, if present, would swear to the facts contained in the affidavit, whereupon the court overruled the motion and required the parties to proceed to trial on such admission: *Held*, the court erred, as the act of 1869 is but an amendment of the practice act, and does not apply to criminal trials; but that the court might properly, in such a case, permit the prosecuting attorney to admit the absolute truth of the affidavit, without the right to contradict its truth, and require the defendant to go to trial, but in doing so it would not be under the practice act, but because the court could see that the defendant would not be prejudiced. *Van Meter et al.* v. *the People*, 168.

CONTRACTS.

CONTRACT AGAINST PUBLIC POLICY.

1. *In respect to the location of a railroad.* Two persons owning a tract of land on the line of a railroad, contracted with the president of another road then being constructed, and a firm of individuals who had contracted to build that road, to lay the land off in town lots, and, after selling lots to the amount of $4800, to convey to the president of the road and to the construction company an undivided half of the remaining lots. The president and the individuals composing the construction company were to pay no money, but agreed to "aid, assist and contribute to the building up of a town on said land:" *Held*, that if this contract was made to secure the location of the road at a place where it would not be of the greatest benefit to the stockholders of the road, then it was in the nature of a bribe, and can not be enforced; or, if the place where the parties agreed the road should be located, which was afterwards done, was the route best calculated

CONTRACTS. Contract against public policy. *Continued.*

to promote the interest of the stockholders and the public, and the officers of the company were professing to hesitate between it and another line to procure the agreement, that was a fraud, and the contract can not be enforced in equity. *Bestor et al.* v. *Wathen et al.* 138.

2. When the legislature grants a company a charter for the purpose of constructing a railway, the grant is made because it is supposed the road will bring certain benefits to the public; and when subscriptions are made to build such a road, it is with the understanding that the officers entrusted with its construction will so locate the line and establish its depots as to bring the highest pecuniary profit to the stockholders, compatible with a proper regard to the public convenience. These alone are the considerations which should control the action of the president and directors of the road, and so far as they permit their official action to be swayed by their private interest, they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public. Ibid. 138.

3. If such a contract was entered into when the line adopted was only equally as good as another, then neither the company nor the public were injured, yet the company made their power instrumental of private emolument in a manner which a court of equity will not sanction. Public policy forbids the sanction of such contracts. Ibid. 138.

4. *Remedy in respect to such contracts.* A court of equity will not enforce a contract resting upon the delinquency of such officers, or tending to produce it. Ibid. 138.

5. Where, in such a case, the defendants file a bill to have the contract set aside as a cloud on their title, it is error in the court to grant the relief. Having entered into a contract, the effect or the tendency of which was to induce the other parties to commit a breach of duty, they are not entitled to the relief sought. Ibid. 138.

Mutuality.

6. The owner of certain lands contracted to sell to another at a specified price. The vendor was to receive in payment for the same $50, cash in hand, and so soon as the vendee was satisfied with the title, a conveyance was to be made to him, when he was to pay the purchase money according to the terms of the agreement: *Held*, there was no mutuality in the contract for which the vendor could be compelled to perform. *Baxter* v. *Lamont*, 237.

Receipt.

7. *Whether it amounts to a contract.* Where, upon the delivery of grain, a receipt is given therefor, subject to the market price of corn,

CONTRACTS. RECEIPT. *Continued.*

on its return to the person giving it, by a day named, and storage to be paid, and on the back of the receipt there were dates and figures showing other deliveries at different times, and there was evidence tending to show that the person did not call for a receipt, but only for a memorandum of the dates, and amounts delivered, and that the person to whom it was given did not know its contents, it was for the jury to say whether the receipt expressed the contract of the parties, and whether the amounts indorsed on the back of the receipt were to be subject to the same terms. *McEwen* v. *Morey*, 32.

RECEIPT OF A CARRIER.

8. *As the contract of the shipper.* Where a shipper of goods by railroad takes a receipt from the company, containing conditions restricting their liability to their own line of road, if he accepts it with a full knowledge of such conditions and intending to assent to them, it becomes his contract as fully as if he had signed it. *Chicago and Northwestern Railway Co.* v. *Montfort et al.* 175.

CONTRACT CONSTRUED.

9. *As to price to be paid.* Where one party said to another, when he got ready to shell his corn, haul it to his warehouse in Seneca and he would make it satisfactory as to price, and the corn was hauled and delivered at the warehouse, the law implies a contract to pay the market price at the time and place of delivery, for which a recovery may be had. *McEwen* v. *Morey*, 32.

EXEMPTION OF A STREET RAILWAY.

10. *From certain assessments—validity of such a contract, and of its construction.* See SPECIAL ASSESSMENTS, 15, 16.

RESTRICTING LIABILITY OF TELEGRAPH COMPANIES.

11. *To what extent allowable by contract.* See TELEGRAPHY, 2, 3, 4.

CONVEYANCES.

DELIVERY OF A DEED.

1. The delivery of a deed need not be made by the grantor himself, nor is it indispensable that it be made to the grantee. If made to any person for the grantee, and it is absolute and not conditional, his assent will be presumed. *Thompson* v. *Candor*, 244.

2. Where a party proposes to make a donation of a tract of land to an educational institution, makes a deed thereto and hands it to one of the trustees who was superintending the erection of the buildings

CONVEYANCES. Delivery of a deed. *Continued.*

thereon, but imposes no conditions and gives no directions in reference to the deed, and subsequently dies, the presumption is that he intended to deliver the deed. *Thompson* v. *Candor*, 244.

3. The deed, in such a case, takes effect from the time it is delivered to the trustee, and not when it is handed by him to the secretary of the institution; no act was to be done by the company, and they were in possession and engaged in erecting a building thereon when the deed was made. This was evidence of an intention to deliver and to accept, and the intention must control. Ibid. 244.

Acknowledgment of deeds. See that title.

CORPORATIONS.

In what manner they may act.

1. Assent of the Board of Trustees of the Illinois and Michigan Canal to the work of deepening the canal as proposed by the city of Chicago, under the act of 1865, was not required to be given upon a formal meeting of the board in its corporate capacity, but the written or verbal assent, or mere acquiescence of its members, was sufficient for the purpose of charging the city with consequences growing out of possession. *City of Chicago* v. *Joney*, 383.

Organization under the general law.

2. Where parties endeavor to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body *de facto*, and the regularity of its organization can not be questioned collaterally. Such irregularity can only be questioned by *quo warranto* or *scire facias*. *Thompson* v. *Candor*, 244.

Municipal corporations.

3. *Special charters for towns—under constitution of* 1848. The constitution of 1848, by authorizing the adoption of township organization, did not prohibit the general assembly from creating towns with special charters. In the absence of such a limitation, that body had power to create municipal corporations, as well in regard to a town six miles square, as to a village with less territory. *Greeley et al.* v. *The People*, 19.

4. *Power to erect a town hall.* Under a charter creating a general municipal government, with all the ordinary machinery thereof, such a body has the power to erect a town hall in which to hold town meetings, elections, and for other corporate purposes, and whether

CORPORATIONS. Municipal corporations. *Continued.*

such a building is necessary, is a question that must be left, in a great degree, to the people and the officers, and an application of the fund raised by special assessment to such a purpose, in the absence of evidence, will not be held such a perversion of the fund as is not included in the provisions of the charter. *Greeley et al.* v. *The People*, 19.

5. *Duty and liability of cities in regard to the safe condition of streets and sidewalks.* See HIGHWAYS, 6 to 9.

COUNTY CLERKS.

Of their fees. See FEES, 3.

CREDITOR'S BILL. See CHANCERY, 9, 10, 11.

CRIMINAL LAW.

Street walkers at night.

1. At common law, peace officers were authorized to arrest street walkers, and they were liable to punishment as for a misdemeanor, and the common law is in force in this State as to such offenses. *Miles* v. *Weston*, 361.

2. Where persons were seen in the night time for a considerable time, in the street near to a person's house, apparently examining it, and would separate when persons passed, and then come together again, and the occupant of the premises found and brought to the place two policemen, who found a person there who, when accosted by them, stated he had been there two hours, and was thereupon arrested by the policemen: *Held*, that such facts should mitigate the damages, if not justify an imprisonment, although the person arrested had but come to the place at the time he was arrested. Ibid. 361.

Accessories.

3. *In misdemeanors.* Our statute, in reference to accessories before the fact, applies to misdemeanors, although it uses the word "crimes." A misdemeanor is a crime, although not of the gravest character. In misdemeanors, all accessories before the fact are principals at common law as well as under our statute, and as such are punishable. *Van Meter et al.* v. *The People*, 168.

Reasonable doubt.

4. *What amounts to.* A reasonable doubt, beyond which the jury should be satisfied in a criminal case before finding the accused guilty, is one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause. *May* v. *The People*, 119.

CRIMINAL LAW. *Continued.*

EVIDENCE IN CRIMINAL CASES.

5. *As to the time a warrant was issued.* In a criminal prosecution where a question arose as to the time when the warrant for the arrest of the accused was issued, the testimony of a police officer in respect thereto given months after the event, the witness undertaking to state the time of issuing the warrant without its being produced and without having recently ascertained the time by any reference to the record of the proceedings, was regarded as of too uncertain a character to be relied upon to establish the guilt of the prisoner. *May* v. *The People*, 119.

6. *Proof of guilty knowledge—receiving stolen goods.* Where a second hand retailer of clothing was indicted for receiving stolen goods, and, as tending to prove guilty knowledge, evidence was introduced that he had only paid for the clothing about one third of its value, it is error to refuse to permit accused to prove, that, according to usage, dealers in second hand clothing do not generally pay full prices for clothing, but purchase it at a reduction, and, from the character of the business, they are compelled to sell new clothing for the price of second hand goods, and hence they must purchase out of season and at reduced prices. Such evidence would tend to rebut the inference of guilty knowledge drawn from the fact that accused had purchased the goods at very low rates. *Andrews* v. *The People*, 354.

7. *Conversations between third persons.* In such a prosecution, it is proper, by instruction, to exclude evidence which has been admitted of a previous conversation between the prosecuting witness and the brother of accused in reference to stolen goods. It is improper to permit such evidence to go to the jury, and when it does, it should be excluded. Ibid. 354.

CURTESY.

TENANCY BY THE CURTESY.

1. *Since the act of* 1861. Under our law, and since the passage of the "married woman's act" in 1861, tenancy by the curtesy does exist, as has been recognized by numerous decisions. *Armstrong et al.* v. *Wilson et al.* 226.

2. *Rights of the tenant—waste.* Where a person has curtesy in an eighty acre tract adjoining his own land, and in a timber tract adjoining neither, it is waste to use timber growing on that tract to improve the tract of which he is the owner. The tenant by the curtesy has the right to reasonable estovers, which is confined strictly to timber and wood for the use of the estate, and it must be actually applied, used and consumed on the estate, or with its proper use and enjoyment. Ibid. 226.

CURTESY. TENANCY BY THE CURTESY. *Continued.*

3. Where the tenant commits waste, and a bill is filed by the remainder-men to enjoin future waste, and for an account for waste already committed, on a proper showing the relief should be granted in full. *Armstrong et al.* v. *Wilson et al.* 226.

CUSTOM.

OF ITS CHARACTER.

1. A custom must be general and uniform. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known. *Leggott et al.* v. *Sands' Ale Brewing Co.* 158.

PLEADING A PARTICULAR CUSTOM.

2. A particular custom must be stated in the declaration, and the rules, as to stating customs, are the same in pleas as in declarations, only greater strictness is required in pleas. Ibid. 158.

PROOF OF A CUSTOM.

3. A plea, that vendors of ale have a custom or usage of crediting purchasers with ale found unfit for use, is not supported by proof of loss in quality, after shipment to a distant territory upon a new venture, exposed to delays and subject to every variety of carriage. Ibid. 158.

DAMAGES.

MITIGATION OF DAMAGES.

1. *In an action for slander*, it is held, want of express malice may be shown, also that a retraction of the slander is made, in mitigation of damages, but the retraction must be effective. *Storey et al.* v. *Wallace*, 51.

EXCESSIVE DAMAGES. See NEW TRIALS, 4 to 7.

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES, 11, 12.

DEBTOR AND CREDITOR.

EQUITABLE LIEN OF THE FORMER. See PARTNERSHIP, 7.

ASSIGNMENT OF A LIFE POLICY.

*By the wife, for whose benefit it was issued—rights of a creditor who loans money on the faith of such assignment.* See INSURANCE, 16, 17, 18.

DECREE.

DECREE UPON CONSTRUCTIVE SERVICE.

1. *Opening the same—character of defense allowed.* Where a mortgagor is a non-resident, and served by publication, and within the three years allowed by the statute applies to the court for leave to answer, and is permitted to do so, he occupies the same position to the case as though he had been personally served and was defending in the first instance. The decree originally rendered on his default, in nowise affects his rights on the trial, on his answer. *Scott* v. *Milliken et al.* 108.

2. No reason is perceived why a party, applying under the statute and being permitted to answer by the court, may not be allowed to demur, if the bill is substantially defective, but not for mere technical defects. Ibid. 108.

3. *Sale of interest in mortgaged premises pendente lite.* Where a party thus let in to defend, after answer filed sells his equity of redemption, the suit may still progress in the name of such defendant; or, if application be made for the purpose, the court probably might permit the grantee to become a party defendant. Ibid. 108.

DEDICATION.

FOR PURPOSES OF AN ALLEY.

*What amounts to a dedication.* Where ground has been set apart as a private alley, or conveyed to adjoining property owners as a private alley, although used by the public as a pass way without hindrance, such acts do not amount to a dedication to the public, as the intent to dedicate is wanting. *Hemingway et al.* v. *City of Chicago*, 324.

DEEDS. See CONVEYANCES.

DEEDS OF TRUST. See MORTGAGES, 9, 10.

DELIVERY.

DELIVERY OF A DEED. See CONVEYANCES, 1, 2, 3.

DELIVERY OF CHATTELS.

*By means of the transfer of a bill of lading therefor.* See PLEDGE, 2, 3.

DEMAND.

WHETHER DEMAND NECESSARY.

1. *Before bringing suit.* Where a person, desiring to erect a building adjoining the brick house of another, obtained permission to sink

DEMAND. WHETHER DEMAND NECESSARY. *Continued.*

his foundation wall below and partly under the wall of the house, upon his promise to pay any damage which might result therefrom, it was *held*, in order to maintain an action to recover for injury resulting from the excavation, it was not necessary that an estimate of the damages should have been made and presented to the defendant and payment demanded; it was sufficient that he was notified that the house had been damaged, and requested to pay therefor. *Hayes* v. *Moynihan*, 409.

2. *To fix liability of assignor of promissory note.* See ASSIGNMENT, 3.

DILIGENCE.

FRAUD AND CIRCUMVENTION.

*Diligence required of the maker of a note to avoid deception as to the character of the instrument.* See FRAUD AND CIRCUMVENTION, 1.

DISMISSAL OF SUIT.

RIGHT OF THE PARTY.

*As against the authority of one holding a power of attorney.* See POWER OF ATTORNEY, 1, 2.

DISTRESS FOR RENT. See LANDLORD AND TENANT, 6; ACTIONS, 1, 2.

DIVORCE.

ABUSIVE LANGUAGE AND THREATS.

1. *As a ground for divorce.* Divorces will not be granted merely for indulgence in passion, for abusive language and threats of violence, where the safety of the person is not in peril, or the words are not likely to be followed by acts producing serious injury. There must be evidence of a reasonable apprehension of bodily hurt, and such as prevents the party from performing marital duties. *Coursey* v. *Coursey*, 186.

EXTREME AND REPEATED CRUELTY.

2. *Evidence of drunkenness.* On an application of a wife for a divorce, on the ground of extreme and repeated cruelty, it is not error to instruct the jury that they may consider evidence of the drunkenness of the husband in connection with evidence of personal violence, or threats by the husband. Such evidence tends to explain the nature and character of the violence and threats. Ibid. 186.

DIVORCE. Extreme and repeated cruelty. *Continued.*

3. *Continuance of the cruelty—construction of the statute.* It is not error to instruct the jury, in such a case, if the defendant was guilty of extreme and repeated cruelty for a less time than two years, that they should find for the complainant on that issue. The statute only requires acts of extreme and repeated cruelty, but does not require their continuance for two years. *Coursey* v. *Coursey*, 186.

Answer need not be sworn to.

4. *If sworn to, effect.* The divorce statute does not require an answer to a bill for divorce to be sworn to, but provides that it need not, and is different from the general chancery practice in that respect. The statute having dispensed with such oath, the defendant acquires no advantage by swearing to his answer in such a case. Such a sworn answer has no more effect than the bill, and is not evidence. Ibid. 186.

Alimony.

5. Where the court has decreed a divorce on the application of the wife, and thereupon the parties agree upon the alimony which the husband shall pay the wife, consisting of a gross sum of money, furniture and silverware, etc., and it is also agreed that the husband shall support and educate an adopted daughter: *Held*, that the court will not inquire whether the amount decreed for alimony is too large, as it was fixed by the voluntary agreement of the parties. *Buck* v. *Buck*, 241.

6. Inasmuch as the support and education of the adopted child was agreed upon by the parties, the court will not determine whether such a decree could have been rendered without consent; and that, as the decree finds that the parties had agreed upon its terms, it will be presumed that the court was satisfied that the parties had voluntarily agreed upon that part of the decree. Ibid. 241.

ERROR.

Error will not always reverse. See PRACTICE IN THE SUPREME COURT, 3, 4.

EVIDENCE.

Parol evidence

1. *Correcting mistake in a deed.* Where lands are misdescribed in a deed, or other lands than those intended to be conveyed, are described, upon bill filed to correct the mistake, it is competent to fix the intention of the parties by parol evidence. *McLennan* v. *Johnson*, 306.

2. *Application of the statute of frauds in such case.* The fact that the intention of parties is shown by parol evidence of the original

EVIDENCE. Parol evidence. *Continued.*

agreement, does not bring the case within the statute of frauds, when the proceeding seeks not the specific performance of an executory contract, but the correction of a mistake in an executed contract. *McLennan* v. *Johnson*, 306.

3. And parol evidence may be received to show a mistake in a written instrument, whether required by the statute of frauds to be in writing or not. Ibid. 306.

Evidence in chief after opposite party has closed.

4. Where the court below so far disregarded the rule that the party holding the affirmative of an issue must be confined, after the opposite party has closed his evidence in defense, to merely rebutting testimony, as to permit the former, under such circumstances, to introduce new witnesses, but it appeared no injury could have resulted to the latter thereby, he not being surprised by testimony as to new facts, the additional evidence being but cumulative, this court refused to interfere with the discretion of the inferior court in that regard. *Chicago & Iowa Railroad Co.* v. *Duggan*, 137.

Matters of privilege.

5. In an action against a former agent of the plaintiff, to recover for money received by the agent and not paid over, the defendant sought to recoup the damages he had sustained by reason of having been discharged from his employment without proper cause, and before the expiration of the time fixed in the agreement of the parties, and, in testifying in his own behalf, the defendant, in order to reduce the amount of his earnings in other employment, after his discharge, set up a loss claimed to have been sustained by him through one of his customers: *Held*, the witness was not privileged from disclosing, upon cross-examination, the name of such customer. *Williams* v. *The Chicago Coal Co.* 149.

Hearsay evidence.

6. It is error for the court trying a cause to admit hearsay evidence. The party originally making the statement should be called and required to testify, and not a person who has heard the witness make the statements. *Bishop et al.* v. *Georgeson*, 484.

Declarations of an agent.

7. The declarations of an agent are not admissible as evidence unless they are made in connection with the transaction of the business of his agency, and form a part of the *res gestæ*. And it is error for the court to refuse to suppress an answer to an interrogatory in a deposition which proves the declarations of an agent after the transaction has occurred. And to suppress such answer, it is not necessary that the answer should have been objected to when the deposition was taken. *Chicago, Burlington & Quincy Railroad Co.* v. *Lee*, 501.

EVIDENCE. *Continued.*

ADMISSIONS OF AN AGENT.

8. The admission of an agent can bind the principal only when it is made in regard to a transaction then depending. *Chicago, Burlington & Quincy Railroad Co.* v. *Riddle*, 534.

PROOF OF NEGLIGENCE.

9. In an action against a railroad company to recover damages occasioned by a collision at a public crossing on the road of the defendant, it is error for the court to admit evidence that, at previous times, the bell had not been rung or the whistle sounded as trains passed the place where the accident occurred, to prove negligence at the time of the collision. *Chicago, Burlington & Quincy Railroad Co.* v. *Lee*, 501.

WAIVER OF OBJECTION.

10. Nor does it waive the error that defendant had permitted similar evidence of other witnesses without objection. That did not render the further admission of such evidence proper when objected to on being offered. Ibid. 501.

DISCREDITING WITNESS ON CROSS-EXAMINATION.

11. Nor was it admissible to discredit the evidence of the engineer, as he made the statements intended to be contradicted, in answer to questions propounded by plaintiff on cross-examination. A party can not cross-examine a witness as to a collateral fact for the purpose of laying a foundation to contradict him. Ibid. 501.

AS TO VALUE OF PROPERTY SOLD.

12. *As to the place where the price shall be ascertained.* Where a quantity of hay was sold in the stack, it is not error to admit evidence of the value of the property sold, at or near the place of delivery, but not at distant points. *Newlan* v. *Dunham*, 233.

13. *As to basis of calculation.* Although a witness may not be required to make a calculation of the number of tons of hay in stack, he may be required to give the basis upon which it was made. If the intention was to show that he was unable to make the estimate, he could be asked if he could make it. Ibid. 233.

DEGREE OF EVIDENCE REQUIRED.

14. *Upon a third trial*, new evidence tending to set aside a former decree, must be distinct, positive and overwhelming. *Chicago Artesian Well Co. et al.* v. *Corey et al.* 73.

QUESTIONING JUDICIAL PROCEEDINGS COLLATERALLY.

15. *By whom.* Collateral, as well as direct parties, may impeach a void judgment, as when confessed through fraud and collusion without indebtedness. But if only voidable, the rule seems to be different, and only the party himself can impeach it. *Martin* v. *Judd*, 79.

EVIDENCE.

QUESTIONING JUDICIAL PROCEEDINGS COLLATERALLY. *Continued.*

16. *As to sufficiency of proceedings to widen a street, on a special assessment for the improvement of the street.* In a collateral proceeding, the record of the proceedings to widen a road can not be attacked for a defective certificate of the publication of the notice in failing to state the last day of its insertion. The city may have obtained a release, or the parties affected by that proceeding may have estopped themselves from raising the question by voluntary payment. If it were allowed, the city would be compelled, in every case, to prove perfect title to its streets before a special assessment could be levied for their improvement. *Prescott* v. *City of Chicago*, 121.

TO PROVE THE INTEREST OF A PUBLIC OFFICER.

*In the matter of a special assessment.* See SPECIAL ASSESSMENTS, 13.

PREPONDERANCE OF PROOF.

*Necessity thereof to support a bill in chancery.* See PLEADING AND EVIDENCE, 10.

PROOF OF PARTNERSHIP.

*By reputation.* See PARTNERSHIP, 6.

EVIDENCE IN CRIMINAL CASES. See CRIMINAL LAW, 5, 6, 7.

BURDEN OF PROOF.

*As to negligence of telegraph company in transmitting message.* See TELEGRAPHY, 6.

PRESERVING EVIDENCE IN CHANCERY. See CHANCERY, 12.

EXECUTION.

WITHIN WHAT TIME TO BE ISSUED.

1. *When issued from the county court of La Salle county.* A writ of execution can not issue for the first time on a judgment rendered in the county court of La Salle county, after the expiration of a year and a day from the rendition of the judgment. *Chase* v. *Frost*, 143.

VARIANCE BETWEEN A JUDGMENT AND EXECUTION.

2. *Execution not void, only voidable.* See CHANCERY, 11.

FALSE IMPRISONMENT.

MITIGATING CIRCUMSTANCES.

Where persons were seen in the night for a considerable time, in the street near to a person's house, apparently examining it, and would separate when persons passed, and then come together again, and the

FALSE IMPRISONMENT. Mitigating circumstances. *Continued.*

occupant of the premises found and brought to the place two policemen, who found a person there who, when accosted by them, stated he had been there two hours, and was thereupon arrested by the policemen: *Held*, that such facts should mitigate the damages, if not justify an imprisonment, although the person arrested had but come to the place at the time he was arrested. *Miles* v. *Weston*, 361.

FEES.

Clerk of criminal court of Cook county.

1. *Of his fees in criminal cases—liability of the city of Chicago.* Under statutory provisions, the clerk of the criminal court of Cook county may compel the city of Chicago to pay him his fees in all cases of convictions in that court, and on a refusal, may maintain a writ of *mandamus* to compel their payment. *City of Chicago* v. *O'Hara*, 413.

2. The act of 1865, rendering certain counties liable for such fees, does not embrace Cook county, and that act being special does not apply to fees in the criminal court of Cook county, and the county is not liable for such fees, but the city is, under previous legislation. Ibid. 413.

Fees of county clerk.

3. Where the law prohibits the county clerks from charging any fees for services to the county, but that the courts shall allow them such reasonable compensation as they may think right as an *ex officio* fee, not exceeding $100 per annum, exclusive of an allowance of not exceeding $3 per day for their attendance on the courts in term time doing county or probate business: *Held*, that while attending the board of supervisors, transacting county business, the clerk is entitled to the *ex officio* fee and the *per diem* of $3, as he gets no other fees; but when attending probate court he gets his fees, and although the board of supervisors may allow the *per diem* whilst attending the probate court, they are not compelled to do so, as it is left to their discretion, and a writ of *mandamus* will not be awarded to compel them to make an allowance. *Board of Supervisors of Kane county* v. *Pierce*, 481.

FORMER DECISIONS.

Attornment of a tenant.

1. *To grantee of landlord—right of such grantee to sue for rent.* Where a landlord had leased premises, and before the expiration of the term sold and conveyed to a third person, and the tenant had paid one or more installments of the rent to the grantee: *Held*, that such payment amounted to an attornment, and was such a recognition of the grantee, as his landlord, as authorized the latter to sue for and

FORMER DECISIONS. Attornment of a tenant. *Continued.*

recover the rent by an action of debt. The case of *Chapman* v. *McGrew*, 20 Ill. 101, holding a contrary doctrine, is overruled. *Fisher* v. *Deering*, 114.

Commutation with a street railway.

2. *In the matter of improvement of streets.* An ordinance of a city provided that a street railroad company, as respected the grading, paving, macadamizing, filling or planking of the streets upon which they should construct their railways, should keep so much of said streets as should be occupied by the railways, in good repair and condition, in accordance with the regulations of the city in that regard. It was held, in *Chicago* v. *Sheldon*, 9 Wallace, 50, that an ordinance of that character, which had been recognized and confirmed by the legislature, was not unconstitutional, and it was upheld, upon the principle of commutation, and as being a contract, the obligation of which could not be impaired. To this extent, the case of *Chicago* v. *Baer et al.* 41 Ill. 306, is modified. *Parmelee et al.* v. *City of Chicago*, 267.

FRAUD.

Fraud in the purchase of property.

1. *Contract not void but voidable—bona fide purchaser protected.* Fraud in the purchase of property does not render the sale void, but it is voidable at the option of the party defrauded. And where a person purchases and acquires the possession of property by fraudulent means, and sells it to a *bona fide* purchaser without notice, the latter acquires title thereto before the sale is avoided and the property is reclaimed. *Michigan Central Railroad Co.* v. *Phillips et al.* 190.

Acts of trustee under deed of trust.

2. *Whether certain statements of the trustee to the purchaser are in fraud of the rights of the debtor.* See MORTGAGES, 10.

FRAUD AND CIRCUMVENTION.

Diligence required of the maker of a note.

1. Where a party was induced to sign a promissory note upon the representation of the payee that a guaranty should be written upon the back of it that the note should not be paid unless the consideration therefor should prove to be profitable, and he delivered the note, supposing such guaranty had been endorsed upon it, but the same was, in fact, written upon another piece of paper, and the consideration turned out to be worthless, it was *held*, it appearing the maker of the note could read and write with facility, that the defense that the execution of the note was obtained through fraud and circumvention, would not avail him as against an innocent assignee before maturity, as the maker of the note could not have been so imposed upon if he had exercised due diligence. *Mead* v. *Munson*, 49.

FRAUDULENT CONVEYANCES.

WHO MAY QUESTION THEM.

1. Where a person, being indebted, conveyed his property, real and personal, to a trustee, to be sold for the payment of his debts, and a portion of the real estate was conveyed to his principal creditors in satisfaction of their claims: *Held*, that those debts formed a sufficient consideration to support the conveyance, although the proceeds were not applied on all of the debts. *Finley et al.* v. *McConnell*, 259.

2. A deed of trust so executed, although in fraud of creditors, is, nevertheless, binding on the grantor and his heirs and assigns. The statute only makes such deeds void as to creditors and *bona fide* purchasers. Where, in such a case, the grantor is estopped by such a deed, those who subsequently become his grantees are in like manner estopped. Ibid. 259.

3. If a trustee, in such a case, conveys the land in violation of the trust, other creditors have the right to have the fund properly applied. If a purchaser of such a trustee has not acquired title in good faith, a court of equity, on a proper application, would appropriate the fund to the purposes of the trust. But even if the purchase from the trustee was not *bona fide*, that does not give the grantee of the debtor the right to wrest it from the purposes of the original trust. Ibid. 259.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

4. *Whether fraudulent.* See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 1 to 4.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

HABEAS CORPUS.

NATURE OF THE WRIT.

1. The writ of *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed a prerogative writ, and as to the subject, it is deemed a writ of right, that is, such an one as he is entitled to *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment. The prerogatives of the crown of England are here vested in the people, and they have, as he has, the right to know through it why the liberty of any citizen is restrained, and for what he is confined. For this reason it is sued out in the name of the State or the people. In legal contemplation, the people, in all cases of wrongful detention, are concerned in having justice done. It is an inquisition by the government at the suggestion and instance of an individual, but still it is done in the name and capacity

HABEAS CORPUS. Nature of the writ. *Continued.*

of the sovereign. It follows that such a case is within the very exception in the constitution of 1870 limiting the jurisdiction of the criminal court of Cook county in civil cases. *The People* v. *Bradley*, 390.

2. The writ is of undoubted common law origin, and the King's Bench having general, civil and criminal jurisdiction, had jurisdiction of the writ in all cases, but other courts having only civil jurisdiction until the adoption of the act of 16 Car. II, were supposed to have but a partial jurisdiction of it, as in the case of an officer or suitor, etc., in that court, but if he were committed in a criminal matter, these courts could only have remanded him or taken bail for his appearance in the court of King's Bench. Ibid. 390.

Jurisdiction.

3. *Of the criminal court of Cook county under the constitution of* 1870, *and herein, of the jurisdiction of the circuit courts.* The 26th section, Article VI of the constitution of 1870, provides that the recorder's court of the city of Chicago shall be continued and called the "Criminal Court of Cook county," and shall have jurisdiction in all cases of criminal and *quasi* criminal matters arising in the county of Cook, or which may be brought before it pursuant to law; but it shall have no jurisdiction in civil cases, except those on behalf of the people: *Held*, that this provision of the constitution is self-executing, and operated on the court as soon as adopted. Ibid. 390.

4. When the constitution declared that the recorder's court shall be continued, it was intended that it should be with all of its powers, authority and jurisdiction, except in purely civil cases between citizen and citizen, which was thereby taken away; and the statute fixing its terms, providing for selecting jurors, etc., still remained in force. Ibid. 390.

5. The recorder's court had jurisdiction of the writ of *habeas corpus ad subjiciendum*, being a prerogative writ, and essential to the liberty of the citizen, and secured by constitutional and legislative enactment, and as where a prerogative writ is given by the common law to the courts, amendments of the constitution continuing such courts will not be deemed to take away such writs, unless the intention to do so at least fairly appears. Ibid. 390.

6. It has been held in English courts, that the prerogative writ of *certiorari* will not be deemed taken from the courts unless expressly mentioned; and the same rule has been applied to the writ of *habeas corpus*. Ibid. 390.

7. There is nothing in that section of the constitution which amounts to a limitation of the general power of the court to issue the writ. Ibid. 390.

HABEAS CORPUS. Jurisdiction. *Continued.*

8. The circuit courts of this State possess an original common law jurisdiction in criminal cases answering to that of the King's Bench, and they would have had jurisdiction of the writ had our *habeas corpus* act never been passed, and all of that jurisdiction is expressly conferred, by the constitution of 1870, upon the criminal court of Cook county; and the person whom relator held in confinement was under a criminal charge, and the court had jurisdiction to issue the writ, as he was charged with an offense bailable under our statute; nor does it make any difference that the crime was charged to have been committed in another State, as the cause was brought before the criminal court within the language of the constitution. *The People* v. *Bradley*, 390.

Service of the writ.

9. Where a writ of *habeas corpus* is applied for and issued in open court, in the presence of the person to whom it is directed, having custody of the prisoner, and the fact was known to him, and the writ could have been handed to him had he desired it, that he might make his return: *Held*, this amounted to an acceptance of the service, and a waiver of a delivery of the writ to him. Ibid. 390.

Contempt—disobeying the writ.

10. The statute provides that any process which may be issued by the clerks of the circuit courts of the State, or any judge thereof, in pursuance of law, shall be executed by the officers or persons to whom directed; and the circuit courts shall have power to punish all contempts offered to them when sitting as such, and for disobeying any of its process, rules or orders issued or made conformably to law, and there is undoubted common law authority to punish as a contempt for disobedience of the writ of *habeas corpus*. Ibid. 390

11. It may be conceded that, if a court has no jurisdiction to issue a writ of *habeas corpus ad subjiciendum* in any case, the writ would be void, and the person to whom it is directed would not be bound to obey it, and would not be in contempt by refusing so to do. Ibid. 390.

12. The court having jurisdiction of both the *habeas corpus* and the attachment, and having heard evidence as to the service of the writ of *habeas corpus* and disobedience of its command, the determination of the criminal court on these matters is conclusive. The evidence heard below can not be properly brought before this court in such a case. In its absence it will be presumed that it showed a service of the writ, and such a willful disregard or evasion of the writ as amounted to a contempt of court. Ibid. 390.

HIGHWAYS.

HIGHWAY COMMISSIONERS.

1. *In what character they must sue and be sued.* Highway commissioners are a *quasi* corporation. Suits by, or against them, should be brought in their official, not individual names. *Highway Commissioners of Town of Rutland* v. *Highway Commissioners of Town of Dayton*, 58.

OF A BRIDGE CONNECTING TWO TOWNS.

2. *Joint liability of the towns to contribute therefor.* In order to enable a town to compel an adjoining town to contribute to the making or maintaining a bridge over a stream dividing them, under section 18, article 16 of the township organization law, a legal liability to such contribution must be shown. Ibid. 58.

3. This may be, by the record of official acts; by acts of possession and control; by the recognition and use of the easement, or in any manner evincing a complete understanding to that effect. The mere use of a bridge or easement, opened by private enterprise or general subscription by the public, creates no liability. Ibid. 58.

4. *But*, it seems that if a bridge, built by private means and dedicated to public use, is not indicted as a public nuisance, but, on the contrary, if it be used so much and so long by the public as to evince its usefulness to them, it should not continue to be a burthen to those who built it, and may become a public charge. In such case, facts which do not, of themselves, afford a legal estoppel, or conclusion that there is an acceptance, may be treated as affording proof of acceptance. Ibid. 58.

5. *Appropriation—effect of protest.* When the people of a township petition for, and the highway commissioners recommend, a tax to repair such bridge, but protest against being further liable, and the county supervisors levy a tax and appropriate money for the purpose prayed for, the act, coupled with the want of authority to repair other than public highways, would seem to be a recognition, notwithstanding the protest. Ibid. 58.

SAFE CONDITION OF STREETS AND SIDEWALKS.

6. *Duty and liability of cities in that regard.* Where, by the charter of a city, the streets and sidewalks are under the control of the city authorities, it is incumbent on the city to keep them in repair, and for any neglect in its performance the city is liable in damages. *City of Sterling* v. *Thomas*, 264.

7. In an action against a city for injury to the plaintiff occasioned by the alleged neglect of the city to keep a sidewalk in proper condition, it appeared that a person who was erecting a building in the city, did, with the knowledge and consent of the city authorities, in

HIGHWAYS. *Continued.*

SAFE CONDITION OF STREETS AND SIDEWALKS.

order to reach the basement of his building, make an excavation under the sidewalk. This excavation was kept covered with loose boards, except, when access to the basement was necessary, the boards, or a portion of them, were removed, and replaced after the necessity had passed. The opening was thus covered up to six o'clock of the evening of the injury, after which time some person unknown removed the covering, and the plaintiff, it being very dark that night, in going home, fell into the basement and broke his shoulder: *Held*, the question whether this covering of boards, which could be easily removed, afforded sufficient security, was properly left to the jury, and this court concurs with them in opinion it was not sufficient. *City of Sterling* v. *Thomas*, 264.

8. Adequate security should have been afforded, which could have been done by erecting a sufficient railing around the excavation, which would have prevented any one falling into it, and the authorities of the city, by the exercise of reasonable diligence, and at a slight expense, could have done this or compelled the owner of the property to do it—thus far their duty extended. Ibid. 264.

9. The authorities had power to forbid the excavation, and, not having forbidden it, they permitted it. Ibid. 264.

NOTICE TO MUNICIPAL AUTHORITIES.

10. *Of obstruction of streets.* In an action on the case against the city of Chicago, for negligence in permitting a portion of one of its streets to be obstructed by a rope stretched and attached to stakes set in the street, and failing to place any sign of warning to protect travelers from the danger, by means of which the plaintiff, while traveling the street, was thrown from her carriage and severely injured, where there was no proof of actual notice to the city authorities of the obstruction, but it was proved that the street in question was one of the most fashionable and crowded thoroughfares in the city, the fact that the street was so obstructed for at least two days and nights previous to the accident, was regarded as sufficient, in view of the importance of the street and the throng of carriages and pedestrians that crowded it, to charge the city authorities with notice of the existence of the obstruction, and as affording them time to have provided against accidents by lighting the street or otherwise signaling the danger. *City of Chicago* v. *Fowler*, 322.

HOMESTEAD.

CHARACTER OF THE RIGHT.

*Effect of abandonment as regards a prior purchaser.* Where a party conveyed the house and lot on which he resided with his family, and the right of homestead was not released, and the wife did not join in

HOMESTEAD. Character of the right. *Continued.*

the deed, the conveyance passed the fee, but subject to the right of the grantor to retain it and occupy it as a homestead, but when he abandons it, the homestead right ceases. That right is not an estate, but simply a privilege conferred by the statute, which ceases when the grantor and his family cease to occupy the property. As soon as he ceases so to occupy it, the right to hold it, adversely to the fee, is gone, and the grantee may enter and hold possession. *Finley et al.* v. *McConnell*, 259.

HUSBAND AND WIFE.

Of contracts between them.

1. Where a husband and wife held land in equal parts, and it was agreed that the husband should purchase the wife's half at a stipulated price, a part of which he paid, and to secure the balance he and his wife conveyed to a trustee, who conveyed to the husband, and he gave to the trustee a note for the balance of the purchase money, and a mortgage on the premises to secure its payment, and the trustee afterwards transferred the note and mortgage to the attorney of the wife for collection, and he brought a bill to foreclose the mortgage: *Held*, that, as between the husband and wife, the note and mortgage amounted to no more than an unexecuted voluntary promise by the husband to give her that sum of money, and that equity will not enforce such a promise against the land of the husband previously held. *Grove* v. *Jeager et al.* 249.

2. But, in such a case, it would be a fraud on the wife to permit the husband to retain the title to the half of the land previously held by her, and a foreclosure would be allowed as to that half. Ibid. 249.

3. Where a wife, by threats of abandoning her husband, and that she would not live with him, procured from him a conveyance, through a trustee, of half a tract of land, and he acquiesced therein for a considerable time: *Held*, that such acts do not constitute grounds for cancelling the deed from him to her. Ibid. 249.

INFANTS.

Minority of females.

*When it ceases.* The minority of a woman ceases in this State at the age of eighteen years, and in a case of this kind the statute does not require the appointment of a guardian *ad litem* for a female defendant over eighteen and under twenty-one years of age. *Bursen et al.* v. *Goodspeed, Admr.* 277.

## INJUNCTIONS.

To enjoin a judgment at law.

The defendant in an execution issued on a judgment at law obtained against him, filed a bill against the plaintiff in the action at law, who had control of the execution, and the officer in whose hands the execution had been placed, to enjoin proceedings under it. The injunction was granted on the allegations that complainant was not indebted to the plaintiff in the action at law, nor was he under any legal liability to him; that no summons or other process was ever served upon him to appear and answer to the action, nor did he know that an action was pending against him at the suit of such party, which, if he had known, he would have appeared and defended; that the first intimation he had of the suit was the execution in the hands of the sheriff; that the judgment was obtained by fraud and imposition on the court rendering it, and that if a summons issued against him and was returned served, the same was untrue, and was made by mistake or fraud: *Held*, upon the motion of the defendants, it was error to dissolve the injunction and dismiss the bill. The allegations of the bill, which were admitted by the motion to dismiss, presented strong equities in favor of the complainant. *Hickey* v. *Stone et al.* 458.

## INSTRUCTIONS.

Of their qualities.

1. *Oral explanation by the court.* Where the court had given instructions for both parties, and gave an instruction on his own motion, it was error to preface it by the oral remark, in the presence and hearing of the jury, that he had concentrated all there was in those instructions into this one, as embodying all the law necessary for the case, when it did not, in fact, present all the law of the case, and withdrew from the consideration of the jury evidence that was before them. *McEwen* v. *Morey*, 32.

2. *Need not be repeated.* Where proper instructions have been given in a case, it is not error to refuse to repeat them. *Bowen et al.* v. *Rutherford*, 41; *Sangamo Ins. Co.* v. *McKeen et al.* 167.

3. *Of being based upon evidence.* It is not essential that there should be direct testimony upon a point in order to afford a proper basis for an instruction,—it is sufficient if there are circumstances from which the fact involved may be inferred. *Tyler, Ullman & Co.* v. *The Western Union Telegraph Co.* 421.

Questions of law and fact. See JURY, 5 to 9; PRACTICE, 4.

INSURANCE.

OF THE TITLE OF THE ASSURED.

1. *And concealment in respect thereto.* Where an insurance policy contained a condition that if the interest in the real estate be less than a fee, the nature of the title must be stated, or the policy should be void, in answer to the question, what is the title, and is it incumbered by mortgage, etc., it was answered a fee simple. There was a mortgage on the property to secure a loan of $10,000 to the person to whom the loss was, by the terms of the policy, made payable; but that fact was known to the agent and the vice president when the policy was issued, and the agent of the company wrote the application: *Held*, that under such circumstances it would be a fraud to permit the company to escape liability on that ground. The assured had a fee simple title subject to an incumbrance, of which the officers were fully informed. There was not a concealment of the title. This case distinguished from the *Illinois Mutual Ins. Co.* v. *Marseilles Manufacturing Co.* 1 Gilm. 236. *Home Mut. Fire Ins. Co.* v. *Garfield*, 124.

2. *How proven.* Where the policy describes the property insured as averred by the assured, and on the trial a deed, conveying the property to the assured, was read in evidence, and it was proved that assured had been in possession of the property for more than seven years, these facts raise a presumption of ownership in fee in the absence of any objection on the trial to the sufficiency of the proof of title. *Winneshiek Ins. Co.* v. *Schueller*, 465.

CHANGE OF TITLE OF PROPERTY INSURED.

3. *What constitutes, and herein, of the rights of an assignee of the policy.* A policy of insurance contained a condition that, in case of any sale, transfer or change of title, the insurance should be void and cease, unless assented to by the company; afterward the assured assigned the policy with the assent of the company, to a mortgagee, and afterwards the assured sold the property to three persons, one of whom re-conveyed to him, and the other two executed mortgages to secure the purchase money: *Held*, that the assignee took the policy subject to the conditions it contained, and his equities confer no right. If the assignor has lost all right of recovery, by violating the conditions of the policy, the assignee occupies the same position. *Home Mut. Fire Ins. Co. of Chicago*, v. *Hanslein*, 521.

4. It was a change of title in the property. The assured had agreed that he would not change the title to the property, and if he did, the insurance should cease, and when the condition was violated, the policy became void. Nor did the memorandum that the loss, if any, should be paid to the assignee as his interest might appear, change the rights of the assignee. Ibid. 521.

INSURANCE. Change of title of property insured. *Continued.*

5 *Promise of agent to indorse consent.* Where a person purchased property already insured, and received an assignment of the policy, and, after the purchase, called on the agent of the company to learn whether he would make the necessary indorsement of consent to the transfer, when the agent said he would if the grantee would bring him the policy, but the holder did not present it until after the property was destroyed by fire: *Held*, this did not amount to a waiver of the condition that if the property should be sold the policy should be void, unless the company should give its consent, indorsed in writing, on the policy; that the company had said or done nothing to change the action of the purchaser. *Equitable Ins. Co.* v. *Cooper*, 509.

6. In such a case, there is no contract for a court of equity to enforce against the company. It was but a mere promise without consideration of benefit to the promisor or injury to the promisee, and the latter has no right to recover either at law or in equity. Ibid. 509.

Re-building by the company.

7. Where the charter of an insurance company provided that settlement should be made, and a payment of the loss within three months, unless they, within that time, determined to re-build, and were authorized to do so in a convenient time, "provided they do not lay out and expend in such buildings or repairs more than the sum insured on the premises," and a loss occurs, and notice is served on the assured that the company had elected to re-build, but they failed to do so: *Held*, that by giving the notice, the contract was not changed to a contract to re-build, but the company, failing to re-build within a reasonable time, became liable to pay the amount of the insurance, with interest and a fair rental value of the ground while the owner is thus deprived of its use. *Home Mutual Fire Ins. Co.* v. *Garfield*, 124.

8. In such a case, it is error for the court to instruct the jury that the company was bound to re-build, "cost what it may," as they are restrained by their charter as to the amount that may be so expended. Ibid. 124.

Proof of loss.

9. *Waiver of objections.* Where the condition in a policy required that, in case of loss, the assured should forthwith give notice and make the required proof within thirty days, and on the occurrence of a loss the assured filled a blank furnished by an agent of the company and swore to the same, thus proving the loss, and handed it to an agent of the company, who only objected to some items in the schedule, which he struck out, and the assured frequently saw and conversed with the agent before the expiration of the thirty days, but no further proof was required nor other objections made: *Held*, that if

INSURANCE. Proof of loss. *Continued.*

the proof was insufficient, all irregularities were waived by failing to point out objections to the proof, that they might have been obviated within the limited time. *Winnesheik Ins. Co.* v. *Schueller*, 465.

10. *Allegations and proofs.* Where the declaration averred a waiver of all objections to the insufficiency of the proof of loss, and the evidence showed that proof was furnished in time and no objection was made to its sufficiency, there was no variance. Ibid. 465.

11. *Examination of assured.* The personal examination of the assured, reserved to the company by the conditions of the policy, formed no part of the proof of loss provided by the policy, and it did not matter that such an examination was made more than thirty days after the loss occurred. The right to so examine was a privilege reserved to the company, which they could exercise or not, as they might choose, but was not a duty imposed on the assured. Ibid. 465.

12. In such a case, it is not error to refuse instructions which inform the jury that such a personal examination is a part of the proof of loss required of the assured by the condition in the policy. Ibid. 465.

13. *As to time of commencing suit.* The suit on the policy was brought one hundred and four days after proof of loss, and the money was payable ninety days after proof of loss, and it was not error to refuse to instruct the jury that the suit could not be maintained until ninety days after a personal examination of assured, which was less than ninety days before the commencement of the suit, as such examination constituted no part of the preliminary proof of loss, and it was proper to so instruct the jury. Ibid. 465.

Marine insurance—notice.

14. *Marine policy on goods "lost or not lost"—of notice to the company that the goods were already lost.* Where a party obtained from the agent of an insurance company a marine policy on goods, lost or not lost, shipped on a certain day, it appeared the vessel on which the goods had been shipped was lost two days prior to the date of the policy. The defense, in an action against the company, was, that the party procuring the insurance knew of the loss at the time, and failed to inform the agent: *Held*, the fact that the daily papers at the place where the policy was issued, announcing the loss of the vessel, were received at the office of the company on the morning of the day the policy was issued, did not show, necessarily, that the information was received by the company. *Merchants' Ins. Co. of Chicago* v. *Paige*, 448.

Notice to agents.

15. Moreover, the particular agent through whom the insurance was effected, was the person who should have had the information;

INSURANCE. NOTICE TO AGENTS. *Continued.*

and as his business was outside of the office of the company, information at the office was not the same as information to him, or to the company. Nor would notice to one of the agents of the company necessarily import notice to another. *Merchants' Ins. Co. of Chicago* v. *Paige*, 448.

LIFE POLICY FOR THE BENEFIT OF THE WIFE.

16. *Assignment thereof by her—and herein, of a renewal of the policy in her name.* Where a person insures his life for the benefit of his wife, and she indorsed her name on the policy in blank, and the husband procured a loan of money and pledged the policy as collateral security, and afterwards paid the agent of the company the larger portion of the premium, and the creditor holding the policy having called on the agent to learn whether the premium had been paid, and being informed by the agent that the greater part had, and the balance would be paid in a few days; the time for its payment was permitted to pass, and the agent declared a forfeiture, and a new policy was issued to the wife in her name, for the same amount, on the same terms, and in other respects similar to the first, and the sum paid towards the premium on the first policy was applied to the premium on the new policy; and the person whose life was insured having died, the creditor claimed that he was entitled to payment out of the funds: *Held*, that the declaring the forfeiture and the issuing of the new policy did not affect the rights of the creditor, and that his lien attached to the fund under the new policy as he held it under the first. *Norwood et al.* v. *Guerdon*, 253.

17. The new policy was, in substance, though different in form, a mere renewal of the old. It was a renewal evidenced by the policy instead of a receipt, and the creditor should be allowed the same interest he would have had in the old if the same money had been applied in procuring the ordinary renewal. Ibid. 253.

18. The wife having placed her name on the back of the policy at the request of her husband, and delivered it to him, she thus enabled him to procure the loan of money, and it would be opening a door to fraud to permit the wife to deny the power of the husband to fill up the assignment. Such an assignment by the wife must be held valid and binding in equity. By signing her name in blank, she gave the public the evidence of her consent—an act that could only be interpreted as designed for an assignment—and the same consequences must attach against her as would follow from such an act performed by any other person. Ibid. 253.

PARTIES—ASSIGNEE OF POLICY.

*Can not sue in his own name.* See PARTIES, 2.

INTEREST.

WHETHER RECOVERABLE.

1. *Who shall decide.* Where an agent has retained money belonging to his principal, and notified him of the fact, whether the principal shall recover interest in an action for the money, is a question for the jury, under proper instructions, and it is error for the court to compute and direct the jury to allow it. *Williams* v. *The Chicago Coal Co.* 149.

WHEN RECOVERABLE.

2. *On balance of a settled account.* See JUSTICE OF THE PEACE, 1, 2.

AT WHAT RATE RECOVERABLE.

3. *On an usurious contract.* See USURY, 3.

JUDGMENTS.

JUDGMENT MUST BE AGAINST ALL OR NONE.

1. *On a contract executed by several.* In an action against the members of a voluntary association, upon a contract, the recovery must be against all or none. *Pettis et al.* v. *Atkins et al.* 454.

2. In an action against husband and wife upon a promissory note executed by both, it was held to be error to render a judgment against the husband alone, as he was sued jointly with the wife. In suits on contract, a recovery must be had against all or none of the defendants sued. *Thomas* v. *Lowy*, 512.

3. *Exception under act of* 1869—*manner of pleading.* The second section of the act of March 26, 1869, which provides that in actions brought against several defendants, where the plaintiff shall fail to establish his case against one or more defendants who shall put their joint liability in issue by proper pleading, he shall, notwithstanding, be entitled to judgment against such other defendant or defendants as may have made the contract sued on, does not apply except the joint liability be put in issue by a sworn plea. Ibid. 512.

CAN NOT EXCEED THE AD DAMNUM IN THE DECLARATION.

4. Where the verdict and judgment are greater than the *ad damnum* in the declaration, the judgment must be reversed, although the excess may have grown out of interest accrued after suit was brought. *Hanford* v. *Blessing*, 352.

WHO MAY IMPEACH A JUDGMENT.

5. *When it is void, and when it is merely voidable.* See EVIDENCE, 15.

JUDICIAL SALES. See SALES, 10 to 13.

JURISDICTION.

PRESUMPTION.

1. *In respect to courts of general jurisdiction, and herein, when they are exercising statutory powers.* The general jurisdiction of the circuit courts extends to all matters and suits at common law and in chancery; and when so acting it is a court of superior jurisdiction, and the rule is, that nothing shall be intended to be out of the jurisdiction of such a court but that which appears to be. Where a court of superior jurisdiction exercises statutory and extraordinary powers, it stands on the ground and is governed by the same rules as courts of limited jurisdiction, which is, that nothing shall be intended to be within the jurisdiction but that which is so expressly alleged. *Haywood* v. *Collins et al.* 328.

2. In summary proceedings in courts, under a special statute prescribing the course to be pursued, that course ought to be exactly observed, and those facts, especially, which give jurisdiction, ought to appear, in order to show that the proceedings are *coram judice.* Ibid. 328.

See ATTACHMENT, 2, 3.

CRIMINAL COURT OF COOK COUNTY.

3. *Of its jurisdiction.* The criminal court of Cook county is but the continuation of the recorder's court of the city of Chicago, with extended territorial jurisdiction and enlarged criminal jurisdiction, but with its civil jurisdiction between citizen and citizen taken away. *The People* v. *Bradley*, 390.

4. *In respect to granting a writ of habeas corpus.* See HABEAS CORPUS, 3 to 7.

OF A JUSTICE OF THE PEACE.

5. *On change of venue from one who was not a justice.* If a person not a justice of the peace were to assume the functions of such officer, and issue a writ of replevin, he would be a trespasser; but if the defendant in such writ were to apply to him and procure a change of venue to a person who was a justice, and then proceed to trial before the latter, he thereby waives all objection to the want of jurisdiction and confers it on the officer trying the case, both as to the person and the subject matter, and can not maintain a motion to dismiss the suit on appeal in the circuit court. *Graves v. Shoefeldt*, 462.

JURY.

COMPETENCY.

1. *Prejudice.* In an action against an insurance company, where a juror, on his examination, states that he has a prejudice against all insurance companies, that it was founded on the fact that he could not

JURY. COMPETENCY. *Continued.*

comprehend their proceedings, but that the prejudice would not affect his verdict: *Held*, that it was error to disallow a challenge for cause, as he did not stand indifferent between the parties; but it was further held that, as the proof showed that justice was clearly done between the parties, and there could have been no other finding, the judgment should not be reversed for such an error. *Winnesheik Insurance Co.* v. *Schueller*, 465.

2. *Having an opinion.* Where a juror answers that he has a fixed opinion on one of the points in issue to be tried, he is incompetent, and it is error to receive him against the objections of the party who challenges him for cause. Such a juror would not be inclined to give due weight to evidence adverse to his preconceived opinion, and is not indifferent between the parties. *Davis* v. *Walker*, 452.

JURY MUST DECIDE FACTS.

3. *Not the court.* In an action against a discharged agent to recover money received by the latter and not paid over, the defendant claimed, by way of recoupment, damages for a breach of the contract of employment on the part of the plaintiff, and also for one month's salary, and for an amount the agent had allowed on the settlement of a claim for his employer: *Held*, it was error for the court to instruct the jury as to how they should find and the amount of their verdict. These were questions for the jury, and not the court. *Williams* v. *The Chicago Coal Co.* 149.

4. *As to the question of interest.* See INTEREST, 1.

5. Whether a shipper of goods accepted the receipt of the carrier, with the knowledge that it contained restrictions upon the liability of the latter, and with the intent to assent thereto, is a question of fact to be determined by the jury. *Chicago and Northwestern Railway Co.* v. *Montfort et al.* 175.

6. Whether a dedication of a bridge to the public was accepted, is a question of fact for the jury, and it is error for the court to instruct them that certain facts constitute such acceptance. *Highway Commissioners of the Town of Rutland* v. *Highway Commissioners of the Town of Dayton*, 58.

7. *Of assent of sender of telegraphic dispatch to restrictions of liability of the company.* See TELEGRAPHY, 5.

MUST DECIDE UPON WEIGHT OF EVIDENCE.

8. It is improper for the court to instruct the jury as to the weight of the evidence. *Merchants' Ins. Co. of Chicago* v. *Paige*, 448.

9. It is not error to refuse an instruction which professes to determine the weight of evidence, or what it tends to prove. These are questions for the jury. *Andrews* v. *The People*, 354.

JUSTICE OF THE PEACE.

EXTENT OF RECOVERY.

1. *Recovery of interest and damages in excess of the amount endorsed on the summons.* In a suit upon an account before a justice of the peace, the plaintiff recovered a judgment for the full amount endorsed on the summons. The defendant appealed to the circuit court, where the plaintiff recovered a judgment for the full amount of his claim with the addition of interest thereon and ten per cent damages for the delay in taking the appeal: *Held*, the fact that the judgment exceeded the amount endorsed on the summons by the amount allowed for interest and damages did not vitiate it. *Welch* v. *Karstens*, 117.

2. The justice trying the cause had a right, under sec. 28 of chap. 59, R. S. 1845, which provides that if the judgment is rendered upon any note or bond, or for a balance upon a settled account, the justice shall allow interest from the time when the same became due and include the same in the judgment, to allow interest from the time when the account was demanded and payment promised. Ibid. 117.

JURISDICTION—WAIVER.

3. *On change of venue from one who was not a justice.* See JURISDICTION, 5.

LACHES. See LIMITATIONS, 3, 4; MORTGAGES, 3; SALES, 10, 11

LANDLORD AND TENANT.

LEASE—WHETHER ASSIGNABLE.

1. At the ancient common law, a lease, like any other agreement or *chose in action*, was not assignable so as to give the assignee an action against the tenant; but, by the 32 Hen. 8, chap. 34, sec. 1, the assignee of the reversion became invested with the rents, and where the tenant attorned to him, he might maintain an action of debt to recover subsequently accruing rents. *Fisher* v. *Deering*, 114.

2. Although the assignment of the reversion created a privity of estate between the assignee and the tenant, still it required an attornment to create such a privity of contract, even under the 32 Hen. 8, as would authorize the assignee to sue for and recover the rent in his own name. Ibid. 114.

3. The 4 and 5 of Anne, chap. 16, was adopted by the British Parliament to dispense with the necessity of an attornment, to enable the assignee to sue for and recover the rent from the tenant. But this statute is not in force in this State. Ibid. 114.

GRANTEE OF THE LANDLORD.

4. *Attornment of the tenant.* Where a landlord had leased premises, and before the expiration of the term sold and conveyed to a third

LANDLORD AND TENANT.

GRANTEE OF THE LANDLORD. *Continued.*

person, and the tenant had paid one or more installments of the rent to the grantee: *Held*, that such payment amounted to an attornment, and was such a recognition of the grantee, as his landlord, as authorized the latter to sue for and recover the rent by an action of debt. *Fisher* v. *Deering*, 114.

5. *Former decision.* The case of *Chapman* v. *McGrew*, 20 Ill. 101, holding a contrary doctrine, is overruled. Ibid. 114.

DISTRESS FOR RENT.

6. *When allowable.* Where a tenant removes from or abandons the leased premises, the statute gives the landlord the right to distrain for rent due, and also for that to become due. Nor will it affect the landlord's right if the tenant gives notice that he intends to leave. He can not, by such means, deprive the landlord of his right to distrain. *Hare* v. *Stegall*, 380.

7. *Remedy of the tenant in case of distress when no rent is due, or in case of an excessive distress.* See ACTIONS, 1.

8. *Remedy of the tenant where property distrained is sold without an appraisement.* See ACTIONS, 2.

MALICIOUS PROSECUTION.

9. *Of maliciously and without probable cause, suing out and levying distress warrant.* See MALICIOUS PROSECUTION, 1, 2, 3.

LEASE. See LANDLORD AND TENANT, 1, 2, 3.

LIBEL. See SLANDER.

LIENS.

MECHANICS' LIEN.

1. *Under contracts express or implied.* The law of lien enacted in 1845 applied only in cases of express contracts to furnish materials or labor. That of 1861 enlarges the provision so as to cover all contracts, express or implied. *Chicago Artesian Well Co. et al.* v. *Corey et al.* 73.

2. Proof of labor or materials furnished within one year after request, express or implied, will sustain the lien. Ibid. 73.

3. *Diversion of materials.* The diversion to other uses, without collusion of the seller, of a portion of the materials purchased for use upon the premises, does not tend to defeat the lean respecting it. Ibid. 73.

4. *Subsequent purchaser.* A sale of the property after the lien is fixed, to a party cognizant of the encumbrance, gives him no rights as against the lien. Ibid. 73.

LIENS. *Continued.*

DEBTOR AND CREDITOR.

5. *Equitable lien of the latter.* See PARTNERSHIP, 7.

LIEN FOR TAXES.

6. *Lien upon lands for taxes on personal property.* See TAXES, 9, 10, 11.

LIFE ESTATE IN PERSONALTY. See WILLS, 3.

LIMITATIONS.

PRESENTATION OF CLAIMS AGAINST ESTATES.

1. *Of the two years' limitation.* A claim against an estate not presented within two years of the grant of letters testamentary or of administration, is barred by the statute, except it may share in any estate discovered after the expiration of the two years. *Shephard* v. *Rhodes et al.* 301.

2. *When the statute begins to run in case of the discovery and probate of a will after the appointment of an administrator.* Where an administrator was appointed, and a will of the decedent was subsequently discovered and probated and thereupon the letters of administration were revoked: *Held*, claims, to share equally in the distribution of assets, should be presented for allowance within two years from the grant of the first letters of administration. The limitation of two years begins to run from that time, and it is error to allow a claim to be paid out of assets inventoried within two years from the first grant of letters. A claim exhibited after that time should, if established, be allowed and paid out of assets discovered after the expiration of two years from the grant of the first letters. Ibid. 301.

APPLICATION BY ADMINISTRATOR.

3. *For an order of sale of land to pay debts.* There is no period of time fixed by the statute of limitations within which an administrator is required to file his petition for leave to sell real estate for the payment of debts, but, in analogy to the statutes of limitation relating to the lien of judgments, and, under certain circumstances, to bringing the action of ejectment, seven years have been held to bar numerous proceedings, but in the absence of statutes on such subjects, each case must largely depend on its own circumstances, and where more than seven years have elapsed, the delay may be explained. *Bursen et al.* v. *Goodspeed, Admr.* 277.

4. *The delay accounted for.* An administrator, a short time after the grant of letters of administration, filed his petition to sell real estate to pay debts, and a portion of the creditors opposed the sale at that time on the ground that the proceeds thereof would amount to

LIMITATIONS. Application by administrator. *Continued.*

but little more than enough to pay the widow $1000 for her homestead and the value of her dower in the land, and a sale would operate as a sacrifice of the property without benefit to the creditors; the application was continued from term to term and finally discontinued; and after a number of years the administrator was removed and another appointed; and subsequently, after the lapse of some eleven years from the grant of the first letters, this proceeding was commenced; the widow had died, and the heirs were all of age: *Held*, that these circumstances sufficiently explained the delay, and that, as the land was held by the heirs of deceased, the order for the sale thereof might be made, notwithstanding more than seven years had elapsed. *Bursen et al.* v. *Goodspeed, Admr.* 277.

Pleading—statute of another State.

5. Where the statute of another State is relied upon as a defense, it must be pleaded and set out at least in substance, and it must be proved on the trial. If not pleaded, it is error to permit it to be proved. *Palmer* v. *Marshall*, 289.

6. A plea that the cause of action did not accrue within five years, and the laws of no State are recited, will be referred to the laws of this State, and when the suit is on a promissory note, such a plea presents an immaterial issue, and should be disregarded. It is error to admit the statutes of limitation of another State under such a plea. Ibid. 289.

Limitation act of 1839.

7. *Color of title—what constitutes.* If one take a deed absolute to himself, but for the benefit of his client, and afterwards disregards his client's interest, and sells without objection of the client, his deed gives color of title, and can not be impeached by third parties. *Hardin* v. *Osborne*, 93.

8. A deed by an assignee in bankruptcy does not give color of title, when it appears that the bankrupt has himself already parted with his title in trust under a special assignment, even though the date of acknowledgment is subsequent to the decree in bankruptcy. Ibid. 93.

9. *Color of title—of the question of good faith in acquiring it.* Where lands were sold for delinquent taxes under a judgment rendered at a special term, and the sale made at a day later than that fixed by law, and this appeared from the recitals in the deed which purported to convey the land, it was color of title, and the grantee will not be charged with bad faith by reason of such recitals. This court having, previous to this sale, intimated that such a sale might be made, and the purchaser having bid the land off and obtained his tax deed

LIMITATIONS. Limitation act of 1839. *Continued.*

before this court held that such a sale could not be made on a day different from that fixed by law, bad faith will not be attributed to the purchaser and holder of the color of title. *Hardin* v. *Crate*, 215.

10. Where persons owned lands, and their agent, to pay taxes, with their assent, and to strengthen their title, purchased the lands at a sale for delinquent taxes, and received a tax deed for the same, and paid all taxes legally assessed thereon for more than seven successive years, and afterwards sold and conveyed the lands to innocent purchasers, and the agency had ceased about the time the lands passed redemption, and the purchasers reduced the lands to actual possession, and the former owners ceased, from the time the lands were conveyed by the tax deed, to give them any attention by paying taxes or otherwise for more than fifteen years, and then only sold them, consisting of 1000 acres, by quit-claim deed for $200: *Held*, that bad faith would not be inferred from these circumstances, especially as one of the former owners was a witness in the case, and did not claim that the purchaser at the tax sale paid the taxes or held the land as their agent, nor did he impute any act of bad faith to the holder of the tax title. Ibid. 215.

11. The relation of principal and agent having terminated after the sale for taxes and before the time for a redemption had expired, bad faith in receiving the tax deed will not be inferred by reason of the existence of their former relation. When the length of time and all of the attendant circumstances are considered, the presumption arises there was some arrangement between the principals and their agent, rather than that the latter had been guilty of a fraud. The acquiescence in such a purchase by the owners, when fully informed of it, and their long silence unexplained, afford a conclusive presumption of good faith of the purchaser. Ibid. 215.

12. *Subsequent sale for taxes—its effect.* The fact that the land was sold for taxes eleven years after the tax deed was given, did not destroy the bar of the statute. The claim and color of title made in good faith, with seven successive years' payment of taxes on vacant and unoccupied lands, had then been completed, and merely permitting the land to be sold for taxes did not affect rights thus acquired, and the reduction of the land to possession before the commencement of the suit, completed the bar. Ibid. 215.

13. *Vacant and unoccupied lands—of the possession.* Where a person holds color of title in good faith, and pays all taxes on vacant and unoccupied lands for seven successive years, the statute does not require that he, to render the bar of the statute complete, should take possession immediately on the completion of the seven years of payment of taxes; it is sufficient if the possession is had before the owner shall take steps to remove the bar. Ibid. 215.

LIMITATIONS. *Continued.*

LAPSE OF TIME ASIDE FROM THE STATUTE.

14. *Delay in applying to redeem from sale on execution—waiver of irregularities.* See MORTGAGES, 3; SALES, 10, 11.

MAINTENANCE. See ASSIGNMENT, 4.

MALICIOUS PROSECUTION.

DISTRAINING FOR RENT.

1. *Probable cause for the distress—of evidence in respect thereto.* The judgment of a justice of the peace against the landlord in case of a distress for rent, on the ground that a check had been drawn for more than the sum due, and delivered to, and was still held by, the landlord's agent, but had been offered to be returned to the drawer, and refused, cancelled the rent, is not conclusive of the want of probable cause for distraining. *Hammond et al.* v. *Will*, 404.

2. A judgment against the landlord, in such a case, is only *prima facie* evidence of probable cause, which may be rebutted. Ibid. 404.

3. In such a case, where the tenant had abandoned the premises of his own accord and drew a check for a few dollars more than was due for a month's rent, and sent it to the agent of the landlord, with a view of terminating the lease by having it received as the amount due to a date after the month's rent was due, and to thus estop the landlord from claiming rent for the balance of the term, but the agent refused to accept it and offered to return it, and never presented it for payment: *Held*, that these facts showed probable cause for distraining for the month's rent which was due, and that there were not grounds for maintaining an action for maliciously, and without probable cause, suing out and levying a distress warrant for rent due. Ibid. 404.

MARRIED WOMEN.

WIFE JOINING HUSBAND IN A PROMISSORY NOTE.

A husband and his wife joined in the execution of a note and power of attorney to confess a judgment, and on the maturity of the note a judgment was confessed thereon, an execution was issued, when a motion was made to set aside the execution, vacate the judgment and permit the parties to plead. The court let the parties in to plead, when they filed the plea of the general issue, and a plea of the coverture of the wife. To this latter plea a demurrer was sustained, and the wife thereupon filed a plea of her coverture in abatement, and the plaintiff moved to strike this plea from the files, but the motion was denied. A

MARRIED WOMEN.

WIFE JOINING HUSBAND IN A PROMISSORY NOTE. *Continued.*

trial was had resulting in a judgment in favor of the wife and against the husband: *Held*, the suit was improperly brought against the wife, as she was not legally liable; the joint plea in abatement was obnoxious to a demurrer, as it came too late after the plea in bar. *Thomas* v. *Lowy*, 512.

MASTER AND SERVANT.

LIABILITY OF THE FORMER FOR ACTS OF THE LATTER.

1. The city of Chicago, having contracted with parties for deepening the Illinois and Michigan canal under the supervision of its own engineer, and subject to his orders, is liable for damages caused by the negligence of its contractors. In such case the doctrine of *respondeat superior* applies. *City of Chicago* v. *Joney*, 383.

INJURIES TO SERVANT FROM NEGLIGENCE OF FELLOW SERVANT.

2. *Liability of the common master.* In an action against a railroad company to recover for injuries to the plaintiff, occasioned by the alleged negligence of the defendants, it appeared the plaintiff was employed by the company as a common laborer at their carpenter shop, and, after his day's work was done, in going from the shop to his home, while crossing the defendants' track, was struck by one of their engines: *Held*, the employment of those in charge of the engine, and the plaintiff as a laborer in the carpenter shop, was so dissimilar and separate the one from the other, that the plaintiff should not be held responsible for the negligence of the former. The doctrine that an action will not lie by a servant against a railroad company for an injury sustained through the default of a fellow servant, did not apply. In such a case, the company should be held responsible for gross negligence of the servant who caused the injury. *Ryan* v. *Chicago & Northwestern Railway Co.* 171.

MEASURE OF DAMAGES.

REFUSAL TO RECEIVE PROPERTY AND PAY FOR IT.

1. *Of a re-sale.* Where a person purchased of another the hair and bristles of all hogs he might kill during the season, at a specified price per head, and was to take and pay for them, and the seller, when he commenced slaughtering, gave the buyer notice and requested him to take away the hair and bristles and pay for the same according to the agreement, but the buyer refused, and the vendor then sold the hair and bristles for the highest market price: *Held*, that he could recover

MEASURE OF DAMAGES.

REFUSAL TO RECEIVE PROPERTY AND PAY FOR IT. *Continued.*

the difference between the contract price and the market price; that this is the true measure of damages for such a breach of contract. *Ullman* v. *Kent et al.* 271.

FINDING VALUE OF PROPERTY SOLD.

2. *Of the place.* Where a quantity of hay was sold in the stack, it is not error to admit evidence of the value of the property sold at or near the place of delivery, but not at distant points. *Newlan* v. *Dunham*, 233.

UPON BILL RENDERED.

3. Where a person, at the request of another, went to, and saw, the treasurer of a coal company, for the purpose of negotiating the sale of a tract of coal land to the company, and conversed with the treasurer on the subject, and was only engaged in such employment not exceeding one day, and the owner subsequently sold the land to the company, and the person who had seen the treasurer presented a bill for a specified sum for his compensation, but it was not paid: *Held*, that the amount of such bill thus presented is the extreme limit of any recovery he can have. It is the price he fixes on the value of his compensation and an admission that it is worth no more. *Daniels* v. *Wilber*, 526.

FOR THE KILLING OF A DOG.

4. *Whether proof of pecuniary value necessary.* In an action to recover damages for the killing of the dog of the plaintiff, it is error for the court to instruct the jury that, to recover, the plaintiff must prove, by a preponderance of evidence, that the dog was his property, and was of some pecuniary value. The law recognizes the right of property in a dog, and if it was destroyed without legal justification, the law implies damages, and plaintiff is entitled to at least nominal damages, as it does in every case of illegal invasion of the right of property of another. *Brent* v. *Kimball*, 211.

OF A BRIDGE CONNECTING TWO TOWNS.

5. *Contribution for repairs.* Where a town made repairs upon a bridge connecting with another town, and sued the latter for contribution, it was *held*, that liability being established, the town which made the repairs, and paid or became responsible for the cost, can not recover more than is shown to be one-half of the sum reasonably and judiciously expended. *Highway Commissioners of the Town of Rutland* v. *Highway Commissioners of the Town of Dayton*, 58.

MEASURE OF DAMAGES. *Continued.*

FOR UNDERMINING THE WALL OF A BUILDING.

6. Where a person, desiring to erect a building adjoining the brick house of another, obtained permission to sink his foundation wall below and partly under the wall of the house, upon his promise to pay for any damage resulting therefrom, in an action to recover for injury in consequence of the excavation, where an item was insisted upon for "risk" in making repairs of the damaged building, and although it should not have been allowed, the judgment will not be reversed because the court refused to so instruct the jury, when the evidence of a number of witnesses place the damages at a larger amount than was found by the jury. The court could only have instructed that the jury should not allow the item unless the evidence showed it to have been a usual and customary charge in making such repairs. *Hayes* v. *Moynihan*, 409.

INCORRECT TRANSMISSION OF TELEGRAPHIC DISPATCH.

7. A party in Chicago delivered to a telegraph company, in that city, a message, directing his banking house in New York to sell one hundred shares of a certain character of stocks, which amount was then held by the banking house for a customer. The message, as delivered in New York, directed the sale of *one thousand shares*, and thereupon the party receiving the message sold that amount, having to go into the market to buy the residue: *Held*, if the sender of the message was compelled to, and did, purchase nine hundred shares of the stock to replace that so sold, by reason of the carelessness of the company in transmitting the message, and that, in the interval between the selling one thousand shares and the repurchase of the nine hundred shares to replace the extra number of shares sold, that stock had advanced in price, this advance, in an action against the company, would be the measure of damages. *Tyler, Ullman & Co.* v. *The Western Union Telegraph Co.* 421.

IRREGULARITY IN DISTRESS FOR RENT.

8. Where rent was in arrear, and property was distrained for its payment, and after having the amount of rent due ascertained before a justice of the peace, the constable making the distress sold the property without first having it appraised, as required by the statute, and after a tender of rent and costs: *Held*, in an action of trover by the tenant, after the sale, when the proceeds of the sale are applied to the payment of the rent due, it is error for the court to instruct that the value of the property, when converted, is the measure of damages, as the amount applied to the payment of the rent should go in mitigation, as it was applied to the payment of plaintiff's debt. *Tripp et al.* v. *Grouner*, 474.

MEASURE OF DAMAGES. *Continued.*

OF DAMAGES TOO REMOTE.

9. In an action to recover damages or the breach of a contract to repair and put in good order a still apparatus and column for the manufacture of alcohol, to be performed within a specified time, the breach alleged was, that the defendant did not perform within that time: *Held*, in cases of such character, the measure of damages is not prospective gains unless there should be shown outstanding contracts to be performed by the machinery to be furnished. In this case, the averment in the declaration was, that the plaintiff was deprived of the use of the still for two months, during which time he might and would have manufactured large quantities of alcohol, from which he would have derived great gains. This was regarded as prospective, and too remote to be an element of damages. *Frazer et al.* v. *Smith et al.* 145.

WHERE A PERSON IS WRONGFULLY DISCHARGED FROM EMPLOYMENT.

10. Where a person is employed as the agent of another, and is wrongfully discharged from the employment, he is entitled to recover compensatory damages, but the damages may be mitigated if the agent, after he is discharged, gets or can get employment in business of the same general character, to the extent of his compensation thus received, if less than his wages under the contract, and if equal thereto, then only nominal damages. If he engages in business of a different character, requiring harder labor and more capital, the damages should not be reduced the full amount of his earnings in such business. *Williams* v. *The Chicago Coal Co.* 149.

PUNITIVE DAMAGES.

11. *Whether recoverable.* Where an officer only omits a duty unintentionally, and has not acted willfully or oppressively, punitive damages should not be allowed against him. So in an action by a tenant against an officer for failing to have property, distrained for rent, appraised before selling it, it appeared the tender of the rent due, if made, was not urged on the trial, and the person entitled to receive the rent having signified a willingness to receive it, after it was claimed to have been made, these are acts tending to show that the proceeding was not willful, and as precluding a recovery of vindictive damages. *Tripp et al.* v. *Grouner*, 474.

12. *Trespass to realty.* In an action of trespass *quare clausum fregit*, to entitle the plaintiff to recover vindictive damages, it should appear that the trespass was wanton, willful or malicious. *Stillwell* v. *Barnett*, 210.

MECHANICS' LIEN. See LIENS, 1 to 4.

MINORITY OF FEMALES.

AT WHAT AGE IT CEASES. See INFANTS, 1.

MISTAKE.

IN THE DESCRIPTION OF LAND.

1. *A court of chancery will correct it.* When lands, verbally agreed to be sold, are found misdescribed, or other lands are described instead, a court of chancery will order a proper conveyance. *McLennan* v. *Johnston*, 306.

RE-CONVEYANCE.

2. Where a party seeks the reforming of a deed in respect to an alleged mistake in the description of the premises, he should tender a reconveyance, and the court, in decreeing the correction of the original error by a new deed, should require him to return the title he erroneously received. Ibid. 306.

DEGREE OF EVIDENCE REQUIRED.

3. A deed will not be reformed by the decree of a court so as to make it express something entirely different from what is written upon its face, except upon evidence of the clearest and most satisfactory character. *Palmer* v. *Converse*, 313.

WHEN AND WHERE COGNIZABLE.

4. Where a party sold a quantity of hay to another, to be paid for at an agreed price per ton, in a particular mode, when the quantity should be ascertained by persons they might choose, and persons were selected and the amount determined and reported by them: *Held*, on a trial in a suit for a breach of the contract, that the defendant could not prove that the persons selected had made a mistake in ascertaining the amount, but their determination might be questioned for fraud. Fraud in an award may be shown either at law or in equity, but mistake is cognizable only in chancery. *Newlan* v. *Dunham*, 233.

5. Even if a mistake could be corrected in an action at law, it would have to appear that the persons making the mistake were misled, deluded, or misapprehended the facts. Ibid. 233.

MITIGATION OF DAMAGES. See DAMAGES, 1.

MORTGAGES.

WHAT CONSTITUTES A MORTGAGE.

1. Where a person having a lease on a piece of ground and a warehouse thereon, sold the same to another person, the grantee assuming

MORTGAGES. What constitutes a mortgage. *Continued.*

the payment of grantor's debts in part and giving his note for the balance, and giving to the grantor a covenant to reconvey the property at the end of five years on being repaid the purchase money and ten per cent interest, the grantor to pay taxes, repairs and improvements, and to pay the grantee one half of the losses which might occur in the grain business to be carried on by them: *Held*, this transaction was in the nature of a mortgage given by the grantor to the grantee to secure the money advanced by him, and that equity, only, can do complete justice between the parties. *Hanford* v. *Blessing*, 352.

Of a deed absolute in form.

2. *Whether a mortgage.* When a sale is in form absolute, in order to change its character to that of a mortgage, the evidence must clearly show that it was so intended. Slight evidence is not sufficient. *Remington* v. *Campbell*, 516.

Foreclosure.

3. *What constitutes.* Where a party gave a mortgage on land to secure several notes, and the mortgagee sued on a part of them, obtained judgment and sold the land under execution, and it was not redeemed, and the certificate of purchase was regularly assigned through several persons until it came to one who obtained a deed, went into possession and opened a valuable coal mine thereon, and the mortgagor, after nine years from the sale, conveyed the land by quit-claim deed to another person, who filed a bill to redeem: *Held*, that the sale was a foreclosure, and the great length of time before an effort to redeem was made, waived any irregularity, if any existed, in the sale. *Rigney* v. *Small et al.* 416.

Strict foreclosure.

4. *Subsequent purchaser from mortgagee—where the mortgagor is let in to defend.* Where a mortgagee files a bill to foreclose, makes publication against a non-resident mortgagor, and obtains a decree of strict foreclosure on a default and then sells the property, and the purchasers make lasting and valuable improvements, it is correct practice for the mortgagor, who afterwards obtains leave to answer, to file a cross bill, and make such purchasers defendants and parties to the suit. *Scott* v. *Milliken et al.* 108.

5. In such a case, equity requires that the land should be valued, and if not equal to the mortgage debt, then the foreclosure may be strict, unless a redemption shall be made. If, on the other hand, it is unimproved, and found to be of greater value than the debt, the mortgagor should be allowed to redeem as in the other case, but if not redeemed, a sale should be decreed, and from the proceeds should be paid the costs; the debt due on the mortgage notes, and taxes paid by

MORTGAGES. STRICT FORECLOSURE. *Continued.*

complainants before selling to the purchasers, should be paid to them; to the mortgagor the excess of the value of the land unimproved over the amount of the costs, debt and taxes; to the purchaser from the mortgagee the value of the improvements independently of the land, which value should be ascertained by the court. *Scott* v. *Milliken et al.* 108.

SALE UNDER POWER IN THE MORTGAGE.

6. *Whether properly made.* A person gave a series of notes, falling due at different times, and executed a mortgage to secure their payment, and it contained a provision that, if default should be made in the payment of the principal or interest on the days when due, the whole of the principal and interest should, at the option of the payee, become immediately due and payable, and it authorized the payee, his heirs, executors, administrators or assigns, after publishing the required notice, to sell the equity of the premises and the redemption, and the mortgagee was authorized to convey to the purchaser. The mortgagor sold the premises, and his grantee also sold them, both subject to the mortgage; and, subsequently, the mortgagee assigned the notes and mortgage to another person, who gave and published the notice of a sale for the payment of all the notes and interest, but two having matured by the efflux of time, and on the day fixed for the sale offered the premises, and they were bid off by another person to whom he conveyed. On a bill filed to set aside the sale because no sale was, in fact, made according to the notice: *Held*, that where the proof preponderated in favor of there having been a sale at the time, place, and in the manner required by the notice and mortgage, the sale would not be disturbed. *Heath* v. *Hall et al.* 344.

ASSIGNEE OF THE NOTES AND MORTGAGE.

7. *Of his powers.* Also, that the holder of the notes and mortgage could exercise the option to declare all the notes due, and that such power passed by the assignment. Ibid. 344.

8. Also, that the holder, being an assignee, had the right, under the terms of the mortgage, to advertise and make the sale in the manner prescribed in the mortgage, and on the sale being made, he had power to execute a deed of conveyance to the purchaser. Ibid. 344.

SALE UNDER DEED OF TRUST—NOTICE.

9. *And herein, of notice of the election of the holder to declare the whole debt due.* Where a person borrowed money and gave a trust deed on real estate to secure its payment in three years, with interest payable annually, and the deed provided that if the interest remained due and unpaid thirty days, the holder of the claim might require the trustee to sell the property, after giving notice as required by the deed,

MORTGAGES. Sale under deed of trust—notice. *Continued.*

and to apply the money as therein specified; and it was therein agreed that, on default in the payment of any installment of principal or interest for thirty days after its maturity, the whole debt, principal and interest, should, at the option of the holder, become due and payable, and the property be sold as though the debt had become due by lapse of time: *Held*, under such a deed, that the trustee was only bound to give the notice required by its terms, and as the deed did not provide for it, he was not required to give notice to the debtor, nor was the holder bound to give notice of his election to treat the whole debt as due. *Princeton Loan and Trust Co. et al.* v. *Munson*, 371.

Statements by trustee to purchaser.

10. *Whether in fraud of the rights of the debtor.* In such a case, it is not fraud, or ground for setting aside the sale made by the trustee, because he informed the person who became the purchaser, of the amount of the debt previous to the sale; nor did the fact that the trustee said to the person who afterwards became the purchaser of the trust property, that if the money was not paid before the time fixed for the sale, it would be sold, and that he had no expectation it would be paid. This was not fraud, nor did it work injury to the debtor. Ibid. 371.

Redemption by purchaser under execution.

11. *As against a purchaser under foreclosure of a prior mortgage.* See REDEMPTION, 1, 2.

MUNICIPAL CORPORATIONS. See CORPORATIONS, 3, 4; HIGHWAYS, 6 to 9.

NAVIGABLE STREAMS.

Obstruction by a bridge.

1. *In what proceeding the fact availing.* Whether a bridge erected over a stream which has been declared by an act of the legislature to be a navigable stream, is an obstruction to the navigation thereof, can not be made a question in a suit by one town against another to compel contribution for repairs to the bridge. If the bridge obstructs navigation, and is violative of the law declaring the stream navigable, it may be indicted and abated as a nuisance. *Highway Commissioners of Town of Rutland* v. *Highway Commissioners of Town of Dayton*, 58.

NEGLIGENCE.

Negligence in railroads.

1. *Killing of stock—defective fence—contributory negligence.* Where a person's cattle break through the fence on the side of a railroad track, and the owner of the cattle repairs it with defective materials,

NEGLIGENCE. Negligence in railroads. *Continued.*

in a temporary manner, but it is apparently sufficient, and his cattle again break through the same place, and are killed, and it appears that he knew that the fence thus repaired was defective, and he failed to notify the employees of the company: *Held*, that he was guilty of negligence. The owner of adjoining lands has no right to remain inactive and let his cattle get upon the railroad track through the known deficiency of the fences along the road. When he undertook to repair the fence, and did it negligently, and failed to notify the company, he became liable for the natural consequences of his negligence. *Chicago, Burlington and Quincy Railroad Co.* v. *Seirer*, 295.

2. *Notice to the company of defective fence.* It was not error for the court to amend an instruction so as to inform the jury, in such a case, that the company should have had notice that the fence apparently good was defective, before they would be liable for the injury to the stock. But the failure on the part of the owner to use reasonable efforts to notify the company of such defects, in any case where the defects are known to the proper agents of the company, would not justify the company in failing to repair. Ibid. 295.

3. It such a case, it was error for the court, without limitation or qualification, to instruct the jury that, if the fence was defective, the company were liable. It should not, under the facts in the case, have laid down the rule of absolute liability. Ibid. 295.

4. *Fencing a road—gate left open.* In an action against a railroad company to recover the value of a horse killed by one of defendant's trains, it was held to be error to instruct the jury that, if the road was not so fenced as to prevent the horse from getting upon it, they were bound, under any circumstances, to find for the plaintiff. There was evidence tending to show that the horse came upon the road through an open gate. If this was true, plaintiff could not recover, unless the gate had been so long open as to raise the presumption that the servants of the company knew it, or to charge them with negligence. The instruction excluded from the jury the consideration whether, if the horse came through the open gate, the company was chargeable with carelessness. *Chicago, Burlington and Quincy Railroad Co.* v. *Magee*, 529.

Comparative negligence.

5. In an action against a railroad company to recover damages for the killing of the husband of the plaintiff, the accident being occasioned by a collision at a road crossing, an instruction informed the jury that, if the employees neglected to ring a bell or sound the whistle as required by statute, the plaintiff was entitled to recover of the company for killing her husband unless he was guilty of a greater degree of negligence: *Held*, such an instruction was too broad, as it should

NEGLIGENCE. COMPARATIVE NEGLIGENCE. *Continued.*

have limited the liability of the company to the injury caused by the failure to ring the bell or sound the whistle, and it should have been modified so as to have informed the jury that the negligence of deceased must have been slight as compared with that of the company. Instructions in such cases should lay down the duty of both parties, and leave the jury to find whether the defendant was guilty of negligence; and even if the deceased was guilty of negligence, whether it was slight as compared with that of the company. *Chicago, Burlington and Quincy Railroad Co.* v. *Lee*, 501.

MASTER AND SERVANT.

6. *Liability of the common master for injuries to one servant from the negligence of another.* See MASTER AND SERVANT, 2.

NEGOTIABLE PAPER.

ITS FREE CIRCULATION FAVORED.

1. The law favors the use of commercial paper, and courts should not permit weak and uncertain evidence to impede or restrain its free circulation. *House* v. *Davis*, 367.

NEW TRIALS.

CONDITIONAL ORDER FOR A NEW TRIAL.

1. *Effect of a remittitur in obviating a new trial.* Where the court enters an order that unless plaintiff will remit a certain portion of his verdict within a specified time, a new trial will be granted, but the sum is not remitted until after the time has expired, when the court thereupon overruled the motion for a new trial and rendered judgment for the amount remaining after entering the *remittitur: Held*, that it was not error to overrule the motion after the time named had expired; that the order, as entered, was a conditional one granting a new trial, and was under the control of the court during the term; that the mere overruling of the motion was not error, and the refusal to grant a new trial could not be questioned unless there were other grounds requiring it to have been allowed. *Miles* v. *Weston*, 361.

NEWLY DISCOVERED EVIDENCE.

2. It is not error to refuse to grant a new trial on newly discovered evidence which is only cumulative and inconclusive in its character. *Bowen et al.* v. *Rutherford*, 41.

3. On such an application it must appear that the party asking a new trial has used due diligence to discover evidence before the trial. Ibid. 41.

NEW TRIALS. *Continued.*

EXCESSIVE DAMAGES.

4. *Obstruction of streets.* In an action on the case against the city of Chicago, for negligence in permitting a portion of one of its streets to be obstructed by a rope stretched and attached to stakes set in the street, and failing to place any sign of warning to protect travelers from the danger, by means of which the plaintiff, while traveling the street, was thrown from her carriage and severely injured: *Held*, while a verdict for the plaintiff of $4400 was regarded by the court as much greater than they would have allowed, and the injury did not appear to them to be exclusively attributable to the accident, yet the damages were not considered so excessive as to warrant them in disturbing the verdict on that ground. *City of Chicago* v. *Fowler*, 322.

5. *For injury resulting from excavation under the wall of the building of another.* Where it appeared that a person, desiring to erect a building adjoining the brick house of another, and obtained permission to sink his foundation wall below and partly under the wall of the house, and agreed to pay for all damages the house might thereby sustain, and on putting in his foundation damage was done to the building, in a suit to recover damages for the injury, the evidence being very conflicting on the question of the extent of the damages, the judgment will not be reversed because the damages are excessive, although they may appear to be large. *Hayes* v. *Moynihan*, 409.

6. *Irregularity in distress for rent.* In an action by a tenant against an officer who sold property seized under a distress warrant, without an appraisement as required by law, it appeared the sale was well attended and the bidding spirited, and the property sold for $110.20. The omission to comply with the statute in respect to the appraisement was unattended with especial circumstances of aggravation. The valuation of the property distrained, even by the plaintiff himself, was only $376. The jury returned a verdict for $1450. A *remittitur* of $686.50 was entered: *Held*, the verdict, even with the *remittitur*, was excessive, and the judgment was reversed. *Tripp et al.* v. *Grouner*, 474.

7. *In action for slander.* It was held, in an action for slander, that, except in a case of flagrant wrong, a verdict will not be disturbed, especially when the damages have been reduced upon a second trial. *Storey et al.* v. *Wallace*, 51.

NOTICE.

IN JUDICIAL PROCEEDINGS.

1. *Necessity of notice.* The principle is very general, subject to few exceptions, that all persons whose rights are to be affected by an

NOTICE. In judicial proceedings. *Continued.*

order or judgment of a court, must have notice, actual or constructive, of the pendency of the proceeding against them. *Long, Admx.* v. *Thompson, Guardian, et al.* 27.

Distribution of money of an estate.

2. *Notice in respect thereto.* See ADMINISTRATION OF ESTATES, 9, 10.

Killing of stock on a railroad.

3. *Whether notice should be given to the company of a defective fence.* See NEGLIGENCE, 2, 3, 4.

Of a re-sale.

4. *In case a purchaser fails to keep his margin good—sufficiency of a notice to authorize a re-sale.* See SALES, 1.

Obstruction of streets of a city.

5. *What is sufficient notice thereof to the municipal authorities.* See HIGHWAYS, 10.

Special assessment to open an alley.

6. *Whether notice thereof sufficiently certain.* See SPECIAL ASSESSMENTS, 6.

Publication of notice.

7. *In respect to a special assessment—of its sufficiency.* Same title, 7, 8.

Notice in proceedings by attachment.

8. *Of its sufficiency, and in what manner shown.* See ATTACHMENT, 2 to 7.

Deed of trust to secure a debt.

9. *Of notice of the sale thereunder, and whether notice is necessary of an exercise of the option to declare the whole debt due.* See MORTGAGES, 9.

Of an adverse or defective title to a pledge.

10. *Of notice thereof to the pledgee.* See PLEDGE, 4, 5.

On re-sale of goods.

11. *Whether notice to a former purchaser necessary.* See SALES, 8.

Marine insurance on goods "lost or not lost."

12. *Of notice to the company that the goods were already lost.* See INSURANCE, 14, 15.

Change of venue.

13. *Necessity of notice.* See VENUE, 1.

NOTICE. *Continued.*

ASSIGNOR OF PROMISSORY NOTE.

14. *Whether notice of non-payment necessary to fix his liability.* See ASSIGNMENT, 3.

NOTICE OF DEFENSE IN A SUIT.

15. *By plea.* See PLEADING, 5.

OFFICERS.

DISQUALIFIED BY INTEREST.

1. Where public officers are clothed with important powers, subject to but few effectual restraints, so that the rights of private property are almost at their mercy, it must be held that the acts of such officers must be free from the motives of special pecuniary interest, and courts should open the way to a proper investigation of the sources of such improper motives; to do otherwise would be to encourage a prostitution of their powers to their own private ends, by a judicial shield, which should be applied to the protection of the oppressed. *Hunt* v. *City of Chicago*, 183. See SPECIAL ASSESSMENTS.

CLERK OF CRIMINAL COURT OF COOK COUNTY.

2. *Tenure of his office under new constitution.* The constitution of 1870 did not affect the tenure of office of the clerk of the criminal court of Cook county, but when the recorder's court was changed to the criminal court, the clerk was retained in office until the expiration of his term. *City of Chicago* v. *O'Hara*, 413.

PARENT AND CHILD.

OF AN ADOPTED CHILD.

*Liability for his support and education—in case of divorce of the parties adopting him.* Where a party had adopted a child, and was subsequently divorced, and the decree required him to support and educate the child, and he had previously placed the child in a boarding school to be taught, and his divorced wife, who had the custody of the child, afterwards placed the child in the same school, and although he gave notice that he would not pay the expense, as it failed to appear that he had provided other means of education, or that there were common schools accessible, he was held liable to pay the expense incurred in keeping the child at the boarding school. *Buck* v. *Buck*, 105.

PARTIES.

IN CHANCERY.

1. *Bill to correct mistake.* A grantee who, having title by a wrong description, sells a portion of his purchase, following the erroneous description, must, in seeking relief against his own grantor, make his

PARTIES. In chancery. *Continued.*

own grantee a party defendant. Omission to do so is fatal. *McLennan* v. *Johnston*, 306.

Assignee of policy of insurance.

2. *Can not sue in his own name.* In an action on an insurance policy, it was *held*, that the assured, who held the legal title, could not sue, because he had broken the condition of the policy. The assignee could not sue because he was not originally a party to the contract. The assignment could only pass an equitable interest, and he could not sue in his own name for a breach. *Home Mutual Fire Ins. Co. of Chicago* v. *Hanslein*, 521.

Suit by an administrator.

3. *When he may sue in his own name.* See ADMINISTRATION OF ESTATES, 3, 4.

Suit against husband and wife.

4. *When the latter improperly joined.* See MARRIED WOMEN, 1.

Dismissal of suit.

5. *Right of a complainant to dismiss a suit as against the holder of a power of attorney.* See POWER OF ATTORNEY, 1, 2.

PARTNERSHIP.

Whether a partnership exists.

1. *As between the parties, and as to third persons.* In an action against A and B on a promissory note signed A & Co., the declaration alleged that A and B were partners in business under the firm name of A & Co., and as such made the note sued on. B denied the partnership and his joint liability with A as partner, on the note. The plaintiff introduced in evidence the note, and a bond for a deed for certain mill property, executed by a third person, with the knowledge of B, to "A and B, composing the firm of A & Co.," which bond was duly recorded. It appeared that B made the most, if not all, the payments on the property, and that when reimbursed by A, the property was to be the property of A; that the note was executed for work done in the mill by the plaintiff as miller; that B visited the mill several times after the purchase. A testified that B never had any interest in the mill business; that he alone was interested in that, and assumed the firm name of A & Co. in which to transact business; that the firm was himself and no other; that B never authorized him to use his name, nor did he ever represent to others or to the plaintiff that B had any interest in the mill business; that the interest of the latter only extended to the real estate: *Held*, the evidence was sufficient to charge

PARTNERSHIP. WHETHER A PARTNERSHIP EXISTS. *Continued.*

B upon the note; that the bond for a deed to the mill property, taken with the knowledge and consent of B, in which A and B were described as composing the firm of A & Co., and put on record, was a holding out to the world that they were partners in the mill property and in the business of the mill, though, as between themselves, there may have been no partnership in the mill business. *Wheeler* v. *McEldowney*, 358.

WHAT CONSTITUTES.

2. *Banking association.* Where a number of persons enter into articles of association for banking purposes, and, without any charter, assume a name, open a stock book, subscribe for shares of stock, and a portion of them pay small sums on the stock, hold meetings, elect directors, publish the names of such directors, none of whom take any steps to inform the public that they do not belong to the association, enter into business, buy and sell exchange, receive deposits, draw bills and transact business as a bank: *Held*, that all become members of a partnership and are liable as such, and that they may be sued on a draft drawn by the company which is not paid. *Pettis et al.* v. *Atkins et al.* 454.

PARTNERS AS TO THIRD PERSONS.

3. *Though not between themselves.* Although persons may not be, in fact, partners, still they may so act as to become liable to the public as partners, and be estopped from denying a partnership. Ibid. 454.

PROOF OF PARTNERSHIP.

4. Where a partnership is denied by one of the persons sued, he can not be proved a partner by the acts or declarations of those claimed to be partners. Their declarations are admissible to prove them partners, but it is error, when such evidence has been adduced, to instruct the jury that, if they find from all the evidence that the person denying the partnership is a partner, then the declarations of either partner will bind the firm. Such instruction authorizes the jury to consider the evidence not applicable to the proof of partnership, by the person denying it, to make him a partner. *Bishop et al.* v. *Georgeson*, 484.

5. A person can not be made a partner in fact, or appearance, so as to bind him, unless by his consent, admissions or acts. The declarations or acts of others can have no such effect unless authorized or ratified by him. Ibid. 484.

6. *By reputation.* Whether persons are partners *inter se*, or *quoad* third parties, must be established by facts, by the acts of the party, or by circumstantial evidence, which induce the belief of a partnership.

PARTNERSHIP. Proof of partnership. *Continued.*

The question turns upon the assent of the person to be charged, and not upon general repute. A partnership can not be proven by general reputation. *Bowen et al.* v. *Rutherford*, 41.

Control of partnership funds.

7. *Equitable lien of a creditor.* Where several persons, acting together, borrowed a sum of money from a bank, and shipped a lot of cattle to market consigned to another person to sell, who, after making sale, paid the expenses and charges attending the shipment and sale, and also paid off and discharged a mortgage on the cattle, and held about half of the proceeds in his hands, and one of the partners directed him to pay it to the bank, and he agreed to hold it subject to the order of the partners, and it was paid to one of the partners by his, and the direction of another, who constituted a majority: *Held*, that by the direction of one partner to pay to the bank, and what he said, gave the bank no lien on the fund, and the agent was authorized to pay it, as he did, under the direction of the other two partners, and as he paid the money before the bank filed their bill to enforce payment out of the fund, there was nothing upon which an equitable lien could attach. *Steele* v. *First National Bank of Joliet*, 23.

Suit at law by one partner against another.

8. *Whether it will lie, and when the remedy is in equity.* One partner can not sue another at law until there has been a dissolution of the partnership, a final settlement of the affairs of the firm, a balance struck and a promise to pay. Balances struck only preparatory to a settlement are not sufficient. Until the final settlement is had, the remedy is in equity. A statement of accounts between two of three partners, showing the amount of profits that had been made, but which failed to state in whose hands they were, the amount each partner was entitled to receive, or whether the partners had received their capital stock put in, or had accounted for funds, if any, drawn out by them, is not such an accounting and settlement as authorizes one partner to sue another at law. *Burns* v. *Nottingham*, 531.

9. Where one partner testifies a settlement was had with one or two other partners, and he understood that a certain sum was due him, but does not say it was found to be due on the settlement, or that the other admitted such sum to be due, and testifies that the other agreed to give his notes for what he owed, but the latter, in his testimony, denies that any sum was found to be due, and that he was willing to give his notes for what was due when it could be ascertained: *Held*, this evidence fails to prove a final settlement and a balance struck. In such a case, the remedy is in a court of equity. Ibid. 531.

PAYMENT.

APPLICATION OF PAYMENTS.

1. *Where there are several debts.* Where a debtor owes a creditor several debts, and makes payments, he has the right to direct their application to any one or more of the debts he may choose; but if he makes payments and gives no directions, then the creditor may apply them as he may choose; and when such payments are made, and neither party makes the application, the law will apply them in the manner most advantageous to the creditor, as it will be presumed he would, had he made an election, have so applied them. *Hare* v. *Stegall*, 380.

2. Where a creditor holds two debts against another, and one is secured and the other is not, and payments have been made by the debtor, and there is no evidence that he directed their application, and no evidence of how they were applied, it will be presumed that they were credited on the debt for which he held no security. Ibid. 380.

TIME FOR PAYMENT.

3. *On sale of goods, where no time for payment is fixed by the parties.* See SALES, 2.

PLEADING.

OF THE DECLARATION.

1. *Count for goods sold and delivered.* It is essential to the *indebitatus* count for goods sold and delivered, that it should aver they were sold and delivered to the defendant at his request. Where such an averment is wanting in such a count, upon a special demurrer the count would be bad. *McEwen* v. *Morey*, 32.

DUPLICITY—WAIVER.

2. Where a count in a declaration averred that a railway company failed to fence its road, and that a train was run, conducted and directed carelessly, whereby plaintiff's horse was killed: *Held*, that plaintiff might recover on proving either ground; that the declaration was obnoxious to a demurrer for duplicity, but both grounds were traversed by filing the general issue. *Chicago, Burlington and Quincy Railroad Co.* v. *Magee*, 529.

WAIVER OF DEMURRER TO DECLARATION.

3. *By plea.* Where a defendant demurs to the declaration and the demurrer is overruled, and he then pleads to the action, he waives the grounds of demurrer, and can not raise the legal questions presented by the demurrer. If he desired to do so, he should have abided by his demurrer. *Home Mutual Fire Ins. Co.* v. *Garfield*, 124.

PLEADING. *Continued.*

DEMURRER TO ONE OF A SERIES OF PLEAS.

4. *To which it shall apply.* Where a party files a number of pleas in such a confused manner that it is difficult to determine the order in which they were filed, and a defective special plea appears first in the series, and the general issue the second, and a demurrer, as appears by the record, was sustained to the first plea, it will be held that the demurrer was sustained to the bad special plea, and not to the general issue, unless it appears from the record that the court deprived the defendant of the benefit of the general issue on the trial. *Lamb et al.* v. *Holmes*, 497.

NOTICE OF DEFENSE.

5. When a plea, denying a partnership, is filed, it is notice that such a defense will be made. *Bowen et al.* v. *Rutherford*, 41.

NON EST FACTUM—IN ASSUMPSIT.

6. The plea of *non est factum* is not an appropriate plea in the action of assumpsit, and it is proper practice, in such a case, to strike it from the files on motion. Even if it could be used, the plea of *non-assumpsit* is broader and will admit a more comprehensive defense, and is preferable. *Lamb et al.* v. *Holmes*, 497.

FOREIGN STATUTE.

7. *Must be pleaded.* Where the statute of another State is not pleaded, it is error to base an instruction on such a statute. *Palmer* v. *Marshall*, 289.

STATUTE OF LIMITATIONS OF ANOTHER STATE.

8. *Must be specially pleaded.* See LIMITATIONS, 5, 6.

FAILURE OR PARTIAL FAILURE OF CONSIDERATION.

9. *Must be specially pleaded.* See PLEADING AND EVIDENCE, 11.

OF A PARTICULAR CUSTOM.

10. *Mode of pleading it.* See CUSTOM, 2.

WHEN PLEA MUST BE SWORN TO.

11. *To entitle a plaintiff in an action against several to recover against a part of the defendants, under act of* 1869. See JUDGMENTS, 3.

PLEA IN ABATEMENT. See ABATEMENT, 1.

## PLEADING AND EVIDENCE.

### Allegations and proofs.

1. *Must correspond.* Upon bill filed by a subsequent grantee of a mortgagor to set aside a pretended sale had under a power given in the mortgage, upon the ground that there was no sale of the premises at auction, and the proof fails to sustain the bill, the complainant can not change his ground and attack the sale for an irregularity. The allegations and proofs must agree, or relief will be denied. A party can not obtain relief by making one case by his bill, and a different one by his proofs. *Heath* v. *Hall et al.* 344.

2. Where the theory of a bill in chancery is, that promissory notes, upon which judgment had been rendered, were usurious, and that the assignee, who obtained the judgment, had colluded with the payee to hold the notes in trust for him, and the proof fails to sustain the bill, it is erroneous for the court, under such a bill, to require the payee to bring the amount of usury into court to be paid to the assignee, and to require that the maker bring the balance of the judgment into court to be paid to the assignee. *House* v. *Davis*, 367.

3. The evidence must be in support of the theory of the bill, and if not, although a case may be made by the evidence, the party is not entitled to relief, and it must not be variant from the case the party is called upon by the bill to defend. Ibid. 367.

4. *False imprisonment.* In an action for trespass and false imprisonment, where the court permitted evidence of the kind of food that was furnished to plaintiff, and the character of the prison in which he was confined, and the kind of treatment he received: *Held*, it was error, as there were no facts specially averred authorizing them to be received, and as there was no such averment in the declaration the admission of such evidence was calculated to surprise the defense, and it should have been rejected. *Miles* v. *Weston*, 361.

5. *As to price.* Where a count avers that the defendant purchased of plaintiff a quantity of corn at the highest market price for similar shelled corn in the city of Morris at the time of delivery, the plaintiff could not recover on such a contract by showing a delivery of corn at another place, and under a contract which did not specify any price at any place. *McEwen* v. *Morey*, 32.

6. *In an action against a railroad company* to recover the value of a horse killed by one of defendant's trains, where the plaintiff avers, in his declaration, that defendant carelessly "ran, conducted and directed" its train, it is error to instruct the jury that they might consider the condition of the brakes employed. The action was for carelessness, and not for a failure to properly equip their road. *Chicago, Burlington and Quincy Railroad Co.* v. *Magee*, 529.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS. *Continued.*

7. *What amounts to a variance.* To constitute a variance there must be a substantial departure from the issue, in the evidence adduced, and it must be in some material matter which, in point of law, is essential to the charge or claim. *Frazer et al.* v. *Smith et al.* 145.

8. *As to when a contract was made.* In an action to recover damages for the breach of a contract, the declaration alleged the contract to have been made on the 20th day of February, 1868, to repair and put in good order a still apparatus and column for the manufacture of alcohol, to be performed within and during the period of six weeks from and after that day, with breach that the defendant did not perform within that time, averring damage by reason of loss of use of the machinery. The proof showed that the contract was made on the 1st day of March, 1868, and that the defendant was to complete the same in thirty days: *Held*, there was no substantial variance between the allegation and proof. The time of making the contract was not of the essence. Ibid. 145.

9. *When a variance is immaterial.* In a case where an instrument in writing is not declared on as the cause of action, it may, nevertheless, be read in evidence, although it may vary from the averments in the declaration, if it tends to prove the issue. *Newlan* v. *Dunham*, 233.

10. *Preponderance of evidence.* Where a bill contains allegations entitling complainant to relief, they must be proved by at least a preponderance of evidence. When the evidence is conflicting, and there is not a preponderance in favor of the bill, or where the preponderance is against the bill, relief should not be granted. *Singer* v. *Jennison et al.* 443.

FAILURE OF CONSIDERATION.

11. Under the plea of *non assumpsit* a party is not permitted to prove a failure, or partial failure, of the consideration of the note sued on. Such defense must be presented by special plea. *Leggat et al.* v. *Sand's Ale Brewing Co.* 158.

COVERTURE.

12. It has been held that coverture may be pleaded, or given in evidence under the general issue. But where coverture is pleaded in abatement, and out of time, and therefore unavailing, in the absence of proof under the general issue, the defense can not prevail. *Thomas* v. *Lowy*, 512.

SUIT BY AN ADMINISTRATOR.

13. *When he may sue in his own name, and whether he must prove his fiduciary character.* See ADMINISTRATION OF ESTATES, 3, 4.

PLEADING AND EVIDENCE. *Continued.*

STATUTE OF LIMITATIONS OF ANOTHER STATE.

14. *Under what state of pleading it is admissible in evidence.* See LIMITATIONS, 5, 6.

PLEDGE.

OF PROPERTY NOT PAID FOR BY THE PLEDGOR.

1. *Rights of the pledgee as against the original vendor.* Where a person purchases a lot of highwines, and is to pay for them on delivery, and they are delivered late in the afternoon, the seller saying he will leave them until the next morning when he will call and get his pay, and the purchaser ships them to New York and draws drafts on a bank and attaches the shipping receipts to the drafts as collateral security for the payment of the money, and the drafts are presented to a bank and they are cashed: *Held*, the bank, having no notice that the highwines had not been paid for, acquired a valid and binding lien on the property as a pledge for the payment of the money; and that it would be protected against the vendor's claim for the purchase money. *Michigan Central Railroad Co.* v. *Phillips et al.* 190.

2. *Delivery of the property by transfer of bill of lading.* The transfer of a bill of lading by the shipper, on a sale or pledge of the property shipped, is a symbolical delivery of the property, and this, too, without any indorsement on the bill. The shipper, when he is the owner of the property shipped, does not lose his title by inserting the name of a consignee when he ships the property. The title still remains in him unaffected. In such a case, the consignee becomes the factor or commission merchant of the shipper. Ibid. 190.

3. In such a case, the same rule applies to the shipper who is not the owner, but has been put in possession of the property under such circumstances as to sell and pass the title to an innocent purchaser. Such a pledge and transfer of the bill of lading, transfers a legal and not a merely equitable title in the pledge. Ibid. 190.

4. *Notice of adverse title to the pledge.* Where it appeared that it was usual, on the sale of highwines, among dealers and rectifiers, to accompany the transfer with what are called coupons, but not with bankers who advanced money on drafts on bills of lading of highwines shipped, to have the coupons accompany the bills of lading: *Held*, that in this case the want of such coupons to accompany the bills of lading, was not notice that the pledgor had no title, or a defective one. Ibid. 190.

5. A notice of defective title in the pledgor comes too late to affect the pledgee, after he has advanced the money secured by the pledge. To be operative, the notice should have been prior to the payment of the money. Ibid. 190.

## POWER OF ATTORNEY.

### Dismissal of suit by a party.

1. *Rights of one holding a power of attorney.* Where a party gives to another a power of attorney, which recites that the maker is indebted to the attorney, authorizing him to file a bill to set aside a conveyance made by the guardian of the maker of the power, and to compel the guardian to account, and, out of the proceeds realized from the suit the attorney should be paid: *Held*, that after such a suit is commenced in the name of the person giving the power, he may dismiss the suit notwithstanding the opposition of the attorney. *Norton* v. *Tuttle et al.* 130.

2. Where a claim of this character is not assignable, the giving of a power of attorney by the holder of the mere naked right to his creditor authorizing suit to be brought and prosecuted in his name, the claim not being assignable, confers no rights on the attorney in fact, and therefore nothing upon which to found a claim of an irrevocable power to prosecute the suit. The position of the attorney is less favorable than if he were assignee. Ibid. 130.

## PRACTICE.

### Time of taking certain objections.

1. *That checks offered in evidence are not stamped.* In an action by a purchaser of property, against the seller, for breach of the contract, where checks were offered in evidence that had been tendered under the contract, but did not have attached the required revenue stamps, but no objection was made on that ground, the objection can not be urged for the first time on appeal, when the seller did not refuse them on that ground, but placed the refusal upon the claim that the estimates were not correctly made as to the quantity of the property sold. *Newlan* v. *Dunham*, 233.

2. *Insufficient description in a deed.* Where a deed is read in evidence without objection, and it is apparent that a description of land therein could be rendered more clear and satisfactory by other evidence, the objection that the description in the deed is not clear, can not be urged as a ground of reversal. *Eldridge* v. *Walker*, 230.

### Administrator's sale of land to pay debts.

3. *Disposition of a demurrer, on appeal.* Where the defendants, on an application by an administrator for an order to sell lands to pay debts, demur, in the county court, to the petition, and the demurrer is overruled and they file an answer, it is not error in the circuit court on appeal to strike a demurrer from the files when it has been filed in that court. *Bursen et al.* v. *Goodspeed, Admr.* 277.

PRACTICE. *Continued.*

QUESTIONS OF LAW AND FACT.

4. In a suit on a policy of insurance where the question was whether the company waived the sufficiency of the proof of loss, and certain facts are found to exist, it is then a question of law whether they amount to a waiver, and it is not error for the court to instruct the jury that if certain facts, which amount to a waiver, are found to exist, there was a waiver by the company of further proof of loss. *Winnesheik Ins. Co.* v. *Schueller*, 465.

PRACTICE IN THE SUPREME COURT.

WHAT MAY BE ASSIGNED AS ERROR.

1. *Overruling challenge of juror.* It is the duty of this court to review the action of the court below in all cases as to the competency of jurors, whether the challenge be to the polls for favor or for principal cause. *Winnesheik Ins. Co.* v. *Schueller*, 465.

ASSIGNMENT OF ERRORS—ABSTRACT.

2. Upon an appeal to this court, where there was no assignment of errors upon the record in accordance with the rule of court in that regard, and none accompanying the record, and the appellant failed to file an abstract in the manner required, but instead thereof merely a printed index to the transcript, the court refused to consider the case, and affirmed the judgment of the court below. *Buckley* v. *Eaton*, 252.

ERROR WILL NOT ALWAYS REVERSE.

3. *Erroneous instructions.* A judgment will be affirmed if it is clearly sustained by uncontradicted evidence, notwithstanding the court may have given an erroneous instruction, where it can be seen no injury could result therefrom. *Graves* v. *Shoefelt*, 462.

4. *Overruling challenge of juror.* Where a juror, on his examination, states that he has a prejudice against all insurance companies; that it was founded on the fact that he could not comprehend their proceedings, but that the prejudice would not affect his verdict: *Held*, that it was error to disallow a challenge for cause, as he did not stand indifferent between the parties; but it was further held that, as the proof showed that justice was clearly done between the parties, and there could have been no other finding, the judgment should not be reversed for such an error. *Winnesheik Ins. Co.* v. *Schueller*, 465.

PRESUMPTIONS.

OF LAW AND FACT.

1. *That evidence was considered.* In an action for breach of a contract to sell and deliver a quantity of hay in the stack to the plaintiff,

PRESUMPTIONS. Of law and fact. *Continued.*

it appeared the quantity of hay was to be ascertained by referees. The seller contended there was a mistake in the estimate: *Held*, where the evidence is admitted as to the basis on which such a calculation is made, the presumption is that it was considered by the jury, and that they determined whether there was so gross a mistake as showed a fraud on the part of the referees. *Newlan* v. *Dunham*, 233.

2. *As to jurisdiction of courts of general jurisdiction when in the exercise of statutory powers in summary proceedings.* See JURISDICTION, 1, 2.

3. *Texas cattle—capability of communicating disease—presumption in respect thereto, under the statute.* See TEXAS CATTLE, 1.

Appearance entered by attorney.

4. *Presumption as to authority of attorney.* See APPEARANCE, 2.

PROBABLE CAUSE.

For distress for rent. See MALICIOUS PROSECUTION, 1, 2, 3.

PROCESS.

Service of process.

*In chancery.* There is no substantial departure from the statute when the service of process is required to be made by *delivering* a copy *to* the defendant, and by the return it appeared a copy of the summons was *left with* the defendant. *Buck* v. *Buck*, 105.

PURCHASERS.

Holder of collaterals.

1. *Can not buy at his own sale.* One to whom securities are pledged for security of a debt, can not become the purchaser at his own sale. *Chicago Artesian Well Co. et al.* v. *Corey et al.* 73.

2. Such sale, if illegal, does not cancel the securities, but the pledgee is remitted to his former rights respecting them. Ibid. 73.

Subsequent purchaser with notice.

3. *Of a mechanic's lien.* See LIENS, 4.

Purchaser of chattels from vendee in possession.

4. *Of his rights as against the original vendor.* See SALES.

Bona fide purchaser from fraudulent vendee.

5. *Of his rights.* See FRAUD, 1.

PURCHASERS. *Continued.*

SALE OF PREMISES BY LESSOR.

6. *Right of purchaser to sue for rent.* See LANDLORD AND TENANT, 4, 5.

PURCHASER FROM MORTGAGEE.

7. *After a strict foreclosure on constructive service—relative rights of such purchaser and the mortgagor.* See MORTGAGES, 4, 5.

TENANTS IN COMMON.

8. *Whether one may acquire title to the property without the consent of the other.* See TENANTS IN COMMON, 1, 2.

RATIFICATION.

ITS EFFECT.

1. Ratification of act done is equivalent to precedent authority, and relates back to the date of the execution of the power. *Martin* v. *Judd*, 78.

REASONABLE DOUBT. See CRIMINAL LAW, 4.

RECEIPT.

WHETHER IT AMOUNTS TO A CONTRACT. See CONTRACTS, 7, 8.

REDEMPTION.

BY A PURCHASER UNDER EXECUTION.

1. *As against a purchaser under foreclosure of a prior mortgage.* Where a person executed a mortgage on real estate, and subsequently another person recovered a judgment against the mortgagor, which became a lien on the same land, an execution was issued on the judgment, and the premises were sold to another person who assigned the certificate of purchase to still another person, and three days after the right to redeem by the mortgagor had expired, the mortgagee filed a bill to foreclose, and on the same day the mortgagor entered his appearance, and a decree of foreclosure was afterwards entered ordering the payment of the money in ten days, and, in default thereof, that, on ten days' notice, the land be sold, and the sale was made and the land purchased by a person not in interest, bidding $900 more than the amount of the decree on the foreclosure, and the money was not at the time paid to the mortgagee, but the $900 was paid to the mortgagor, who was the father-in-law of the purchaser, at the foreclosure sale; the purchaser at the execution sale, or his assignee of the certificate of purchase, was not made a party to the foreclosure proceeding;

REDEMPTION. By a purchaser under execution. *Continued.*

the assignee filed a bill to redeem: *Held*, that his right to redeem was not lost. *Grob* v. *Cushman*, 201.

2. That, in such a case, he might redeem by paying the amount paid by the purchaser under the decree to satisfy the mortgage. When the bill to foreclose was filed, the mortgagor's right to redeem had expired, his equity of redemption had been sold, and he had failed to redeem within one year, and the assignee of the certificate of purchase under the execution sale held the equity of redemption, and not having been made a party to the foreclosure suit, his right to redeem was not cut off by the foreclosure sale. Ibid. 201.

3. *Laches—waiver of irregularities.* See MORTGAGES, 3.

By a judgment creditor.

4. *When he loses his right.* A judgment creditor purchasing the land within the twelve months, takes his grantor's right of redemption, but loses his right to redeem as a creditor. *Martin* v. *Judd*, 78.

5. *Regularity of his judgment.* A debtor who has failed to redeem within twelve months may confess judgment in favor of another creditor upon a *bona fide* debt, for the purpose of enabling him to redeem, but the indebtedness must be clearly shown and the proceeding free from suspicion. Ibid. 78.

RELEASE.

Release of surety.

*Extension of time to the principal.* See SURETY, 1.

REMEDIES.

Organization of a corporation.

1. *As to the mode of questioning the regularity thereof.* See CORPORATIONS, 2.

By one partner against another.

2. *Whether at law or in equity.* See PARTNERSHIP, 8, 9.

Contracts against public policy.

3. *Remedy in respect thereto.* See CONTRACTS, 4, 5.

Bridge over a navigable stream.

4. *Whether an obstruction to navigation—in what proceeding the question may arise.* See NAVIGABLE STREAMS, 1.

In case of distress for rent.

5. *Remedies of the tenant where there is an improper distress.* See ACTIONS, 1.

REMEDIES. In case of distress for rent. *Continued.*

6. *Remedy of the tenant where property distrained is sold without appraisement.* See ACTIONS, 2.

REMITTITUR.

Its effect in obviating a new trial.

*Under a conditional order.* See NEW TRIALS, 1.

REPLEVIN.

Whether it will lie.

1. *In favor of a tenant in case of an improper distress.* See ACTIONS, 1.

Of the bond.

2. *Its requisites.* It is not ground for dismissing a replevin suit, on appeal in the circuit court, that the bond does not correctly state the date of the writ. *Graves* v. *Shoefelt*, 462.

RESCISSION OF CONTRACTS.

In chancery. See HUSBAND AND WIFE, 3.

RESPONDEAT SUPERIOR. See MASTER AND SERVANT, 2.

RESULTING TRUST. See TRUSTS, 1.

RETURN UPON PROCESS.

Contradicting the same.

1. A party may, in some cases, contest the fact of service of process upon him. *Hickey* v. *Stone et al.* 458.

Return of service in chancery. See PROCESS, 1.

SALES.

Sale of grain to be delivered at a future time

1. *Of keeping the margin good.* A party residing at a distance from the city of Chicago, employed a commission merchant in that city to purchase for him a quantity of wheat, to be delivered at a subsequent day. He agreed to allow the commission merchant one-half of a cent per bushel as compensation for purchasing, and to advance ten cents per bushel as a margin, and to keep it good at that sum. It was also understood that, when the grain should be delivered, the commission merchant was to pay for and store the same, holding it to secure his advances, which, with interest and storage, were to be paid when the

SALES.

SALE OF GRAIN TO BE DELIVERED AT A FUTURE TIME. *Continued.*

wheat should be sold. The wheat was purchased, and the margin, as agreed upon, was paid to the commission merchant, and soon after, the price of wheat began to decline, of which the commission merchant advised the party for whom he had purchased, and asked for instructions in regard to the sale of the wheat. Subsequently, the latter was advised that the margin already deposited had been absorbed by the further decline in the market, and was requested to put up more margin, which he failed to do, and thereupon the commission merchant sold the wheat at a considerable loss: *Held*, the margin not being kept good, the commission merchant had the right to sell the grain upon the notice given. *Mœller et al.* v. *McLagan*, 317.

SALE OF CHATTELS.

2. *Payment, and the waiver thereof.* Where chattels are sold, and no time of payment is fixed by the contract, payment is a condition precedent, implied by law, and the title would not vest until payment, unless waived by the vendor. *Michigan Central Railroad Co.* v. *Phillips et al.* 190.

3. The vendor, in such a case, may waive payment, and if he does, the title to the property sold will vest in the vendee. Ibid. 190.

4. *Delivery without waiver—bona fide purchaser.* But even where there has been no waiver by the seller, still, if he delivers the property to the purchaser, and thus vests him with *indicia* of ownership, and he sells or pledges it to a *bona fide* purchaser without notice, the latter acquires rights which will be protected. Where the property is thus placed in the hands of the purchaser, as to third persons who become *bona fide* purchasers, it does not matter as to the intent with which it was delivered. Ibid. 190.

5. Such a case as the present is unlike one where something remains to identify or separate the property, or ascertain its weight, etc., as nothing remained here, not even a delivery, but to pay for the property, to complete the sale, and fully vest the title as between the contracting parties. Where one of two innocent parties must suffer loss by the fraud of another, the person who enables the commission of the fraud must suffer the loss. Ibid. 190.

6. *Rights of a pledgee of property so delivered to the purchaser, as against the vendor.* See PLEDGE, 1.

7. *Delivery of chattels, by means of the transfer of a bill of lading.* Same title, 2, 3.

OF A RE-SALE—NOTICE.

8. Where a person purchased of another the hair and bristles of all hogs he might kill during the season, at a specified price per head,

SALES. Of a re-sale—notice. *Continued.*

and was to take and pay for them, and the seller, when he commenced slaughtering, gave the buyer notice and requested him to take away the hair and bristles and pay for the same according to the agreement, but the buyer refused: *Held*, where such a breach of contract occurs, the vendor may re-sell the goods without notice to the buyer that he will do so, and the vendee will be liable for the loss sustained. *Ullmann* v. *Kent et al.* 271.

Time for payment.

9. *When no time is fixed by the parties.* Where a party purchases goods at an agreed price, and no time is fixed for payment, the law implies that payment is to be made when the goods are delivered. Ibid. 271.

Judicial sales.

10. *Sale on execution—irregularity as to time in the day—waiver.* Where a certificate of purchase issued on a sale of land upon execution stated the sale was made at four o'clock in the morning, that, if true, would have been ground, if applied for in proper time, for setting aside the sale and awarding a new execution. It rendered the certificate and sale voidable, if the sale was so made, but it was not void. And the holder of the title under the execution sale having no notice, he would have been protected, but a delay of nine years in applying to redeem is laches, and the sale could not be set aside. *Rigney* v. *Small et al.* 416.

11. *Sale of land en masse—laches.* Where property, susceptible of division, is sold *en masse*, the debtor may have the sale set aside if he applies to the court in a reasonable time. Such irregularity does not render the sale void, but simply voidable; but by laches, the debtor will lose the right to have the sale set aside. Ibid. 416.

12. *Failure of title—caveat emptor.* Where, in a partition suit, the land was found not susceptible of division and was sold by the master, and the proceeds partitioned, and the purchaser at that sale paid the money and received a deed from the master, but afterwards the administrator of the ancestor of those who sought the partition filed his petition for the sale of the land for payment of the debts, and under an order of the court one-half the land was sold for that purpose, on a bill filed by the purchaser at the master's sale: *Held*, that he was not entitled to relief. *Bassett* v. *Lockard*, 164.

13. It was held that, at a judicial sale, there is no warranty of title, and the maxim *caveat emptor* applies. The purchaser runs all risks of title at such a sale. If the land descended to those seeking partition, burthened with a lien of the ancestor's debts, he, at the master's sale, purchased subject to have his title defeated by a sale for the payment of those debts. Ibid. 164.

SALES. *Continued.*

UNDER A DEED OF TRUST GIVEN TO SECURE A DEBT.

*Of the regularity of the sale.* See MORTGAGES, 9, 10.

SLANDER.

PUBLISHING PROCEEDINGS OF COURTS.

1. *Privileged publications.* A faithful report of the proceedings of courts of justice, is a privileged publication, and shall not be held a cause of action for libel. It would appear that slanderous statements, made by witnesses, which are not pertinent to the matter under investigation, are not privileged. Nor is it settled that coroner's inquests may be for this purpose classed with judicial proceedings. *Storey et al.* v. *Wallace*, 51.

2. A statement made upon the authority of a newspaper, and not purporting to be a report of such proceedings, is not privileged. Responsibility can not be evaded by offer of proof that the libel was in fact matter in evidence. Ibid. 51.

3. Proprietors of newspapers, though ignorant, at the time, of the publication of libellous matter, are responsible. Ibid. 51.

SPECIAL ASSESSMENTS.

IN THE CITY OF CHICAGO.

1. *By whom assessment must be determined.* Where an ordinance, directing the improvement of a street upon which an assessment is made for the purpose, directing it to be curbed with curb walls, where they are not already built, and curb walls be re-built where they are not in a good and sound condition, the work to be done under the superintendence of the board of public works: *Held*, the ordinance and assessment under it are void, as the ordinance attempts to confer discretionary power which can only be exercised by the common council, and tended to induce unfair assessments, favoritism and fraud. *Moore et al.* v. *City of Chicago*, 243.

2. Where the common council passed an ordinance for the improvement of a street, and ordered curb walls to be built where the same were not already built and in good and sound condition, but it did not specify what portion was in good and sound condition and what was not: *Held*, that the ordinance was an attempt to confer on the board of public works an illegal discretion which would tend to open the way to an unfair assessment, and to favoritism and fraud. It is governed by the case of *Foss* v. *City of Chicago*, 56 Ill. 354, and is held to be void, and the collector had no authority to apply for judgment. *Bryan* v. *City of Chicago*, 507.

SPECIAL ASSESSMENTS. In the city of Chicago. *Continued.*

3. An ordinance of the city of Chicago directed a certain street to be curbed with curb walls "where the same are not now already built, and where the same are not now in a good and sound condition," the work to be done under the superintendence of the board of public works: *Held*, the ordinance vested the board of public works with a discretion required to be exercised by the common council alone, and was void. *Wright* v. *City of Chicago*, 312.

4. An ordinance ordered to be constructed, on a certain street, curb walls, and to be re-built and repaired "where the same are not now in a good and sound condition," "said work to be done under the superintendency of the board of public works, conformably to the drawings prepared by said board:" *Held*, the ordinance was void, because it undertook to vest in the board of public works a discretion which should have been exercised by the common council alone. *McDonnell* v. *City of Chicago*, 350.

5. An ordinance for the curbing "with curb walls where curb walls are not already built" in the designated "portion of Milwaukee avenue," and filling and paving with wooden blocks a portion of that avenue, does not confer any discretion on the board of public works, and it is valid. This case is distinguished from *Foss* v. *City of Chicago*, 56 Ill. 354. In that case, to execute the ordinance required a large discretion on the part of the board of public works, while in this there is none conferred. *Page et al.* v. *City of Chicago*, 441.

To open an alley—notice.

6. In a proceeding to levy a special assessment to open an alley, the notice is sufficiently certain if it states the location of the alley and the land to be taken, in the language of the ordinance, giving the numbers of lots in the block and the portions to be taken for the alley. *Hemingway et al.* v. *City of Chicago*, 324.

Publication of notice.

7. *Whether sufficient.* Where a notice that an assessment has been completed, and that application will be made for a confirmation, and the certificate of publication fails to state the last day it was inserted, there is no legal evidence that publication was made, and the collector has no authority to apply for a judgment on the assessment roll. Ibid. 324.

8. Certificates of publication of notices of the meeting of the commissioners to make a special assessment, and of the application to the common council for confirmation, stated that the notices had been published six days consecutively, Sundays and holidays excepted, giving

SPECIAL ASSESSMENTS. PUBLICATION OF NOTICE. *Continued.*

the date of the first but not of the last publication: *Held*, the certificates were within the case of *Rich et al.* v. *The City of Chicago*, 59 Ill. 286, and were insufficient. *Rice* v. *City of Chicago*, 388.

OF A NEW ASSESSMENT.

9. A new special assessment will not be sustained where the record fails to disclose upon what basis it was made. *Harrison* v. *City of Chicago*, 360.

EQUALITY BETWEEN THE ASSESSMENT AND BENEFITS.

10. *Of the rule in that regard.* The charter of a town, granted under the constitution of 1848, authorizing special assessments to be levied, is not unconstitutional because it does not require them to be made on the principle that the benefits must at least be equal to the assessment. But the constitution of 1848 requires assessments to be so made, and an assessment in excess of benefits would be void. *Greeley et al.* v. *The People*, 19.

11. An ordinance requiring a specified sum to be assessed on the property in the town, benefited by the improvement, without reference to whether the property is benefited to that amount, and without requiring it to be levied on the principle of equality of benefit and burthen, is void, and the levy of an assessment under it can not be enforced. Ibid. 19.

INTEREST OF AN OFFICER.

12. *Who made the assessment.* Where two members of the board of public works, one of whom owned property affected, made the assessment for widening a street: *Held*, that the latter was disqualified to act by reason of his interest, and the assessment and the ordinance based upon it were void. *Hunt* v. *City of Chicago*, 183.

13. *Evidence in respect thereto.* In such a case, it is error for the court, on an application for a judgment for the assessment, to refuse to permit the defendant to show that one of the two commissioners making the assessment had a pecuniary interest in making it. Ibid. 183.

OMISSION TO ASSESS CERTAIN PROPERTY.

14. *Effect thereof on assessment on other property.* Where, in the improvement of a street by special assessment, there was, in the center of the street, a horse railway, and there was no evidence that such railway company was exempt from such assessment, the presumption is, that the track was liable to such assessment, and it was error, on account of its omission, to render judgment on the assessment against other property for the improvement. *Page et al.* v. *City of Chicago*, 441.

SPECIAL ASSESSMENTS. *Continued.*

EXEMPTION OF STREET RAILWAYS.

15. *By contract—of its extent.* Where a horse railway company constructed their road in one of the streets of the city, with the agreement that the company should keep so much of the street as they occupied in repair, according to the requirements of the common council for the repairs of such streets, but the company were exempted from assessment for grading, paving, macadamizing, filling or planking the streets or parts of streets upon which they should construct their railways: *Held*, that this agreement did not exempt the company from assessment to defray the expense of widening the streets upon which their railways are constructed. *Parmelee et al.* v. *City of Chicago*, 267.

16. *Constitutionality of a contract of that character.* An ordinance of a city provided that a street railroad company, as respected the grading, paving, macadamizing, filling or planking of the streets upon which they should construct their railways, should keep so much of said streets as should be occupied by the railways, in good repair and condition, in accordance with the regulations of the city in that regard. It was held, in *Chicago* v. *Sheldon*, 9 Wallace, 50, that an ordinance of that character, which had been recognized and confirmed by the legislature, was not unconstitutional, and it was upheld, upon the principle of commutation, and as being a contract, the obligation of which could not be impaired. To this extent the case of *Chicago* v. *Baer et al.* 41 Ill. 306, is modified. Ibid. 267.

QUESTIONING PRIOR PROCEEDINGS.

17. *As to sufficiency of a proceeding to widen a street, on a special assessment to improve the street.* See EVIDENCE, 16.

SPECIAL CHARTERS FOR TOWNS.

UNDER CONSTITUTION OF 1848. See CORPORATIONS, 3.

STATUTES.

CONSTITUTIONALITY.

1. *Of the title of a private or local law—amendment of the charter of the city of Chicago.* A law entitled "An act to amend the charter of the city of Chicago, to create a board of park commissioners, and to authorize the levy of a tax in the town of West Chicago, and for other purposes," is not repugnant to the constitution because it contains many provisions prescribing the manner in which the subject matter of the act, as stated in the title, shall be carried into effect. All of the provisions contained in the law are well expressed and embraced in the words, "an act to amend the charter of the city of Chicago." *Prescott* v. *City of Chicago*, 121.

STATUTES. *Continued.*

BRITISH STATUTES IN AID OF THE COMMON LAW.

2. *How far in force in this State—and herein, of adopting the construction thereof given by the English courts.* Our general assembly has adopted the common law, and all British statutes, with a few exceptions, in aid of the common law, so far as they are applicable to our condition, passed prior to the fourth year of James the First, as the rule of decision until altered or repealed. The 32 Hen. 8, chapter 34, section 1, was adopted prior to that time, and is applicable to our condition, and is in force. And the legislature, in adopting it, will be presumed to have intended to adopt the judicial construction that had been placed on that statute. *Fisher* v. *Deering*, 114. See also, LANDLORD AND TENANT.

FOREIGN STATUTES.

3. *Must be pleaded.* See PLEADING, 7; LIMITATIONS, 5, 6.

STATUTES CONSTRUED.

4. *Plea denying joint liability must be sworn to, under act of March 26, 1869, to enable a plaintiff to recover against a part of several defendants in action on a contract. Thomas* v. *Lowy*, 512. See JUDGMENTS, 3.

5. *Tenancy by the curtesy—since the "married woman's act" of* 1861. *Armstrong et al.* v. *Wilson et al.* 226. See CURTESY, 1, 2, 3.

6. *Witness—competency.* Under act of 1867. *Marshall et al.* v. *Karl, Admr.* 208. See WITNESSES, 1.

7. *Divorce—extreme and repeated cruelty; how long to be continued.* Construction of the statute in *Coursey* v. *Coursey*, 186. See DIVORCE, 3.

8. *Lien upon land for taxes assessed on personal property.* The 14th section of the act of 1853 construed in *Schaeffer* v. *The People*, 179. See TAXES, 9, 10, 11.

9. *Accessories—in misdemeanors.* The statute construed in *Van Meter et al.* v. *The People*, 168. See CRIMINAL LAW, 3.

10. *Continuance—admitting truth of affidavit.* The practice act and act of 1869 amendatory thereof, construed in *Van Meter et al.* v. *The People*, 168. See CONTINUANCE, 3.

11. *Texas cattle—capability of communicating disease—presumption in respect thereto, under the statute. Davis* v. *Walker*, 452. See TEXAS CATTLE, 1.

STATUTE OF FRAUDS.

PAROL PROMISE IN RESPECT TO LANDS.

1. Where a person desiring to erect a building adjoining the brick house of another, obtained permission to sink his foundation wall below and partly under the wall of the house, upon his parol promise to pay all damages which might result to the building: *Held*, in an action to recover for injury to the building by reason of the excavation, the verbal promise does not relate to such an interest in land as brings it within the statute of frauds and perjuries. The promise bound the party making it no farther than did the law, to make compensation for any damages that resulted from laying the foundation of his building as he did. *Hayes* v. *Moynihan*, 409.

PROMISE TO PAY THE DEBT OF ANOTHER.

2. Where the owner of a lot of cattle shipped them to a person to be sold, with directions as to the manner of applying the proceeds to the payment of certain debts owing by the shipper, it was *held*, that if the person to whom the shipment was made promised to pay a portion of the money derived from the sale to a creditor of the shipper, such promise was for the payment of the debt of another, and, not being in writing and signed by the party to be charged, was within the statute of frauds. *Steele* v. *First National Bank of Joliet*, 23.

CORRECTING MISTAKE IN A DEED.

3. *Admissibility of parol evidence for that purpose.* See EVIDENCE, 1, 2, 3.

STREET WALKERS.

AT NIGHT. See CRIMINAL LAW, 1, 2.

SUBROGATION.

WHETHER ALLOWABLE.

1. Where, in a partition suit, the land was found not susceptible of division and was sold by the master, and the proceeds partitioned, and the purchaser at that sale paid the money and received a deed from the master, but afterwards the administrator of the ancestor of those who sought the partition filed his petition for the sale of the land for payment of the debts, and under an order of the court one-half the land was sold for that purpose, on a bill filed by the purchaser at the master's sale: *Held*, in such a case there can be no subrogation, as there was no claim that could be subrogated. The lien of the creditors was discharged by the sale by the administrator, and the purchaser thereby acquired the title to the land and nothing more. There was no remaining right held by the creditors. He did

SUBROGATION. WHETHER ALLOWABLE. *Continued.*

not pay the money to satisfy or purchase the debts, but to buy the title to the land, which he acquired, and nothing more. He acquired no right of the creditors which may have once existed. He purchased at the master's sale land that was burthened with, and subject to, a lien that was capable of defeating his title, and he may have abated from the price the amount of the debts against the estate, but whether he did or not, he purchased without warranty or fraud, *Bassett* v. *Lockard*, 164.

SURETY.

RELEASE OF SURETY.

1. *Extension of time to the principal.* Where the payee of a note entered into an agreement with the principal, without the knowledge or consent of the surety, to extend the time of payment of the note for one year, upon condition that the principal should pay him twelve per cent interest, it was *held*, that such agreement did not release the surety from liability on the note. *Silmayer* v. *Schaffer*, 479.

TAXES.

SALE FOR DELINQUENT TAXES.

1. *By whom to be made.* Where the city collector applied to the court for an order for the sale of real estate for the payment of delinquent city taxes and assessments in the mode pointed out by the city charter, and an order was so made by the court, such order authorizes the collector, and no one else, to make the sale, precisely as though he had been so ordered in specific language. *Hills* v. *City of Chicago*, 86.

2. *Constitutional provision.* Section 4 of Article IX of the constitution requires the legislature to provide, in all cases where a sale of real estate is necessary to collect taxes and special assessments for State, county, municipal or other purposes, that a return shall be made to some general officer of the county having authority to receive State and county taxes, "and there shall be no sale of the said property for any of said taxes or assessments, but by said officer, but on the order or judgment of some court of record:" *Held*, that this provision prohibited the court from rendering a judgment for the sale of real estate for such taxes on the application of any person but the general county officer named, and that no other but him could make the sale. Ibid. 86.

3. In giving an interpretation to this clause, no aid can be derived by a comparison with other clauses of that instrument, as it stands alone, disconnected from other clauses. Ibid. 86.

TAXES. Sale for delinquent taxes. *Continued.*

4. In such case the cardinal rule is, that it must be so construed as to give effect to the intent of the people in adopting it. Where the words employed, when taken in the ordinary sense and their grammatical arrangement, embody a definite meaning which involves no conflict with other parts of the same instrument, then the meaning thus apparent on the face of the instrument is the only one that can be presumed to have been intended to be conveyed, and there is no room for construction. *Hills* v. *City of Chicago*, 86.

5. It must be presumed that the people who adopted the constitution understood the force of the language used, and that language has been employed with sufficient precision to convey the intent, and unless examination demonstrates the presumption does not hold good in the particular case, nothing will remain but to enforce it. Ibid. 86.

6. The language employed in this section is plain and unambiguous, conveys a definite meaning, and involves no absurdity, conflict or inconsistency, when compared with other parts of the instrument. In such a case, the argument drawn *ab inconvenienti* can not apply to the interpretation, but to the policy of the prohibition itself. Ibid. 86.

7. When an act is prohibited by clear and unambiguous language of the constitution, the policy of such inhibition, or the inconvenience that may ensue from its enforcement, is a matter with which the court has no concern, its duty being to faithfully enforce it. Ibid. 86.

8. The first branch of the section enjoins upon the legislature the duty of providing that a return of unpaid taxes and assessments be made to some general officer of the county, having power to receive State and county taxes, it being the object to promote public convenience and economy. Had the clause gone no further, it would have been incapable of enforcement by any other department of the government until the legislature had adopted enactments to carry its provisions into effect. The last clause was designed to produce prompt action. Its effect began with the adoption of the constitution, and annulled all laws in conflict with its provisions. When such a constitutional provision is adopted it abrogates all laws conflicting therewith. Such may not be a rule of universal application, but it does apply when a particular proceeding authorized by a former statute is prohibited by the constitution. Ibid. 86.

Lien upon land for personal tax.

9. Where personal property of a person is assessed in the town in which he resides, and his lands lie in and are assessed in another town, and the personal tax is not paid, a lien for that tax does not attach to the land in another town in the hands of a purchaser after the assessment and before the delinquency of the personal tax. In such a case the land is not delinquent. *Schaeffer* v. *The People*, 179.

TAXES. Lien upon land for personal tax. *Continued.*

10. The 14th section of the Revenue Law of 1853 declares that personal property shall be liable for taxes levied on real estate, and the latter shall be liable for taxes levied on personal property, but the land does not become liable for the personal tax unless it can not be collected from personal property, and that must be shown before judgment can be rendered against the real estate. *Shaeffer* v. *The People*, 179.

11. The 49th section of the same act makes personal property liable for tax on real property, but does not render real estate liable for the personal tax. Ibid. 179.

TELEGRAPHY.

Duty and liability of telegraph companies.

1. A telegraph company is a servant of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is, to transmit correctly the message as delivered. *Tyler, Ullman & Co.* v. *The Western Union Telegraph Co.* 421.

Restricting liability by contract.

2. *Necessity of repeating messages.* Where a party, desiring to send a telegraphic dispatch, is required by the company to write his message upon a paper containing a condition exonerating the company from liability for an incorrect transmission of the message unless it shall be repeated, and at an additional cost therefor to the sender, it is held that such a restriction, even if it be regarded as a contract, is unjust, without consideration, and void. Ibid. 421.

3. Nor is such a restriction upon the liability of the company relieved of its objectionable character by a stipulation in the contract that the company will insure the accurate transmission of the message by a special agreement to be made, in writing, with the superintendent of the company, the amount of risk to be specified in the contract and paid at the time of sending the message. Such a provision would not be available to persons in localities where there was no superintendent, and would occasion inconvenient delay even where such officer could be found. Ibid. 421.

4. It is against public policy to permit telegraph companies to secure exemption from the consequences of their own gross negligence, by contract. So, notwithstanding any special conditions which may be contained in a contract between a company and the sender of a message, restricting the liability of the former in case of an inaccurate

TELEGRAPHY. Restricting liability by contract. *Continued.*

transmission of the message, the company will still be liable for mistakes happening by their own fault, such as defective instruments, or carelessness or unskillfulness of their operators, but not for mistakes occasioned by uncontrollable causes. *Tyler, Ullman & Co.* v. *The Western Union Telegraph Co.* 421.

5. *Whether a contract exists is for the jury to determine, not the court.* Whether a paper furnished by a telegraph company, containing conditions and restrictions in respect to the liability of the company in case of an incorrect transmission of messages, and upon which a message is written and signed by the sender, is a contract or not, depends upon the fact whether the sender had knowledge of such conditions and restrictions and assented thereto; and whether or not such regulation was brought to the notice of the sender so as to fix knowledge upon him, is a question of fact to be determined by the jury, and not by the court. Slight evidence of assent will, no doubt, suffice, but it is for the jury to determine. Ibid. 421.

Burden of proof.

6. In an action against a telegraph company to recover damages resulting from an alleged incorrect transmission of a message, if the plaintiff prove the inaccuracy of the message, the company, to exonerate themselves, must show how the mistake occurred. In the absence of any proof on their part, in that regard, the jury must presume a want of ordinary care on the part of the company. Ibid. 421.

Disclosing importance of message.

7. *Whether necessary.* A telegraphic message was sent from Chicago to New York, as follows: "Sell one hundred Western Union. Answer price." It was *held*, the dispatch sufficiently disclosed to the operator the nature of the business so as to inform him of the importance of its correct transmission. But be a message of great or trifling importance, the company are bound to transmit it literally—at least to use the highest degree of care and skill in their efforts to do so. Ibid. 421.

Duty of receiver of message.

8. The receiver of a telegraphic message is not required to telegraph back to ascertain the correctness of the message. The company is bound to send the message correctly in the first instance. Ibid. 421.

Measure of damages.

*In case of an incorrect transmission of a telegraphic dispatch.* See MEASURE OF DAMAGES, 7.

TENANTS IN COMMON.

Of dealings between them.

1. Where two persons own real estate, and are desirous of raising money by its sale, and one of them is entrusted with its sale, and has it conveyed to a third person for the price agreed upon, but the money is paid by the joint owner himself, with the view of acquiring the entire title to the property, such an arrangement is a fraud on the party owning the other moiety. *Eldridge* v. *Walker*, 230.

2. In such a case, the owner entrusted with the sale of the property occupies the same relation to the other owner as his agent, and an agent can not occupy the relation of both seller and purchaser of the same property. And where the owner whose interest is thus sought to be acquired, does not assent to the sale, he may disaffirm it where the rights of innocent purchasers and creditors have not intervened. Ibid. 230.

TENANT BY THE CURTESY. See CURTESY.

TEXAS CATTLE.

Capability of communicating disease.

*Presumption.* The act of the general assembly assumes that Texas cattle, although free from disease, do communicate disease to other cattle, and whilst it is the duty of courts to enforce the act, it is not a legal presumption that this theory is true. That is a question of fact to be determined by a jury. The act makes the owner of Texas cattle liable for damages sustained from disease communicated by them, but it does not require a jury to believe, without evidence, or that it is a recognized scientific fact, that the disease is thus communicated. The act does not say the jury, in a suit for damages, must accept such a theory as true. *Davis* v. *Walker*, 452.

TOWNS.

Of a bridge connecting two towns.

*Joint liability of the towns to contribute therefor.* See HIGHWAYS, 2, 3, 4, 5.

TRESPASS.

Killing the dog of another.

1. *Whether a trespass, and herein, of the liability of the owner for the trespasses of his dog.* Where one person kills the dog of another, which has been scared and runs upon his premises, but has done no injury,

TRESPASS. Killing the dog of another. *Continued.*

or was attempting to do none, but simply because the party killing it suspects that the dog had previously interrupted his hens' nests, such act is a trespass, for which the perpetrator is liable. *Brent* v. *Kimball*, 211.

2. If a dog is vicious, and the owner has notice of the fact, an action would lie against him for damage by the dog. But the party injured has no more right to kill the dog than he would have to kill a breachy animal for breaking into his corn. Ibid. 211.

3. Our statute has enacted the common law in declaring that the owner of a dog shall be liable for all damages sustained by reason of such dog killing, wounding or chasing sheep, or other domestic animals. And the same act authorizes any person, who may discover any dog killing, wounding, or chasing sheep, or discover such dog under circumstances that satisfactorily show that the dog has recently been so engaged, to immediately pursue and kill such dog. No one but the master of a dog has the right to kill him, except where the dog is found killing, wounding, or chasing sheep, or under circumstances which show that the dog has been recently so engaged, or where he has been recently bitten by a rabid dog, or by one reasonably supposed to be so, or where a dog is ferocious and attacks persons. Ibid. 211.

Trespass upon realty.

4. *Whether exemplary damages recoverable.* See MEASURE OF DAMAGES, 12.

TROVER.

When the action will lie.

*By a tenant, where property distrained is sold without an appraisement.* See ACTIONS, 2.

TRUSTS.

Resulting trust.

1. *How created.* To establish a resulting trust, the money of the *cestui que trust* must be used in the purchase of the property in which the trust is claimed to exist. Such a trust can not be created by agreement or contract. *Remington* v. *Campbell*, 516.

Of deeds of trust to secure debts.

2. *Action of the trustee thereunder.* See MORTGAGES, 9, 10.

USURY.

Law of California.

1. To a plea that the note sued on grew out of an usurious contract, a replication was filed that the note was executed in the State of California, and that, by the laws of that State, parties might contract for any rate of interest as they might agree—the statute of that State, being read in evidence, so providing: *Held*, that the statute sustained the replication. *Palmer* v. *Marshall*, 289.

Effect of renewal of notes.

2. Where promissory notes are tainted with usury, their renewal, and adding the usury into the new ones, will not free them from the usury. The renewal does not change the nature of the indebtedness, but is evidence, simply, of the debt. Had the assignee known of the usury and the several renewals of the notes, the defense could have been made in his hands. The rule is, that so long as any portion of the debt remains, the usury may be pleaded whilst in the hands of the original payee, or an assignee, with notice. *House* v. *Davis*, 367.

Rate of interest recoverable.

3. *On usurious contract.* Interest should be computed at the rate of six per cent on the balance of the debt, after deducting the usury. Ibid. 367.

Extent of remedy, on bill filed.

4. On bill filed to enjoin the collection of a judgment at law recovered by an assignee of the debt, charging usury in the notes on which the judgment was founded, it is error, where the bill is dismissed as to such an assignee, to require money to be brought into court to be paid to him, as the court had no control over him after dismissing the bill as to him. If the bill had been properly framed, it would have been proper to retain jurisdiction of all the parties until exact justice should have been done. Ibid. 367.

5. On a bill properly framed in such a case as this, the maker should bring the money to pay off the judgment, into court, and then he would be entitled to recover the usury and have a decree therefor. Ibid. 367.

VARIANCE.

Between judgment and execution.

*Execution only voidable, not void.* See CHANCERY, 11.

Allegations and proofs. See PLEADING AND EVIDENCE, 1 to 10.

VENUE.

CHANGE OF VENUE—NOTICE.

1. It is not error for the circuit court to overrule an application for a change of venue, where no notice of the motion has been given to the other party. *Graves* v. *Shoefelt*, 462.

VOID AND VOIDABLE.

FRAUD IN PURCHASE OF PROPERTY

1. *Contract only voidable.* See FRAUD, 1.

NOTICE IN PROCEEDINGS BY ATTACHMENT.

2. *Whether its insufficiency renders the judgment void or only voidable.* See ATTACHMENT, 3, 4.

IRREGULARITY IN SALE ON EXECUTION.

3. *Improper hour in the day—sale voidable, not void.* See SALES, 10.

4. *Sale of land en masse—voidable, not void.* Same title, 11.

ERROR.

5. *Whether judgment void for error.* See CHANCERY, 10.

VARIANCE BETWEEN JUDGMENT AND EXECUTION.

6. *Execution not void, only voidable.* Same title, 11.

WAIVER.

WAIVER OF DEMURRER TO DECLARATION.

*By plea.* See PLEADING, 3.

WARRANTY.

WHAT CONSTITUTES A WARRANTY.

1. No particular form of words is necessary to make a warranty. The word warrant need not be used, but there must be some language to indicate the intention. *Leggat et al.* v. *Sand's Ale Brewing Co.* 158.

2. *As to deterioration.* One who orders and purchases an article well known to him, for transportation and resale upon a venture, for his profit, can not, without express warranty, compel the vendor to cover loss by deterioration, resulting from unusual distance, time, and mode of transit. If ale sold and shipped at Chicago be of the quality ordered, the vendor is not held to a warranty that it will bear shipment, or be merchantable on arriving at Montana. Ibid. 158.

WASTE.

LIABILITY OF TENANT BY THE CURTESY. See CURTESY.

WILLS.

LIFE ESTATE.

1. A will provided as follows: "I give and bequeath the residue of all the proceeds of all my real and personal estate to my three sisters, Nancy Sherman, Eleanor Fowler and Rebecca Hetfield, to be divided equally among them, it being the intention of this, my last will, that each and all of my three full sisters, aforesaid, shall have the use of all the real estate and personal property willed to each of them respectively, or the proceeds of said real estate if they should see fit to sell the same, and the use only for their natural lives, and at their death to go respectively to their several children, in equal parts, in fee." Another clause of the will gave to these sisters a legacy of $3000 each, absolutely: *Held*, that it was the intention of the testator to give only a life estate in this residuary property to his sisters. *Hetfield* v. *Fowler et al.* 45.

TRUSTEES HOLDING A FUND.

2. *For the benefit of legatees.* In such a case, if there was power to order the money to be paid to the legatees, to secure those in remainder it would be proper to require of the legatees to execute bond with good security for the faithful application of the fund, but a fair construction of the will requires the fund to remain in the hands of the trustees, and that they should pay to the legatees the income arising from the trust fund. Ibid. 45.

LIFE ESTATE IN PERSONALTY.

3. A testator may bequeath a life estate in personal property to another, and limit a remainder on it. Ibid. 45.

WITNESSES.

COMPETENCY.

1. *Under act of* 1867. In an action on a promissory note, where the plaintiff sued an administrator of a deceased person, a question arising as to what constituted the consideration of the note, a person who acted as agent of the deceased in the transactions out of which the consideration arose, was allowed to testify as to his understanding of what the consideration was: *Held*, that one of the defendants who was a surety on the note, and was present during such transactions, and who testified he knew what was the consideration of the note, was a competent witness, under the second clause of section two of the act of 1867, to testify to the same point. *Marshall et al.* v. *Karl, Admr.* 208.

DISCREDITING WITNESS ON CROSS-EXAMINATION. See EVIDENCE, 11.